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The First Amendment and Diet Industry Advertising: How Puffery in Weight-Loss Advertisements Has Gone Too Far

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THE FIRST AMENDMENT AND DIET INDUSTRY
ADVERTISING: HOW “PUFFERY” IN WEIGHT-LOSS
ADVERTISEMENTS HAS GONE TOO FAR

I.	INTRODUCTION	325
II.	BACKGROUND.....	330
	A. <i>Evolution of Commercial Speech and the First Amendment</i>	330
	B. <i>Evolution of the Diet Industry</i>	334
	C. <i>Regulatory Framework Governing the Diet Industry</i>	336
	1. Relationship Between the FDA and the FTC	337
	2. FTC as the Primary Regulator	338
III.	ANALYSIS	340
	A. <i>Diet Industry Continues To Make Misleading and Scientifically Implausible Claims</i>	340
	B. <i>Puffery in Diet Industry Advertising Has Led to Documented Health Problems</i>	342
	1. From the Atkins Diet to Nutri/System.....	342
	2. Recent Challenges to Diet Products Containing Ephedra.....	345
	C. <i>Current Regulation of Diet Industry Advertising Is Not Sufficient</i>	348
	1. Appearance of FTC Success.....	348
	2. In Reality, FTC Actions Are Merely Reactive	349
	3. Requiring Media To Take Responsibility Is Unrealistic.....	350
	a. <i>Media Expertise Is Lacking</i>	351
	b. <i>Financial Concerns Are More Important</i>	352
	c. <i>Deadlines Leave Little Time To Check Advertisements</i>	353
	d. <i>First Amendment Concerns</i>	353
IV.	CONCLUSION.....	354

I. INTRODUCTION

In May 2001, Florida businessman Jody Gorran began the Atkins Nutritional Approach, a high-protein, low-carbohydrate diet that he followed until October 2003.¹ Instead of spending money on clothes in a smaller size, however, Gorran

¹Complaint at 8, Gorran v. Atkins Nutritionals, Inc., No. 2004-CC-006591-MB (Fla. Palm Beach County Ct. May 26, 2004).

found himself paying significant hospital bills.² Shortly before going on the diet, Gorran's tests indicated normal cholesterol levels and a low risk of coronary vascular disease.³ Two years and several episodes of severe chest pain later, Gorran discovered he needed surgery to reopen arteries leading to his heart.⁴ His medical problems included elevated cholesterol, severe angina, and a near-fatal blockage of a coronary artery that required an emergency angioplasty and installation of a permanent stent.⁵ Gorran immediately discontinued the Atkins diet at the request of his doctors, and by December 2003, his total cholesterol returned to a more normal level.⁶

After researching the diet following his health problems, Gorran discovered both the American Heart Association and the American Dietetic Association had issued warnings about the Atkins diet.⁷ According to Gorran, though, the Internet site of Atkins Nutritionals made numerous claims that the diet was fine.⁸ On May 26, 2004, Gorran filed a Complaint in Palm Beach County, Florida, against Atkins Nutritionals and the estate of the late Dr. Atkins.⁹ In his Complaint, Gorran sought \$15,000 in damages and alleged three causes of action against Atkins Nutritionals, including negligent misrepresentation that caused personal injury, a products liability claim for personal injury, and a violation under Florida's Deceptive and Unfair Trade Practices Act.¹⁰

Gorran's case raises an interesting question: should the Atkins book and web site material be afforded protection under the First Amendment? Attorneys for Atkins Nutritionals have argued the Atkins' materials were noncommercial speech, and neither state law nor the First Amendment permits liability to be imposed on

²*Id.*

³*Id.* at 10-11. See also Jessica Azulay, *Suit By Former Adherent Puts High-Fat Diet, Corporate Speech to Test*, THE NEWSTANDARD, Mar. 31, 2005, http://newstandardnews.net/content/?action=show_item&itemid=1614.

⁴Complaint, *supra* note 1, at 10-11.

⁵*Id.* at 12-14. See also Robert Longley, *Atkins Diet Says False Claims Protected by First Amendment*, ABOUT.COM, Nov. 23, 2004, <http://usgovinfo.about.com/b/a/127910.htm>.

⁶Complaint, *supra* note 1, at 14.

⁷*Id.* at 14-16.

⁸*Id.* at 9. On the Atkins diet, people can eat as much cheese, eggs, meat, and other protein-laden foods as they want, but they must strictly limit carbohydrates and avoid refined carbs such as white flour. Atkins' theory was that without the sugars that carbohydrates produce for energy, the human body turns instead to its stored fat reserves for fuel. Andrea K. Walker, *Taking a Bite Out of Bread; The Popularity of Atkins and Other Low-Carb Diets has Created Sudden Winners and Losers Among Food Producers*, THE BALTIMORE SUN, Nov. 30, 2003, at 1D.

⁹Complaint, *supra* note 1, at 21. Specifically, Gorran requested that the court require Atkins Nutritionals to include health warnings on all Atkins' related books, web sites, and products that read "Warning - Low Carbohydrate Diets May Be Hazardous to Your Health - Check With Your Physician" and "Warning - Low Carbohydrate Diets Can Increase The Level of LDL (bad) Cholesterol In Your Blood." *Id.*

¹⁰*Id.*

nondefamatory, noncommercial speech.¹¹ Furthermore, Atkins' attorneys say courts have uniformly held that authors, publishers, and distributors of noncommercial speech owe no duty of care to readers, as "the ideas and information in a generally circulated self-help book and an associated website are fully protected by the First Amendment, even if they cause some harm."¹²

If a court finds that Atkins' book and web site were merely contributions to the marketplace of ideas regarding weight loss and nutrition, Gorran has no case.¹³ If Gorran's attorneys can show the book and web site are commercial speech that comprised an integral part of Atkins' overall marketing strategy, however, Gorran's argument would be substantially stronger.¹⁴ Gorran's lead attorney, Dan Kinburn, said in an interview he thinks Atkins' book and web site both constitute commercial speech, as they were created for the "purpose of inducing people to buy Atkins' products."¹⁵ According to Kinburn, "the website doesn't exist as a discussion forum for diet advice, but exists solely to sell the diet-related products."¹⁶ Consequently, in early 2005, Gorran's attorneys asked the court to compel Atkins Nutritionals to turn over documents relating to the company's marketing strategy.¹⁷

Though Atkins Nutritionals had strongly resisted this request on the grounds that the materials were irrelevant to the case, Palm Beach County Court Judge Susan Lubitz found otherwise.¹⁸ In March 2005, Judge Lubitz ordered Atkins Nutritionals to produce documents that pertained to its marketing strategy.¹⁹ While Atkins' declaration of bankruptcy in July 2005 meant the lawsuit had to be removed to United States Bankruptcy Court and temporarily put on hold, Gorran stated he had no plans to drop his challenge.²⁰ He did not have to wait much longer. On January

¹¹Defendant's Motion For Reconsideration and Supporting Memorandum of Law at 5, *Gorran v. Atkins Nutritionals, Inc.*, No. 2004-CC-006591-MB (Fla. Palm Beach County Ct. Nov. 12, 2004).

¹²*Id.* at 5-6.

¹³Azulay, *supra* note 3.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

¹⁷Plaintiff's First Motion to Compel, *Gorran v. Atkins Nutritionals, Inc.*, No. 2004-CC-006591-MB (Fla. Palm Beach County Ct. Feb. 18, 2005).

¹⁸Azulay, *supra* note 3.

¹⁹*Id.* To date, nearly seventy additional motions, requests, or documents have been filed in the case. Palm Beach County Court Docket, http://courtcon.co.palm-beach.fl.us/pls/jiwp/ck_public_qry_doct.cp_dktrpt_frames?backto'P&case_id'502004CC006591XXXXMB&begin_date'&end_date' (last visited Feb. 6, 2006).

²⁰William Cooper, Jr., *Atkins Bankruptcy Filing Puts Lawsuit On Hold*, PALM BEACH POST (Fla.), Aug. 3, 2005, at 3B. See also News Release, Physicians Committee for Responsible Medicine, *Atkins Lawsuit Will Proceed, Doctors Say* (Aug. 1, 2005), <http://www.pcrm.org/news/release050801.html>. Atkins Nutritionals declared bankruptcy in September 2005; Gorran's lawsuit was removed to United States Bankruptcy Court in November 2005. *Id.*

10, 2006, Atkins Nutritionals announced that it had emerged from bankruptcy.²¹ The case was transferred to the United States District Court for the Southern District of New York a short time later, but on December 11, 2006, Judge Denny Chin dismissed Gorran's lawsuit, ruling that "a book about the [Atkins] diet was not an advertisement for products but rather was a guide to leading a controlled-carbohydrate life."²² If Gorran had his day in court, a favorable decision could have had quite an impact on the diet industry's successful advertising machine. After all, Americans spend more than thirty billion dollars per year on weight-control products and activities.²³ In 2006, revenues in the United States alone are expected to top \$48 billion.²⁴

Because Americans' desire to lose weight has become somewhat of a modern-day search for the Holy Grail, it is not uncommon for millions of people to purchase a diet product as soon as it hits the shelves.²⁵ The book touting the South Beach Diet, for example, has sold nearly nine million copies since it was first released in 2003.²⁶ Although some diet programs advocate reduced caloric intake and increased physical activity as the right way to lose weight, a significant portion of the industry engages in deceptive to blatantly false advertising.²⁷ A Federal Trade Commission (FTC) "review of more than 300 advertisements from radio, television, magazines and newspapers that ran during 2001-2002 found that . . . 55% [of the ads] made claims promising more than the product or service could likely deliver."²⁸

Although "puffery" and misleading advertising generally have been afforded protection under the First Amendment since the 1976 case *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,²⁹ the diet industry's advertising

²¹*Atkins Nutritionals, Inc. Emerges From Bankruptcy; Company Completes Chapter 11 Reorganization in Five Months*, BUSINESS WIRE, Jan. 10, 2006. Interestingly enough, the company now has a revised business model that has shifted away from its prior strategy of educating the public about the benefits of a low-carbohydrate diet. *Id.* The article states that Atkins Nutritionals' new focus is on "great-tasting portable foods with a unique nutrition advantage." *Id.* "The company has pledged \$40 million to a new advertising campaign promoting its "Atkins Advantage" protein bars. According to the article, the new campaign kicked off on January 8, 2006. *Id.*

²²Associated Press, *Atkins Diet Protected by First Amendment, Judge Rules*, FIRST AMENDMENT CENTER, Dec. 12, 2006, available at <http://www.firstamendmentcenter.org/news.aspx?id'17883>.

²³Chester S. Galloway, *The First Amendment and FTC Weight-Loss Advertising Regulation*, J. CONSUMER AFFAIRS, Winter 2003, available at <http://www.allbusiness.com/periodicals/article/728738-1.html> (last visited Feb. 6, 2006).

²⁴Ellen Goodstein, *10 Secrets of the Weight-Loss Industry*, BANKRATE.COM, Jan. 13, 2004, <http://bankrate.com/brm/news/advice/20040113a1.asp>.

²⁵Megan Ogilvie, *Constant Craving*, THE TORONTO STAR, Aug. 5, 2005, at C01.

²⁶*Id.*

²⁷Galloway, *supra* note 23.

²⁸Goodstein, *supra* note 24.

²⁹*Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 749-70 (1976) (declaring commercial speech to be protected under the First Amendment and allowing pharmacists to advertise the price of prescription drugs).

practices have reached a point where they need to be given a closer look. Since 1990, the FTC has brought approximately ninety enforcement actions for false or deceptive weight-loss advertisements or claims.³⁰ Despite these efforts, the number of weight-loss advertisements with unsubstantiated claims continue to grow.³¹ This is problematic because consumers may base their decision on advertising, and advertisements with false or misleading information have the potential to affect a consumer's choice.³² Furthermore, "if the entire field of weight-loss advertising is subject to wide-spread deception, advertising will lose its role in the efficient allocation of resources in a free-market economy."³³ Not only will other manufacturers end up advertising the impossible in order to compete, but the "deceptive promotion of quick and easy weight-loss solutions" could potentially fuel unrealistic consumer expectation.³⁴

Stricter government regulations regarding commercial speech that promotes weight-loss or diet products should be considered for three reasons. First, studies have shown that diet industry advertising often makes weight loss claims that are scientifically impossible. Second, consumers have suffered adverse health effects as a result of trying weight-loss programs or diet products. Third, current FTC regulations are not curbing the problem.

Part II of this note outlines the history of commercial speech and its protections under the First Amendment, along with the history of the rapidly expanding diet industry and its regulatory framework. Part II examines the three arguments in support of stricter governmental regulations on advertising in the diet industry. Part III looks at FTC studies that have shown dietary advertisements actually are blatantly false, not just misleading. Part III also outlines numerous cases where a consumer's trust in diet advertisements led to adverse health problems for that consumer. Part III discusses why neither the FTC's actions of filing suit against manufacturers, nor the possibility of media regulation, would be sufficient to solve the problem. Finally, this note offers an explanation as to why the current methods of addressing puffery and misleading advertising in the diet industry are not sufficient.

³⁰The "puffing" defense is often used by a defendant seller when he or she is faced with a lawsuit where the plaintiff is trying to impose liability on the defendant because of statements the seller made. Puffing has been defined to include statements that are incapable of being measured by objective criteria; statements that do not contain specific content or reference to fact; and statements that are considered exaggeration or hyperbole. This type of deception is condoned by the law when the deception is such that no reasonable person would rely on the statement or believe that it presents literal truth. Joshua Honigwachs, *Is It Safe To Call Something Safe? The Law of Puffing in Advertising*, 6 J. PUB. POL'Y & MARKETING 157, 157-59 (1987).

³¹*Id.*

³²RICHARD L. CLELAND ET AL., FEDERAL TRADE COMMISSION, WEIGHT-LOSS ADVERTISING: AN ANALYSIS OF CURRENT TRENDS 2 (2002).

³³*Id.*

³⁴*Id.*

II. BACKGROUND

A. *Evolution of Commercial Speech and the First Amendment*

The First Amendment, passed in 1787 as part of the Bill of Rights, states that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”³⁵ First Amendment protections, however, are not explicitly outlined in the United States Constitution.³⁶ Rather, protections have been created from United States Supreme Court decisions.³⁷ The concept of “commercial speech” itself did not even exist until the 1942 Supreme Court decision *Valentine v. Chrestensen*, and even then, it did not have a name.³⁸ In *Valentine*, the Court, without offering any analysis or comment, ruled that commercial speech was not protected under the First Amendment.³⁹

Broadly defined, commercial speech is considered “expression related to the economic interests related to the economic interests of the speaker and its audience, generally in the form of a commercial advertisement for the sale of goods and services.”⁴⁰ The Supreme Court has cited three factors to consider in deciding whether speech qualifies as commercial: “(1) whether the speech is an advertisement; (2) whether the speech refers to a specific product or service; and (3) whether the speaker has an economic motivation for the speech.”⁴¹ If the answer to

³⁵U.S. CONST. amend. I.

³⁶Bruce Somerville, *Preserving the Status Quo in Commercial Speech Protection*, http://www.wk.net/bsomerville/highres/academic/commercial_speech.htm#ten (last visited Feb. 6, 2006).

³⁷*Id.*

³⁸*Id.* See also Bruce E.H. Johnson, *Advertising & First Amendment*, FIRST AMENDMENT CENTER, <http://www.firstamendmentcenter.org/speech/advertising/overview.aspx> (last visited Feb. 6, 2006).

³⁹*Valentine v. Chrestenson*, 316 U.S. 52, 54 (1942); see also Johnson, *supra* note 38. *Valentine* grew out of a disagreement over the distribution of handbills. Plaintiff Chrestensen owned a former United States Navy submarine, which he exhibited around the country. In 1940, Chrestensen brought the vessel to the East River in New York City, where he proceeded to print a handbill advertising the boat and distribute it in the city streets. New York City police warned Chrestensen that his actions violated the city’s sanitary code, which prohibited dissemination of commercial and advertising matter in the streets. Because handbills related to information or a public protest were allowed, Chrestensen re-printed his handbill so as to protest city actions on one side and advertise his submarine on the other. When Chrestensen began distributing the new version of his handbill, police arrested him. Chrestensen brought suit in federal court against New York City Police Commissioner Lewis Valentine. Although Chrestensen initially obtained an injunction against Valentine, the Supreme Court reversed the decision. *Valentine*, 316 U.S. at 52.

⁴⁰*U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 933-34 (3d Cir. 1990) (holding that disputed advertisements between a health maintenance organization and a preferred provider organization were entitled to some protection under the First Amendment, because the advertisements were commercial speech).

⁴¹*Id.*

all three questions is “yes,” then there is strong support for the conclusion that the speech is commercial speech.⁴²

It was not until the 1970s that a trend emerged toward providing “commercial speech” with some level of protection under the First Amendment.⁴³ Prior to the 1970s, there would have been no question about the constitutionality of any “government actions restricting weight-loss ads, because commercial advertising was still wholly unprotected.”⁴⁴ In the 1976 case *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court struck down a Virginia statute that outlawed price advertising by pharmacists.⁴⁵ Commercial speech was officially declared to be protected by the First Amendment.⁴⁶ The Court did stipulate, though, that some forms of regulation, such as the regulation of false or misleading advertisements, would be permissible.⁴⁷ In 1977, the Court further expanded the First Amendment protection of commercial speech by extending it to advertising legal services in *Bates v. State Bar of Arizona*.⁴⁸

⁴²*Id.*

⁴³Jef I. Richards, *Is 44 Liquormart a turning point?*, 16 J. PUB. POL’Y & MARKETING 156, 156 (1997). “The distinction between commercial and noncommercial speech is critical to the hierarchy of protection that the Supreme Court put into place in the 1970s. Noncommercial speech, whether it is truthful or not, receives full protection under the First Amendment, and the government may not regulate it.” Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 852 (1999).

⁴⁴Chester S. Galloway et al., *Holding Media Responsible for Deceptive Weight-Loss Advertising*, 107 W. VA. L. REV. 353, 367 (2005).

⁴⁵*Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 749 (1976). The plaintiff in *Virginia Pharmacy* challenged the validity of a Virginia statute that declared it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs. The plaintiff’s claim was that the First Amendment should entitle the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means. The Court found that information would be of value and ruled that the prescription drug price information would be protected by the First Amendment. *Id.* at 749-70.

⁴⁶*Id.* at 771. Specifically, the Court noted that:

In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. . . . There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant government interest, and that in so doing they leave open alternative channels for communication of the information.

Id.

⁴⁷*Id.* at 771. *See also* Richards, *supra* note 43, at 156.

⁴⁸*Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (holding that the absolute suppression of advertising by attorneys violated the First Amendment). Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. They are well situated to evaluate the accuracy of their messages. Second, commercial speech is a hardy breed of expression that is not “particularly susceptible to being crushed by overbroad regulation.” *Id.* at 381-83.

Almost immediately after *Bates*, the First Amendment status of commercial speech began to erode.⁴⁹ In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court established a four-part test that defined under what conditions commercial speech could be regulated.⁵⁰ The *Central Hudson* test asks, first, if the advertisement is protected at all by the First Amendment.⁵¹ “[P]rotection is withheld unless the advertisement concerns lawful activity and is not misleading.”⁵² Second, the test asks whether the asserted governmental interest in regulating the speech is “substantial.”⁵³ If the answer to the first two questions is “yes,” the third question is whether the regulation directly advances the asserted governmental interest.⁵⁴ If that answer is “yes,” the fourth question is whether the governmental interest could be served by a more limited restriction on the speech.⁵⁵ “If so, [then] the regulation is invalid under the First Amendment.”⁵⁶

“The first requirement of the *Central Hudson* test leaves the government entirely free to regulate advertisements that are deceptive, or that promote illegal activities or products.”⁵⁷ The remaining three parts permit regulation of *any* other commercial speech, so long as (1) the government has a substantial interest, (2) that interest is directly advanced by the regulation, and (3) the regulation is no more extensive than necessary.⁵⁸ Similar to *Virginia State Board of Pharmacy*, *Central Hudson*⁵⁹ “granted commercial speech a lower level of constitutional protection, and distinguished between speech that is truthful, and speech that is misleading or deceptive.”⁶⁰ *Central Hudson* also required only that the state show a substantial interest in regulating speech, rather than the higher “compelling interest” standard.⁶¹ This meant that commercial speech received a lower level of protection than other types of speech.⁶²

⁴⁹Richards, *supra* note 43, at 156.

⁵⁰*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

⁵¹Kevin Francis O’Neill, *A First Amendment Compass: Navigating The Speech Clause With A Five-Step Analytical Framework*, 29 Sw. U. L. REV. 223, 262 (2000).

⁵²*Id.* at 262.

⁵³*Id.*

⁵⁴*Id.* at 262-63.

⁵⁵*Id.* at 263.

⁵⁶*Id.*

⁵⁷Somerville, *supra* note 36.

⁵⁸Richards, *supra* note 43, at 156-57.

⁵⁹*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 572 (1980).

⁶⁰Somerville, *supra* note 36.

⁶¹*Id.*

⁶²Richards, *supra* note 43, at 157.

Over the next two decades, the Supreme Court handed down a variety of conflicting decisions regarding commercial speech as it attempted to work out the implications of the commercial speech doctrine.⁶³ In 1986, the Court ruled in *Posadas de Puerto Rico v. Tourism Co.* that a casino's advertising was not protected under the First Amendment, because the casino had violated a law that prohibited advertising aimed at Puerto Ricans.⁶⁴ Commercial speech had received its greatest defeat since *Valentine*.⁶⁵ But by 1996, the laws were shifting again. The Court ruled in *44 Liquormart v. Rhode Island* that commercial speech *was* protected, and a state ban on advertising the price of alcoholic beverages violated the First Amendment.⁶⁶ *Greater New Orleans Broadcasting Association v. United States* provided further support for *44 Liquormart's* holding, as the Court unanimously reversed a lower court decision upholding a federal law banning broadcast advertising of casino gambling.⁶⁷ And by 2001, even tobacco advertising had received First Amendment protection.⁶⁸ A Massachusetts district court ruled in *Lorillard Tobacco Co. v. Reilly* that Massachusetts restrictions on tobacco advertising were unconstitutional under the *Central Hudson* test.⁶⁹

While constitutional protection for commercial speech has been firmly established, it is not absolute.⁷⁰ "Today, the main challenge to First Amendment rights in this context comes from private litigants who attempt to ignore First Amendment rules by arguing their opponents' statements are mere 'commercial speech.'" ⁷¹ Though several lawsuits have attempted to expand the commercial speech doctrine and impose liability on defendants for their public commentary, only a few lower courts have actually recognized an expanded version of the doctrine.⁷²

In *Proctor & Gamble Co. v. Amway Corp.*, the Court of Appeals for the Fifth Circuit ruled that, if a trier of fact could find an economic motivation for the defendant's speech, then various statements that accused Proctor & Gamble of Satanism could be termed "commercial speech."⁷³ And in 2002, the California

⁶³Johnson, *supra* note 38.

⁶⁴*Posadas de Puerto Rico Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328, 348 (1986).

⁶⁵Richards, *supra* note 43, at 157.

⁶⁶*44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996).

⁶⁷*Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 195-96 (1999).

⁶⁸*Lorillard Tobacco Co. v. Reilly*, 84 F. Supp 2d 180 (D. Mass. 2000).

⁶⁹*Id.* at 204. Specifically, tobacco and cigar manufacturers had sued, claiming regulations that prohibited tobacco and cigar advertisements from being in areas likely to be frequented by minors were unconstitutional. *Id.* at 182.

⁷⁰Johnson, *supra* note 38.

⁷¹*Id.*

⁷²*Id.*

⁷³*Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 557 (5th Cir. 2001). Since the late 1970s or early 1980s, Proctor & Gamble had been the victim of rumors that the company was linked to Satanism. The most common rumor was that the company's president admitted on a television show that he worshipped Satan. Although the rumors eventually died down, they resurfaced again in 1995 after one of Proctor & Gamble's competitors Amway, informed

Supreme Court ruled in *Kasky v. Nike, Inc.* that First Amendment protections did not apply to Nike's advertisements that defended the company's use of subcontractors in China, Vietnam, and Indonesia.⁷⁴ The court held Nike's publications qualified as "commercial speech," because the company's statements in its press releases and letters to influential media entities were designed, at least in part, to protect the company's profitability.⁷⁵ As "commercial speech," Nike's advertisements could be regulated to prevent consumer deception.⁷⁶ These latest decisions have greatly expanded the scope of communication that qualifies as "commercial speech" by rejecting its traditional definition: speech that "does no more than propose a commercial transaction."⁷⁷

B. Evolution of the Diet Industry

Consumers have been trying to find an effective way to lose weight since at least 1900.⁷⁸ Numerous types of weight-loss products have gained and lost popularity, including everything from diet bath powders, soaps, and shoe inserts, to the fen/phen diet pill combination.⁷⁹ In the early 1900s, weight-loss drugs included animal-derived thyroid, laxatives, and the poisons arsenic and strychnine.⁸⁰ Eventually, they were all proven to be only a temporary and unsafe method of weight loss.⁸¹ By the

many Amway distributors that a large portion of Proctor & Gamble's products went to support a Satanic Church. Proctor & Gamble filed suit against Amway alleging, among other things, defamation and tortious interference. Interestingly, the court found that Amway's comments could be considered commercial speech because the comments linked Proctor & Gamble's products to a current public debate and because Amway stood to profit economically from the statements. *Id.* at 542-43, 549-50.

⁷⁴*Kasky v. Nike, Inc.*, 45 P.3d 243, 301-02 (Cal. 2002) (holding that when a corporation, to maintain and increase its sales and profits, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements are commercial speech and may be regulated to prevent consumer deception).

⁷⁵*Id.* at 315. Although the Supreme Court granted certiorari and began to hear arguments in *Kasky* in April 2003, it decided in June 2003 that it should not have taken the case, and *Kasky* was allowed to proceed with his lawsuit. Johnson, *supra* note 38.

⁷⁶*Kasky*, 45 P.3d at 319.

⁷⁷Johnson, *supra* note 38.

⁷⁸CLELAND ET AL., *supra* note 32, at 1.

⁷⁹*Id.* Fenfluramine and dexfenfluramine (fen-phen) are prescription medications that were approved by the FDA for many years as appetite suppressants for the short-term management of obesity. On July 8, 1997, the Mayo Clinic reported that twenty-four patients had developed heart valve disease after taking fen-phen. The cluster of unusual cases of valve disease in fen-phen users suggested that there might be an association between fen-phen use and valve disease. Following the Mayo Clinic's report, the FDA received sixty-six additional reports of heart valve disease associated with fen-phen. In September 1997, the FDA requested that manufacturers voluntarily withdraw the fen-phen drug from the market. Press Release, U.S. Food and Drug Administration, FDA Announces Withdrawal of Fenfluramine and Dexfenfluramine (Fen-Phen) (Sept. 15, 1997), available at <http://www.fda.gov/cder/news/phen/fenphenpr81597.htm>.

⁸⁰CLELAND ET AL., *supra* note 32, at 1.

⁸¹*Id.*

1930s, doctors were prescribing the drug dinitrophenol, a synthetic insecticide and herbicide that increased the metabolism so drastically it could cause organ failure, blindness or other health problems.⁸² And in the 1950s, weight loss was attributed to using the hormone human chorionic gonadotropin (HCG), even though the Food and Drug Administration (FDA) eventually said it was only effective to treat a genetic imbalance in young boys.⁸³

Today's diet industry not only encompasses far more products and weight loss programs than in previous decades, but it also has been fueled by a rise in popularity of the dietary supplement.⁸⁴ In addition to diet supplements, a consumer's modern weight-loss options include slimming soaps that claim to slough off fat in the shower; miracle pills that get rid of excess pounds without dieting or exercise; even a "Fat-Be-Gone" ring that, worn on a finger, supposedly trims fat off hips and thighs.⁸⁵ People can merely take a spoonful of "Body Solutions" before bed and see the pounds "melt away," sign up for Richard Simmons "Deal-A-Meal" plan, or join Weight Watchers and Jenny Craig.⁸⁶ Despite the low success rates of the diets themselves, the dollars keep rolling in.⁸⁷ Weight Watchers' net revenues topped \$809.6 million in 2002, and sales of diet pills and supplements skyrocketed from \$168 million in 1996 to \$782 million in 2000.⁸⁸ Even the Atkins diet, which was first published in 1972 and began gaining popularity in the mid-1990s, was estimated to have about fourteen million followers by 2003.⁸⁹

This growing popularity can be attributed, in part, to the diet industry's advertising methods, which have changed greatly over the last fifteen years. Once found only in supermarket tabloids, over-the-top diet advertisements that promise quick, easy weight loss are now common in almost all media forms.⁹⁰ The FTC collected advertisements published in 1992 in eight national magazines and compared them with advertisements that appeared in the same publications in 2001

⁸²*Id.*

⁸³*Id.*

⁸⁴*Id.*

⁸⁵Greg Winter, *Desperation Dieting Fuels Quick-Fix Industry*, DESERET NEWS (Salt Lake City), Oct. 29, 2000, at A1.

⁸⁶Diane Toroian, *Body Solutions Fattens Coffers of Radio Stations*, ST. LOUIS POST-DISPATCH, Feb. 17, 2002, at E5. See also Dawn Sagario & Jennifer Dukes Lee, *Diet Success is Rare: Wallets Get Thinner, But People Don't*, DES MOINES REGISTER (Iowa), Mar. 7, 2005, at 1A.

⁸⁷Goodstein, *supra* note 24. Of the fifty million Americans who go on some kind of diet program, only five to ten percent actually succeed.

⁸⁸Lisa Stansky, *A Brand Everyone Knows*, 25 NAT'L L.J. A9, A9 (2003) (discussing the increase in Weight Watchers members and the company's profits); see also Greg Winter, *Fraudulent Marketers Capitalize On Demand For Sweat-Free Diets*, NEW YORK TIMES, Oct. 29, 2000, at 1.

⁸⁹Walker, *supra* note 8. The twenty million or more people in the United States following the Atkins diet, as well as similar ones such as the low-carb South Beach Diet, Protein Power, and The Zone, constitute about ten percent of the nation's adults. *Id.*

⁹⁰CLELAND ET AL., *supra* note 32, at vii.

to specifically evaluate how weight-loss advertising has changed since the early 1990s.⁹¹ The FTC concluded false or misleading advertising claims had become common in weight-loss advertising, and the number of deceptive advertisements appeared to have increased dramatically from 1992 to 2001.⁹²

The FTC was particularly concerned with advertisements that were grossly exaggerated or gave clearly unsubstantiated performance claims.⁹³ Many of the claims the FTC reviewed were so contrary to existing scientific evidence, or so clearly unsupported by the available evidence, that there was little doubt the claims were false or deceptive.⁹⁴ Claims included advertisements promising that the user could lose a pound a day or more over extended periods of time; that substantial weight loss could be achieved without diet, exercise, or surgery; and that users could lose weight regardless of how much they ate.⁹⁵ Despite thousands of weight-loss studies and an increasingly focused search for solutions, there is no evidence that any prescription, over-the-counter product, or supplement has ever kept a person's weight down for more than a few months.⁹⁶ At best, such drugs or supplements are short-term answers to lifelong problems; at worst, they intensify the disorders they attempt to cure.⁹⁷ Manufacturers in the diet industry, however, consistently defend their claims by arguing that the First Amendment protects their advertising as long as it contains a bit of truth.⁹⁸

C. Regulatory Framework Governing the Diet Industry

Diet industry manufacturers do not have the final say, at least, not technically. The FDA and the FTC both serve to protect consumers by ensuring that products are safe and effective and that their marketing is accurate.⁹⁹ Generally, while the FDA regulates food labeling, the FTC regulates the validity of advertising.¹⁰⁰ The FDA's responsibilities include making sure that foods are safe and wholesome; that drugs and medical devices are safe and effective; and that electronic products emitting radiation do not harm the public.¹⁰¹ Additionally, the FDA helps to ensure that the

⁹¹*Id.*

⁹²*Id.*

⁹³*Id.* at vii-viii.

⁹⁴*Id.* at viii.

⁹⁵*Id.* at viii.

⁹⁶Michael Specter, *Miracle in a Bottle: Dietary Supplements Are Unregulated, Some Are Unsafe and Americans Can't Get Enough of Them*, THE NEW YORKER, Feb. 2, 2004, at 64.

⁹⁷*Id.*

⁹⁸Jodie Sopher, *Weight-Loss Advertising Too Good to Be True: Are Manufacturers or the Media to Blame?*, 22 CARDOZO ARTS & ENT. L.J. 933, 947 (2005).

⁹⁹*Id.* at 937.

¹⁰⁰*Id.*

¹⁰¹U.S. Food and Drug Administration, FDA's Mission Statement, http://www.fda.gov/opacom/more_choices/mission.html (last visited Feb. 6, 2006).

public receives accurate information regarding these substances through labeling.¹⁰² The FTC's jurisdiction, meanwhile, extends to promotional claims for foods, drugs, dietary supplements, other products promising health benefits, and weight-loss advertising.¹⁰³ It regulates claims made through package labeling or media advertising.¹⁰⁴

1. Relationship Between the FDA and the FTC

Since 1954, the FTC and the FDA have operated under a series of joint agreements, where, as stated, the FTC assumed primary responsibility for regulating food and dietary supplement advertising, and the FDA took primary responsibility for regulating food and dietary supplement labeling.¹⁰⁵ Congress's passage of the Dietary Supplement Health and Education Act (DSHEA) in 1994, however, shifted the balance of regulatory power in the diet industry toward the FTC, particularly where diet supplements are concerned.¹⁰⁶

DSHEA essentially removed a class of compounds known as dietary supplements from the FDA's pre-marketing approval process.¹⁰⁷ Prior to DSHEA, the FDA regulated most food supplements categorized as drugs or food additives, both of which require FDA clearance prior to marketing.¹⁰⁸ Following DSHEA, dietary supplements are no longer classified as "drugs;" rather, they are regulated as "foods."¹⁰⁹ This means that dietary supplements can enter the marketplace without FDA approval.¹¹⁰ Now, the FDA can only regulate diet products by examining label

¹⁰²*Id.*

¹⁰³FED. TRADE COMM'N, GUIDE TO THE FEDERAL TRADE COMMISSION (2004), available at <http://www.ftc.gov/bcp/online/pubs/general/guidetofc.htm> (last visited Feb. 6, 2006) [hereinafter GUIDE TO THE FEDERAL TRADE COMMISSION].

¹⁰⁴*Id.* When the FTC was created in 1914, its purpose was to prevent unfair methods of competition in commerce as part of the battle to "bust the trusts." Over the years, Congress passed additional laws giving the agency greater authority to police anticompetitive practices. In 1938, Congress passed the Wheeler-Lea Amendment, which includes a broad prohibition against "unfair and deceptive acts or practices." The FTC's work is performed by the Bureau of Consumer Protection and the Bureau of Competition and Economics. *Id.*

¹⁰⁵Robert G. Pinco & Todd H. Halpern, *Guidelines for the Promotion of Dietary Supplements: Examining Government Regulation Five Years After Enactment of the Dietary Supplement Health and Education Act of 1994*, 54 FOOD & DRUG L.J. 567, 579 (1999). The FDA's regulation of "labeling" includes packaging, inserts, and additional promotional materials included in the point-of-sale purchase. *Id.*

¹⁰⁶CLELAND ET AL., *supra* note 32, at 1.

¹⁰⁷*Id.*

¹⁰⁸Pinco & Halpern, *supra* note 105, at 568.

¹⁰⁹*Id.* at 569-76. Prior to the passage of DSHEA, courts limited the definition of "food" to foods that were ingested primarily for taste, aroma or nutritious value. Food supplement products were found to lack those properties and, therefore, were classified as "drugs." Following the passage of DSHEA, this case law was reversed. *Id.* at 576.

¹¹⁰*Id.*

content after the product is on the market, and the FDA bears the burden of proving that a product is unsafe before it can be removed from the marketplace.¹¹¹

Since DSHEA became law, manufacturers have been able to say nearly anything they want about the potential health benefits of what they sell.¹¹² They also have been able to put out more products. By 1999, the dietary supplement industry had experienced exponential growth, evidenced not only by sales figures, but also by the pervasiveness of promotional materials that began appearing in the media.¹¹³ Although the FDA has attempted to implement policies that invalidate rights established by DSHEA, in reality, its enforcement activities against dietary supplement companies who have violated DSHEA are virtually non-existent.¹¹⁴

2. FTC as the Primary Regulator

Somewhat by default, the FTC has become the predominant regulator of many diet products once they are available on the market.¹¹⁵ Typically, this entails post-market regulation in the form of false advertising claims.¹¹⁶ The organization's regulation of false advertisement claims encompasses a variety of media, including print, broadcast, infomercials, catalogues, direct marketing, and Internet promotions.¹¹⁷ Generally, the FTC analyzes two issues related to false advertising claims: (1) whether the advertisement is truthful and non-misleading; and (2) whether the advertiser has adequate substantiation for all objective product claims before the advertisement is disseminated.¹¹⁸

¹¹¹*Id.* at 569.

¹¹²Specter, *supra* note 96, at 2.

¹¹³Pinco & Halpern, *supra* note 105, at 567.

¹¹⁴*Id.* at 579.

¹¹⁵*Ephedra: Who is Protecting American Consumers? Hearing Before the S. Comm. on Governmental Affairs*, 107th Cong. 79 (2002) [hereinafter *Hearings*] (statement of J. Howard Beales, Director of Bureau of Consumer Protection, Federal Trade Commission), available at <http://www.ftc.gov/os/2003/10/dietarysupptest.pdf>. See also Sopher, *supra* note 98, at 945.

¹¹⁶Sopher, *supra* note 98, at 946. "False advertising" refers to the following:

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) (2006).

¹¹⁷Federal Trade Commission, Division of Advertising Practices, <http://www.ftc.gov/bcp/bcpap.shtm> (last visited May 9, 2007). The Federal Trade Commission's Division of Advertising Practices serves as the nation's enforcer of federal truth-in-advertising laws. *Id.* Its law enforcement activities focus on a variety of areas, including claims about product performance made in national or regional newspapers and magazines; in radio and TV commercials, including infomercials; through direct mail to consumers; or on the Internet. *Id.*

¹¹⁸Pinco & Halpern, *supra* note 105, at 580.

Regarding the first issue related to false advertising claims, the FTC tries to identify all express and implied claims that an advertisement conveys to consumers.¹¹⁹ Under FTC law, an advertiser is equally responsible for the accuracy of claims suggested or implied by the advertisement.¹²⁰ An advertisement can also be deceptive because of what it does not say.¹²¹ Section 52 of the Federal Trade Commission Act requires advertisers to disclose information if it is material either in light of representations made or suggested by the ad, or based on how consumers would use the product.¹²² For example, according to the FTC's *Advertising Guide for the Dietary Supplements Industry*, if a marketer promotes a supplement as a weight-loss aid with a fine print disclosure reading, "Restricted calorie diet and regular exercise required," the FTC would mandate that the advertisement be revised to remove any implication that weight loss can be achieved by using the product alone.¹²³ Furthermore, if research does not show that the product contributes anything to the weight-loss effect caused by diet and exercise, the FTC likely would find it deceptive, even if the product had a disclosure.¹²⁴

The second issue related to false advertising claims is whether an advertiser has adequately substantiated the product's claim. Here, the FTC requires "competent and reliable scientific evidence to support a claim."¹²⁵ This has been defined to mean tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so.¹²⁶ The "scientific evidence" needed depends on the nature of the advertising claim.¹²⁷ As a general rule, well-controlled human clinical studies are the most reliable form of evidence; anecdotal evidence about the individual experience of consumers is not sufficient to substantiate claims about the effects of a diet product.¹²⁸

Specifically where weight-loss advertising is concerned, the FTC has been active in the regulation of deceptive claims. In March 1997, the FTC announced "Operation Waistline," a coordinated, long-term consumer education and law

¹¹⁹Fed. Trade Comm'n, Bureau of Consumer Protection, *Dietary Supplements: An Advertising Guide for Industry*, Apr. 2001, available at <http://www.ftc.gov/bcp/online/pubs/buspubs/dietsupp.pdf> (last visited Feb. 6, 2006).

¹²⁰*Id.* at 3.

¹²¹*Id.* at 5.

¹²²Federal Trade Commission Act, 15 U.S.C. § 52 (2006).

¹²³Fed. Trade Comm'n Bureau of Consumer Protection, *Dietary Supplements*, *supra* note 119, at 7.

¹²⁴*Id.*

¹²⁵*Id.* at 9.

¹²⁶*Id.*

¹²⁷*Id.* at 10.

¹²⁸*Id.*

enforcement program regarding fraudulent weight loss claims.¹²⁹ The goals of “Operation Waistline,” as stated by the FTC, were to alert consumers to misleading and deceptive weight-loss claims and to continue to bring law enforcement actions against those in the industry who violate the law.¹³⁰ Along with the introduction of the program, the FTC also announced it was bringing seven lawsuits against companies who ran weight-loss advertisements claiming consumers could lose weight quickly and easily by using anything from “Fat Burners” diet supplements to skin patches to shoe insoles or cellulose bile products.¹³¹ Between 1990 and 2003, the FTC had taken action against nearly a hundred deceptively marketed weight loss products, most of them supplements.¹³² For example, in May 2006, the FTC ordered a company to pay three million dollars after it was found to have made questionable weight-loss and fat-loss claims about its skin gels.¹³³ The ads for the three skin gels B Tummy Flattening Gel, Cutting Gel, and Dermalin APg—claimed they “melted away fat wherever applied, including a user’s thighs, tummy, even a double chin.”¹³⁴ Most recently, in January 2007, the FTC fined the marketers of four weight loss pills twenty-five million dollars for making false advertising claims ranging from rapid weight loss to reducing the risk of cancer.¹³⁵

III. ANALYSIS

A. *Diet Industry Continues to Make Misleading and Scientifically Implausible Claims*

Stricter governmental regulations regarding diet industry advertising are needed, first and foremost, because research has shown that advertisements continue to make false claims and entice consumers to buy the products. As part of its efforts to take action against manufacturers of diet products, the FTC held a workshop in 2002 to examine the problem of misleading weight-loss advertisements. The results were disheartening. Despite the FTC’s vigilance during the previous decade, a FTC staff

¹²⁹Press Release, Federal Trade Commission, FTC Announces “Operation Waistline” - A Law Enforcement and Consumer Education Effort Designed To Stop Misleading Weight Loss Claims (Mar. 25, 1997), available at <http://www.ftc.gov/opa/1997/03/waistlin.shtm>.

¹³⁰*Id.*

¹³¹*Id.* An FTC action can be triggered by anything from letters from consumers, Congressional inquiries, or articles on consumer or economic subjects. If the FTC believes that a person or company has violated the law, it may try to obtain voluntary compliance by entering into a consent order with the company. A company that signs a consent order need not admit that it violated the law, but it must agree to stop the disputed practices. If a consent agreement cannot be reached, however, the FTC may issue an administrative complaint or seek injunctive relief in the federal courts. GUIDE TO THE FEDERAL TRADE COMMISSION, *supra* note 103.

¹³²*Hearings, supra* note 115 (statement of J. Howard Beales, Director of the Bureau of Consumer Protection, Federal Trade Commission).

¹³³Major Weight-Loss Marketers Pay \$3 Million, May 11, 2006

¹³⁴*Id.*

¹³⁵Associated Press, *Diet Pill Makers Fined Millions For False Claims*, MSNBC, Jan. 4, 2007, <http://www.msnbc.msn.com/id/16467558/>.

report concluded that, as of 2001, more than half of weight-loss advertisements still contained one or more deceptive claims.¹³⁶ The proliferation of misleading weight-loss advertisements has continued despite unprecedented levels of a FTC enforcement.¹³⁷

Specifically, the FTC found that common marketing techniques included consumer testimonials with “before” and “after” photos, rapid weight loss claims, claims that no diet or exercise was required, and “clinically proven/doctor approved” claims.¹³⁸ Compared to 1992, magazine readers in 2001 had to flip through twice as many weight-loss advertisements, many of them more likely to make specific and misleading promises.¹³⁹

Consumer testimonials were found to be particularly pervasive, with sixty-five percent of the advertisements studied using them as a way to promote the weight-loss product or service.¹⁴⁰ These testimonials rarely described modest or realistic successes. Instead, they often claimed specific amounts of weight loss and touted numbers that, in all likelihood, are “simply not achievable for the products being promoted.”¹⁴¹ The FTC also noted that “before” and “after” photos, which were found in forty-two percent of the advertisements it studied, often looked as though the only difference between the two pictures was a change in posture and body control.¹⁴² In the “before” pictures, the person’s shoulders frequently were slumped, and his or her pelvis was thrust forward to emphasize abdominal fat; the “after” pictures showed the person holding back his or her shoulders to emphasize his or her lean body mass.¹⁴³ The FTC report concluded that in some cases, it did not even appear the person had lost any weight.¹⁴⁴ Although the report only looked at specific magazines, and compared only advertisements appearing during a four-month period in 2001 with ads appearing during the same months in 1992, the FTC concluded the results were “consistent with the FTC staff’s general impressions in monitoring weight loss advertising.”¹⁴⁵

Looking at this information in light of *Central Hudson’s* four-part test, it would seem that these types of weight-loss advertisements should not be protected under the First Amendment. Under the *Central Hudson* test’s first element, whether the advertisement is protected by the First Amendment, First Amendment protection is withheld unless the advertisement concerns lawful activity and is not misleading.¹⁴⁶

¹³⁶Galloway et al., *supra* note 44, at 355.

¹³⁷CLELAND ET AL., *supra* note 32, at 31.

¹³⁸*Id.* at viii, ix.

¹³⁹*Id.* at ix, x.

¹⁴⁰*Id.* at 9.

¹⁴¹*Id.* at 10.

¹⁴²*Id.* at 11-12.

¹⁴³*Id.*

¹⁴⁴*Id.*

¹⁴⁵*Id.* at 24.

¹⁴⁶*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

Based on the advertisements, the FTC concluded “there is little doubt that [the claims] are false and deceptive.”¹⁴⁷ Because the FTC found the claims to be false, applying the first prong of the *Central Hudson* test dictated that the advertisements receive no protection, as they fell outside the boundaries of the First Amendment. The fact that so many advertisements, are clearly misleading illustrates the need for the government to reevaluate its regulations concerning advertising of diet supplements or products.

Although *Liquormart* appeared to lean in favor of granting broader protections to commercial speech, Justice Stevens noted the majority’s conclusion stemmed, in part, from a concern over laws that suppress all commercial speech in order to pursue a nonspeech-related policy.¹⁴⁸ He explained that Rhode Island’s error in concluding *all* commercial speech regulations were subject to a similar form of constitutional review did not mean that *every* commercial transaction is subject to the same level of constitutional analysis.¹⁴⁹ The main reason commercial speech has received less protection than other forms of speech is because states want to reserve some freedom to regulate and ensure a fair bargaining process.¹⁵⁰ If commercial speech is regulated for reasons unrelated to the fair bargaining process, it should be afforded the more “rigorous review that the First Amendment generally demands.”¹⁵¹

Here, the FTC’s main concern about diet industry advertising is that many advertisements made deceptive or false claims. This is a concern that falls wholly within the boundaries of the “fair bargaining process.” Therefore, weight-loss advertisements should be afforded a lower level of protection that would allow the government broader latitude in restricting otherwise free expression.¹⁵² Just as these false diet advertisements could be banned under the *Central Hudson* test, the fact that they concern regulation of a fair bargaining process should eliminate any First Amendment protections that may have been allowed under *Liquormart*.¹⁵³

B. Puffery in Diet Industry Advertising Has Led to Documented Health Problems

1. From the Atkins Diet to Nutri/System

Not only are modern-day diet advertisements still making false claims, use of these products based on their advertising methods has continuously led to documented health problems for consumers.¹⁵⁴ In Florida, businessman Jody Gorran

¹⁴⁷CLELANDE ET AL., *supra* note 32, at viii.

¹⁴⁸44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 500 (1996) (citing *Central Hudson*, 447 U.S. at 566).

¹⁴⁹*Id.* at 501.

¹⁵⁰*Id.*

¹⁵¹*Id.*

¹⁵²Galloway et al., *supra* note 44, at 369.

¹⁵³See *Central Hudson*, 447 U.S. at 566; see also *Liquormart*, 517 U.S. at 501.

¹⁵⁴A “puffing” defense claim should no longer be able to apply in these types of situations, largely because consumers *are* taking these advertisements as truth. Generally, the law accepts puffing as a defense to a complaint that the defendant made a false claim in an ad or in some other statement. This deception is condoned when it is such that no reasonable person

claimed he went on the Atkins diet relying on Dr. Atkins' book, *Dr. Atkins' New Diet Revolution* and on information obtained from the Atkins web site.¹⁵⁵ Though Atkins' claims were not as outrageous as some diet advertisements, Gorran asserted he never would have followed the diet if he had not been misled by statements in Dr. Atkins' book and the web site.¹⁵⁶ As stated, Gorran's time on the Atkins Diet resulted in an emergency angioplasty to help re-open a ninety-nine percent blocked coronary artery.¹⁵⁷

Gorran's lawsuit, though dismissed, was certainly not the first instance in which the marketing practices or adverse health effects of a diet product have been challenged. In 1979, the FTC successfully sued Porter Dietsch, a company that packaged and sold the weight-reducing tablet "X-11," for false representations and omissions in its marketing of the diet tablet.¹⁵⁸ According to its advertising, X-11 was billed as "containing a unique ingredient" that would allow users to "lose weight without restricting their accustomed caloric intake."¹⁵⁹ An insert placed inside each package of X-11 even set forth an "eating program for reducing overweights" that was to be used in conjunction with the tablets.¹⁶⁰

Porter Dietsch also omitted material facts from its advertisements, including information that "persons with high blood pressure, heart disease, diabetes, or thyroid disease should only use X-11 tablets as directed by a physician."¹⁶¹ According to research, X-11's main ingredient, phenylpropanolamine hydrochloride (PPA), causes vascular constriction.¹⁶² Not only does this constriction cause an elevation of high blood pressure, but it creates a danger for people with heart disease, elevates the blood glucose level for those suffering from diabetes, and worsens the effects of an overactive thyroid.¹⁶³ The FTC found that many people who suffered from one or more of the diseases that PPA aggravated also happened to be

would rely on the statement or believe that it presents literal truth. Honigwachs, *supra* note 28, at 157.

¹⁵⁵Complaint, *supra* note 1, at 8.

¹⁵⁶*Id.* at 14. Gorran claims that Atkins' book and web site told readers to ignore warnings by the medical and scientific community that diets high in saturated fats posed an increased risk for cardiovascular disease. Specifically, Gorran states in his Complaint that the Atkins web site gave assurances that higher cholesterol levels were not a reason to go off the diet. Gorran also cites Atkin's response to an inquiry from an Atkins customer whose cholesterol levels had gone up; Atkins replied that the customer should not consider going off the diet, and strict conformity with the Atkins diet was the best solution.

¹⁵⁷*Id.* at 13-14.

¹⁵⁸Porter Dietsch, Inc. v. Fed. Trade Comm'n, 605 F.2d 294, 297 (7th Cir. 1979).

¹⁵⁹*Id.* at 298.

¹⁶⁰*Id.* at 301. Expert testimony, however, showed that the "eating program" was nothing more than a starvation diet. The experts testified that this type of eating program was unrealistic and extremely unhealthy. *Id.*

¹⁶¹*Id.* at 298.

¹⁶²*Id.* at 299, 303.

¹⁶³*Id.* at 303.

overweight. Essentially, both X-11 and its advertising were designed for persons most likely to suffer from the diet tablet's serious side effects.¹⁶⁴

Although X-11 may have been pulled from the shelves before many people were affected, Patricia Smith was not so lucky. The Pennsylvania woman died in July 1977, allegedly as a result of the sudden onset of complications caused by a liquid protein diet she was following from the book, *When Everything Else Fails . . . The Last Chance Diet*.¹⁶⁵ Smith purchased a copy of the book in January 1977 and followed the diet under the care of her physician.¹⁶⁶ She had lost more than 100 pounds by June 1977, when she died from cardiac failure allegedly caused because of the diet.¹⁶⁷ In 1988, Smith's husband, David, brought an action against the book's publisher, seeking to recover for his late wife's death.¹⁶⁸ David Smith wanted the court to find that a publisher would be liable to a reader for negligent publication of one of its books.¹⁶⁹ Despite his attempts, the court found that the book still received protection under the First Amendment.¹⁷⁰

Plaintiffs Maria Maldonado and Stephen Waters had more luck than David Smith when they sued the weight-loss program Nutri/System in 1991 for an alleged violation of false advertising under the Virginia Code.¹⁷¹ Their claim asserted that Nutri/System's advertisements regarding its diet system were fraudulent, "in that they touted the Nutri/System diet as a safe way to lose weight when, in fact, it was not safe."¹⁷² Both Maldonado and Waters claimed that the Nutri/System Weight Loss Program, as well as the food provided as part of that program, caused gallbladder disease and the eventual removal of their gallbladders.¹⁷³ Maldonado, in particular, alleged her damages included medical expenses, lost earnings, cosmetic

¹⁶⁴*Id.* at 304.

¹⁶⁵*Smith v. Linn*, 563 A.2d 123, 124 (Pa. Super. Ct. 1989).

¹⁶⁶*Id.*

¹⁶⁷*Id.* at 125.

¹⁶⁸*Id.* at 124.

¹⁶⁹*Id.* at 125.

¹⁷⁰*Id.* at 126. While it might seem that Jody Gorran's case against Atkins Nutritionals is similar to *Smith v. Linn* and would have the same outcome, Gorran's situation can be distinguished. Smith argued that *The Last Chance Diet* was negligently published; Gorran's position regarding Dr. Atkins' book and the Atkins web site focused more on the contents of each, as well as how the company's marketing strategy played into the book and web site contents.

¹⁷¹*Maldonado v. Nutri/System, Inc.*, 776 F. Supp. 278, 279 (E.D.Va. 1991).

¹⁷²*Id.* at 280.

¹⁷³*Id.* The Nutri/System diet method is comprised of weight-loss counseling, medical assistance, and special food supplied by Nutri/System. Maldonado claimed that she only ate Nutri/System food during her participation in the diet program from January to March 1989; similarly, Waters claimed that he also ate only Nutri/System food during his participation in the diet program from April to August 1989. *Id.*

disfigurement, and emotional pain and suffering.¹⁷⁴ The court denied Nutri/System's motion to dismiss.¹⁷⁵

2. Recent Challenges to Diet Products Containing Ephedra

More recently, diet supplements containing ephedra have come under fire, not only for false advertising, but also for causing everything from heart attacks to death. Perhaps most notable was the death of twenty-three-year-old Baltimore Orioles pitcher Steve Belcher, who passed away during spring training in 2003 after taking an over-the-counter product with ephedra.¹⁷⁶ A bottle of Xenadrine RFA-1 that was found in Belcher's locker was said to have contributed to his death.¹⁷⁷ That unexpected tragedy, coupled with information that the government had received more than 16,000 reports suggesting possible links between the use of ephedra and strokes, heatstroke, heart arrhythmia, and psychotic episodes, led to increased debate over whether products containing ephedra should be eliminated.¹⁷⁸ By December 2003, the government announced ephedra would be banned nationwide, explaining that it "posed an unreasonable risk to the public health."¹⁷⁹ The ban marked the first time the FDA removed a dietary supplement from the market since 1994, when DSHEA went into effect.¹⁸⁰

Prior to the ban, two courts found an ephedra supplement manufacturer responsible in some way for false advertising of its product. In *Delahunt v. Cytodyne Technologies*, a class-action lawsuit brought in January 2003, plaintiffs asserted that class members had put their lives at risk by taking Xenadrine RFA-1

¹⁷⁴*Id.*

¹⁷⁵*Id.* at 281. Nutri/System had defended the false advertising count by alleging that Maldonado and Waters' claims were barred because, under the Virginia Code, a private cause of action could only be maintained after a successful criminal prosecution. The court, however, rejected that argument and held that Virginia Code sections 59.1-68.3 did not require such a thing. Nutri/System also argued that the Code did not allow recovery for personal injuries; again, the court disagreed. *Id.* at 280.

¹⁷⁶Specter, *supra* note 96. Ephedrine, the herb ephedra's active ingredient, boosts adrenaline, stresses the heart, raises blood pressure, and increases the rate of an individual's metabolism. Derived from the Asian herb "ma huang," it seems to help with short-term weight loss and with increasing physical stamina. When used in combination with caffeine, however, ephedra is associated with an increased risk of heart attack, stroke tachycardias, palpitations, anxiety, psychosis, and death. *Id.*

¹⁷⁷Robert Pear & Denise Grady, *Government Moves to Curtail the Use of Diet Supplement*, N.Y. TIMES, Mar. 1, 2003, at A2.

¹⁷⁸*Id.*

¹⁷⁹Sheryl Gay Stolberg, *U.S. to Prohibit Supplement Tied to Health Risks*, N.Y. TIMES, Dec. 31, 2003, at A3. By 2003, Illinois, New York, and the National Football League had banned the sale of ephedra products. 720 ILL. COMP. STAT. 602/10 (2007); N.Y. GEN. BUS. LAW § 391-0 (Consol. 2007). Mike Freeman, *N.F.L. Bans A Popular Stimulant*, N.Y. TIMES, Sept. 8, 2001, at D1. Metabolife International, one of the biggest manufacturers of ephedra, suspended sales of pills containing ephedra, as well. Stolberg, *supra*.

¹⁸⁰*Id.*

and by purchasing a product that was not accurately described on its label.¹⁸¹ Xenadrine was marketed to the public as a “Workout Enhancer” and as a “Clinically Proven Fat Loss Catalyst,” with its label claiming that the product’s “phenomenal fat-burning, muscle-sparing benefits” could produce noticeable improvements within just weeks of use.¹⁸² Plaintiff Christine Delahunt, who purchased the product in April 2000, took one tablet nearly every day until June 20, 2000.¹⁸³ On June 28, 2000, Delahunt was hospitalized in Erie County, Ohio, after suffering a seizure and acute psychotic break, which she attributed to Xenadrine.¹⁸⁴ In her fraudulent advertising claim, Delahunt’s allegations included:

(1) that the label affixed to Xenadrine RFA-1 represented that the product contained twenty milligrams of ephedrine when, in actuality, it was impossible to control the exact amount of ephedrine contained in each product; . . . (3) that the label failed to disclose the true dangers associated with taking ephedrine; (4) that Ms. Delahunt purchased Xenadrine RFA-1 in reliance on those misrepresentations and omissions; and (5) she would not have purchased the product had the label not contained such misrepresentations or omissions.¹⁸⁵

Although the court did not recognize that a sufficient “class” existed for the lawsuit to continue as a class-action suit, it refused to dismiss Delahunt’s fraudulent advertising claim.¹⁸⁶

A second lawsuit against Cytodyne echoed similar fraudulent advertising claims. In May 2003, San Diego Superior Court Judge Ronald Styn ruled that Cytodyne Technologies had to return \$12.5 million in profits from California sales of its ephedra product, Xenadrine RFA-1.¹⁸⁷ Judge Styn ordered the money to be put in a pool for distribution to consumers.¹⁸⁸ The class-action suit accused Cytodyne of deceiving customers with advertisements promising “uniquely effective and

¹⁸¹Delahunt v. Cytodyne Tech., 241 F. Supp 2d 827, 830 (S.D. Ohio 2003).

¹⁸²*Id.* at 830.

¹⁸³*Id.* at 831.

¹⁸⁴*Id.* The FDA’s concerns about diet supplements containing ephedra arose, in part, from ephedra’s mechanism of action in the body. It is an adrenaline-like stimulant that can have potentially dangerous side effects on the nervous system and heart. A RAND Corporation study, commissioned by the National Institutes of Health in 2003, reviewed 16,000 “adverse event reports,” and found two deaths, four heart attacks, nine strokes, one seizure, and five psychiatric cases involving ephedra in which the records appeared thorough, and no other contributing factors were identified. Press Release, U.S. Food and Drug Administration, HHS Acts to Reduce Potential Risks of Dietary Supplements Containing Ephedra (Feb. 28, 2003), available at <http://www.fda.gov/bbs/topics/NEWS/2003/NEW00875.html>.

¹⁸⁵Delahunt, 241 F. Supp 2d at 841.

¹⁸⁶*Id.* at 834, 841.

¹⁸⁷Ford Fessenden, *Judge Orders Ephedra Maker to Pay Back \$12.5 million*, N.Y. TIMES, May 31, 2003, at A5. See also Penni Crabtree, *Judge Tells N.J. Diet Pill Firm to Pay Restitution*, THE SAN DIEGO UNION-TRIBUNE, May 31, 2003, at C1.

¹⁸⁸Fessenden, *supra* note 187.

substantial weight loss.”¹⁸⁹ In ruling against Cytodyne, Judge Styn found that the company’s advertising was not supported by scientific research and excluded, misstated, and overstated scientific findings.¹⁹⁰ Judge Styn also noted that the manufacturer had “pushed researchers to cast findings in the most favorable light.”¹⁹¹

Since the ephedra ban in 2003, additional claims against dietary supplement manufacturers, such as Metabolife, have come through the courts.¹⁹² In *Talavera v. Metabolife International, Inc.*, the court found it was sufficient for the plaintiff, Irene Talavera, to have alleged that Metabolife’s “representations concerning the safety and testing of Metabolife 356 E-Z Tab were false.”¹⁹³ Talavera sued Metabolife in 2004 for fraudulently advertising its product, among other things. After hearing Metabolife’s claims that its product had been “independently laboratory tested for safety,” Talavera began taking Metabolife and suffered a stroke that resulted in brain damage.¹⁹⁴ Despite the manufacturer’s claims of safety, Talavera alleged that Metabolife did not adequately test the product before promoting its use.¹⁹⁵ She also alleged the manufacturer understated the health hazards associated with the pills.¹⁹⁶ The court agreed, ruling that Metabolife had falsely represented material facts; that the company knew those facts to be untrue and intended for Talavera to rely on the misrepresentations to sell the product; and that not only did Talavera rely on them, but she also suffered a stroke “as a result of her reliance on [Metabolife’s] misrepresentations.”¹⁹⁷

While the diet industry has often defended false advertising claims like the ones stated above by claiming the ads merely contain “puffery,” or protected commercial speech, it is difficult to see how that defense is still possible.¹⁹⁸ When diet products that are advertised as having “phenomenal fat-burning” effects are actually products that may cause heart attacks or strokes, consumers certainly are not receiving any

¹⁸⁹*Id.*

¹⁹⁰*Id.*

¹⁹¹*Id.* Attorneys for Cytodyne had claimed that the hyperbole of their advertising was just “puffery,” and there was nothing illegal about “puffing.”

¹⁹²Metabolife 356 E-Z Tab had been designed and marketed by Metabolife International, Inc., as a dietary supplement. In a nationwide advertising campaign, the company represented that Metabolife 356 E-Z Tab was a convenient and scientifically and medically safe way to lose weight and get energy. Initially, however, ephedra was one of the ingredients found in Metabolife 356 E-Z Tab. *Talavera v. Metabolife Int’l, Inc.*, No. 04-C-1629, 2004 U.S. Dist. LEXIS 19430, at *2-11, *2 (N.D. Ill. Sept. 24, 2004).

¹⁹³*Id.* at *7.

¹⁹⁴*Id.* at *2.

¹⁹⁵*Id.*

¹⁹⁶*Id.* In reality, Metabolife 356 E-Z Tab was found to raise blood pressure, increase heart rate, cause seizures, strokes, brain injury, heart failure, and sudden death. According to Talavera, Metabolife International learned of the potential adverse effects prior to her buying the product, but did not issue any warning or recall regarding the product before she began taking it.

¹⁹⁷*Id.* at *8.

¹⁹⁸*Delahunt v. Cytodyne Tech.*, 241 F. Supp 2d 827, 830 (S.D. Ohio 2003).

protections. Manufacturers responsible for the products' advertisements should not receive protections under the First Amendment, either.

C. Current Regulation of Diet Industry Advertising Is Not Sufficient

1. Appearance of FTC Success

At first glance, it might seem that the FTC's enforcement methods in regulating diet industry advertising are sufficient. After all, over the last decade, the FTC has made an unprecedented push to target deceptive weight-loss advertising and punish manufacturers by filing lawsuits against them. Not only has the FTC challenged numerous ingredients in dietary supplements, it also has challenged the advertising claims of leading commercial weight-loss centers and a wide variety of weight-loss devices and exercise equipment.¹⁹⁹ In *Weight Watchers International*, for example, the FTC alleged that the corporation, among other things, falsely claimed that participants in the 1989 Weight Watchers "Quick Success" weight-loss program lost weight twenty percent faster than participants in previous Weight Watchers programs.²⁰⁰ The FTC's consent decree against the company not only required Weight Watchers to immediately stop making such weight-loss representations, but it also ordered the company to make all of its advertising files available to the FTC for the next three years.²⁰¹ The FTC has investigated the advertising and promotion of large commercial weight-loss clinics and doctor-supervised, low-calorie diet programs in recent years as well.²⁰² This project resulted in more than twenty consent orders that addressed such advertising methods as unsubstantiated weight-loss claims, atypical consumer testimonials, and misleading endorsements.²⁰³

From a financial standpoint, it might also seem that the FTC's enforcement efforts have made a dent in discouraging deceptive advertising. Since 1990, FTC cases that have challenged false advertising claims for diet pills, potions, patches, and programs have resulted in court orders that required either companies or individuals to pay more than \$48 million to wronged consumers.²⁰⁴ The FTC has assessed an additional \$4.35 million on various weight-loss manufacturers as civil penalties for violations of prior FTC orders.²⁰⁵ Following the FTC's 1997

¹⁹⁹CLELAND ET AL., *supra* note 32, at 26. Such ingredients included chitosan, chromium picolinate, pyruvate, glucomannan, dietary fiber, cellulose/ox bile, fucus, hydroxycitric acid, and L-carnitine. *Id.*

²⁰⁰In the Matter of Weight Watchers Int'l, Inc., 124 F.T.C. 610, 614-15 (1997).

²⁰¹*Id.* at 646-48.

²⁰²CLELAND ET AL., *supra* note 32, at 26.

²⁰³*Id.* at 26-27. Remedies that the FTC required included substantiation for weight-loss or weight-maintenance claims, disclosure of total costs, and prohibitions against misrepresenting staff credentials. *Id.*

²⁰⁴*Id.* at 26.

²⁰⁵*Id.* The FTC filed a similar consent order in 1997 against the corporation Bodywell, Inc., for advertising and marketing a product called "Slimming Soles." The shoe insoles product, which was advertised everywhere from *Cosmopolitan* and *Redbook* to USAir's in-flight magazine and the Farmers Almanac, claimed to cause weight loss by "stimulating certain areas of the feet." The FTC found that it did nothing of the sort, and it prohibited the

“Operation Waistline” campaign, the FTC completed another seventeen lawsuits challenging a variety of deceptive claims for weight-loss products.²⁰⁶ Several of the more recent lawsuits have included strong financial remedies, including consent orders that required \$19.2 million to be paid back to consumers.²⁰⁷

2. In Reality, FTC Actions Are Merely Reactive

Unfortunately, the FTC’s actions constitute a mere slap on the wrist for an industry that, as stated, is expected to earn nearly \$50 billion in 2006.²⁰⁸ Because diet industry advertising currently enjoys a fair level of First Amendment protection under its “commercial speech” status, the FTC has to expend considerable time and effort researching claims to determine if they are deceptive.²⁰⁹ By the time an advertisement is finally banned by the FTC, millions of consumers likely have seen and potentially believed the fraudulent weight-loss claims. Ideally, consumers have only wasted their money on these alleged “weight-loss” products before the FTC can order manufacturers to restructure their advertising claims. That is not always the case. As stated, some consumers have suffered serious health problems as a result of using these products.²¹⁰

The FTC’s regulatory attempts have encountered the toughest challenges where dietary supplements, now considered the fastest-growing segment of the diet industry, are concerned.²¹¹ As stated, since the passage of DSHEA in 1994, the FDA no longer has to approve ingredients used in over-the-counter weight-loss products.²¹² This means that manufacturers can put dietary supplements on the market without first proving they work, and the primary method of enforcement is a false advertising claim.²¹³ Unfortunately for the FTC, the organization seems to be fighting a losing battle: for each success, ten new companies seem to appear.²¹⁴

With an increasing audacity, diet companies continue to disregard federal guidelines in order to promise a quick weight-loss fix, even though their products

company from misrepresenting the results of any test or study; the FTC also required the corporation to pay \$100,000 in fines. *In the Matter of Bodywell, Inc.*, 123 F.T.C. 1577, 1577-79 (1997).

²⁰⁶CLELAND ET AL., *supra* note 32, at 27.

²⁰⁷*Id.*

²⁰⁸Goodstein, *supra* note 24.

²⁰⁹Winter, *Fraudulent Marketers*, *supra* note 88. FTC officials warn that hundreds of new companies have put out questionable products on the Internet during the last few years, because they know that the agency’s handful of regulators, who often need years to pursue a case, cannot catch them all. *Id.*

²¹⁰Azulay, *supra* note 3.

²¹¹Pinco & Halpern, *supra* note 105, at 567. Nonprescription pills, dietary supplements, and other over-the-counter weight loss agents have never been more popular. *Id.* After years of little change, sales of diet pills and supplements have more than quadrupled, rocketing from \$168 million in 1996 to \$782 million in 2000. Winter, *Fraudulent Marketers*, *supra* note 88.

²¹²*Id.*

²¹³*Id.*

²¹⁴Specter, *supra* note 96.

have no effect on weight-loss and can even be harmful.²¹⁵ Each time a manufacturer succeeds with exaggerated promises, regulators say, a few more follow suit, “plastering the airwaves and the Internet with invitations to drop weight while driving, lose [ten] pounds in a weekend and, of course, never diet again.”²¹⁶ FTC officials have conceded that the agency can do little to curb the increase in companies marketing fraudulent diet products.²¹⁷ In a 2000 *New York Times* article, journalist Greg Winter quoted Richard Cleland, a senior attorney in the FTC’s advertising division, as saying, “[t]here are a lot more of them than there are of us, and under no foreseeable circumstances is enforcement going to address this problem. . . . It can only set the example.”²¹⁸

3. Requiring Media To Take Responsibility Is Unrealistic

Cognizant of its shortcomings, the FTC has tried to suggest ways in which other organizations or industries can also try to police deceptive advertising. The media have especially been targeted. As part of its 1997 “Operation Waistline” campaign, for example, the FTC’s Bureau of Consumer Protection sent letters to more than a hundred publications which had published the advertisements listed in the FTC complaints.²¹⁹ While the letters asked the publications to step up their advertising review efforts to prevent clearly deceptive weight-loss advertisements from reaching consumers, they had little effect on publications’ advertising screening practices.²²⁰

Following the issuance of its 2002 report, *Weight Loss Advertising: An Analysis of Current Trends*, the FTC staff also held a workshop, where one set of panelists considered the potential roles the media could play in reducing deceptive weight-loss advertising.²²¹ The panelists concluded there were two possible roles for the media: first, it should educate the public on weight-loss fraud and weight-loss issues generally; and second, it should discourage the dissemination of false weight-loss advertising.²²² While that might sound like a good idea, expecting the media to step in where the FTC has failed simply is not realistic.²²³

²¹⁵Winter, *Fraudulent Marketers*, *supra* note 88.

²¹⁶*Id.*

²¹⁷*Id.*

²¹⁸*Id.*

²¹⁹CLELAND ET AL., *supra* note 32, at 27. As stated, “Operation Waistline” consisted of seven cases the FTC brought simultaneously against various diet industry manufacturers that focused on false advertising claims. *Id.* “Operation Waistline” also had a second phase, called “Operation Workout.” *Id.* The FTC was successful in four administrative settlements that targeted exaggerated claims for fitness equipment by marketers of some of the most popular equipment on the market at that time - Abflex, the Lifecycle, and the Cross Walk Treadmill. *Id.* These cases focused on various weight-loss success and calorie-burning claims. *Id.*

²²⁰*Id.*

²²¹FED. TRADE COMM’N, BUREAU OF CONSUMER PROTECTION, DECEPTION IN WEIGHT LOSS ADVERTISING WORKSHOP: SEIZING OPPORTUNITIES AND BUILDING PARTNERSHIPS TO STOP WEIGHT-LOSS FRAUD 25 (2003).

²²²*Id.* This particular workshop panel consisted of representatives from the three major media trade groups, two publishers, and academics in the fields of marketing, journalism

a. Media Expertise Is Lacking

First and foremost, media trade groups at the FTC workshop articulated the biggest problem: the media lack the “requisite expertise to know whether a claim is deceptive.”²²⁴ Most advertisements are handled by publishers, associate publishers,

ethics, and media law. *Id.* At the workshop, the Cable Advertising Bureau’s (CAB) representative said that the organization had issued voluntary advertising guidelines for its members in 1996 and had included a section in the guidelines that dealt with weight-loss advertisements. Only seventeen percent of the CAB’s membership said in a survey that they actually followed the guidelines; the rest reported using their own form of advertising regulations. *Id.* The Magazine Publishers of America, unlike the CAB, had not even formulated any kind of guidelines for its members. *Id.* It appeared that the newspaper industry had perhaps the highest standard of the three media groups: its representative stated that most newspapers actually do adhere to “fairly well-established guidelines for acceptability.” *Id.* The Newspaper Association of America’s (NAA) representative explained that if there is a concern about an ad, an advertising manager or advertising review committee will look at it. *Id.* According to the NAA representative, this generally helps newspapers to catch and identify advertisements that are blatantly misleading, fraudulent or illegal. *Id.* at 26-27.

²²³The FTC’s goals for how the media could get more involved were outlined in a speech by Commissioner Orson Swindle at a 2003 conference entitled “Aggressive Advertising and the Law.” In his speech, Swindle stated:

[The FTC is] not suggesting that the media institute a massive screening program or network-style clearance procedures for all types of advertisements. We are asking for the media’s assistance solely in the weight loss product area. Besides the economic harm when consumers spend money on weight loss products that don’t work, there are serious health consequences for consumers who are obese or overweight. And unlike many other types of ads, we believe that weight loss advertisements are particularly suited for better media screening. We plan to help the media in this process. Let me explain.

The FTC is working to develop a list of claims that are not scientifically possible. At the FTC’s Weight Loss Advertising Workshop, staff asked scientific experts whether there was a list of claims for over-the-counter weight loss products that are generally agreed to be false. FTC staff is using information from the experts at the workshop to refine a list of false claims. We’re talking about outrageous claims B like “lose 30 lbs. in 30 days” or “lose weight while still enjoying unlimited amounts of high-calorie foods” B which are scientifically impossible to achieve.

We will then distribute the list of false claims to the media to provide clear guidance for screening ads. The screening process we are asking the media to voluntarily adopt involves simply comparing the claims in an ad with the claims on our list. We are not asking the media to review scientific studies or substantiation for weight loss ads, nor are we insisting that media outlets require television network-style clearance procedures for weight loss ads. I certainly commend the television networks for their screening process. But we realize that not every media outlet can support that type of review, which is why we’re developing the list of claims.

Orson Swindle, Commissioner, Fed. Trade Comm’n, Address at the Aggressive Advertising and the Law Conference (April 28, 2003), *available at* <http://www.ftc.gov/speeches/swindle/030428aggressive.htm>.

²²⁴FED. TRADE COMM’N, DECEPTION IN WEIGHT LOSS ADVERTISING WORKSHOP, *supra* note 221, at 27. In order to better equip the media with knowledge of what may constitute a fraudulent weight-loss claim, the media outlets present at the workshop offered various suggestions. One of the suggestions involved providing media outlets with a one-page

advertising salespersons, and advertising copy-readers, none of whom are properly equipped to evaluate an advertisement's claims.²²⁵ Even Commissioner Orson Swindle, while advocating for media involvement in a 2003 speech, acknowledged that it may not be the easiest request. "There is concern about the effort needed to review the [advertisements] for specific claims and about the difficulties that may arise if marketers modify their claims to skirt the list of false claims developed by the Commission," Orson said.²²⁶ Not only is the concern real, it has prompted media publications to refrain from stringent review of their advertising. Out of all the publications discussed at the FTC workshop, for example, only *Good Housekeeping* magazine aggressively screens for deceptive advertisements and requires substantiation for each advertising claim.²²⁷ That vigilance comes at a price. *Good Housekeeping* spends approximately \$2.4 million a year to screen its advertising, a price that "far exceeds the total revenue of most magazines."²²⁸

b. Financial Concerns Are More Important

The majority of media outlets could only dream of a budget that afforded them extra money to properly decipher which advertisements were deceptive. Media trade groups at the FTC workshop added that costs to support a professional staff able to evaluate the accuracy of submitted ads would be greater than their revenues, especially in the newspaper and magazine industries.²²⁹ Similarly, the Cable Advertising Bureau (CAB) stated it would be unreasonable for the FTC to expect cable television stations to expend the same level of resources as the major broadcast networks in policing deceptive advertising.²³⁰ And, financially speaking, media outlets can depend quite heavily on advertisers for their operating revenues. Refusing an advertisement for a deceptive weight-loss claim would result in a direct income loss.²³¹ Furthermore, if a publication carries advertisements that are less appealing to the audience, the publication could end up attracting fewer advertisers and commanding lower prices down the road.²³²

document of easily understood buzz words or examples of problematic advertising campaigns, which could be distributed to decision-makers at all levels. Still, the media outlets expressed concern that even a guide would not be able to solve things. Advertising personnel likely would have to make some judgment call to determine whether one of the scientifically infeasible weight-loss claims is being made and, if so, whether the advertisement is actually deceptive. This could result in complex issues of advertisement interpretation, and the media would be back at square one: ill-equipped to deal with the problems. *Id.* at 29-30.

²²⁵*Id.*

²²⁶Swindle, *supra* note 223.

²²⁷*Id.*

²²⁸Galloway et al., *supra* note 44, at 364.

²²⁹FED. TRADE COMM'N, DECEPTION IN WEIGHT LOSS ADVERTISING WORKSHOP, *supra* note 221, at 27.

²³⁰*Id.*

²³¹Galloway et al., *supra* note 44, at 358.

²³²*Id.* Oddly enough, the reality is that media audiences actually want to hear about weight-loss products. It is nearly impossible to find a single issue of a "women's" magazine that carries no article about ways to lose weight. The competing pressures of advertising

c. Deadlines Leave Little Time To Check Advertisements

Financial concerns aside, the tight deadlines and time constraints that many media outlets face also serve to deter media regulation of deceptive weight-loss advertising. For example, the CAB reported at the FTC workshop that the 2500 cable systems it represents sell 2.7 billion units of advertising each year, and each of its sixty member-channel networks that carry advertisements average about 217,000 commercials per year.²³³ Because the advertisements are constantly changing, according to the CAB, it would be nearly impossible to evaluate every single advertisement before it was slated to air.²³⁴ Deadlines are especially prevalent in the newspaper industry, where daily publications generally must make decisions in a short period of time.²³⁵ Pre-printed advertisements are frequently supplied by third parties only hours before a paper goes to press, which puts further time pressures on newspaper advertising departments.²³⁶ Even the editor-in-chief of *Good Housekeeping* concluded at the workshop that, if faced with 24-hour deadlines, the magazine's advertising standards program would be difficult to implement.²³⁷

d. First Amendment Concerns

Finally, the FTC's request that media outlets regulate deceptive advertising prior to its publication "resembles prior restraints that First Amendment case law abhors."²³⁸ In a 2003 article, the *New York Times* quoted Hearst Publishing spokesman Paul Luthringer as saying that the FTC's actions "would, in effect be exerting prior restraint on what a publisher can or cannot publish, which is an abridgment of freedom of the press guaranteed by the First Amendment."²³⁹ The danger of pre-screening such advertising is that, in the process of evaluating the claims, the media may decide not to publish speech that actually is truthful.²⁴⁰

dollars versus truthful advertisements are not unique, though. In the nineteenth century, the early magazines were reluctant to allow advertising at all. But after the Civil War, the consumer demand for patent medicines was so high that it exerted a strong force on magazine publishers. Media audiences wanted to hear about these products, even if their results were questionable, and the products, in turn, gained credibility from the appearance in credible magazines. *Id.* at 358-59.

²³³FED. TRADE COMM'N, DECEPTION IN WEIGHT LOSS ADVERTISING WORKSHOP, *supra* note 221, at 28.

²³⁴*Id.*

²³⁵*Id.*

²³⁶*Id.*

²³⁷*Id.*

²³⁸Sopher, *supra* note 98, at 957. See also *Near v. Minnesota*, 283 U.S. 697, 722-23 (1931) (holding unconstitutional a Minnesota statute that required prior restraints of newspapers once the publication had defamed someone's character with a malicious or scandalous article).

²³⁹Nat Ives, *The Media Business: Advertising; Media Companies Are Raising Their First Amendment Flags*, N.Y. TIMES, Feb. 13, 2003, at C4.

²⁴⁰Sopher, *supra* note 98, at 958.

Media trade groups present at the FTC's workshop expressed a similar sentiment. They concluded that, if burdened with the task of reviewing weight-loss advertising for accuracy, media outlets most likely would react by rejecting all advertisements for weight-loss products and programs.²⁴¹ Not only would this be costly to the media, but it also would be an unfair result for weight-loss advertisers who do make legitimate claims.²⁴² This concern, along with the fact that media outlets are ill-equipped, financially unable, and have too little time to evaluate deceptive advertising claims, further illustrates why stricter regulations of diet industry advertising are needed.

IV. CONCLUSION

Over the last decade, the diet industry's misleading and scientifically implausible claims have escalated. These claims no longer qualify as "puffery," a harmless form of commercial speech that receives protection under the First Amendment. Rather, a number of advertising claims have actually led to documented, and serious, health concerns for consumers. Even though the FTC has stepped up its enforcement of these advertising claims in recent years, its efforts have not been enough to reduce the problem.²⁴³

Aside from filing a complaint with the FTC, a consumer's only other recourse is to file a private legal action, such as the lawsuit Florida businessman Jody Gorran filed against Atkins Nutritionals.²⁴⁴ But, private litigation is expensive and often inefficient, and it tends to happen after the damage has already been done.²⁴⁵ Although the FTC has called upon the media to help regulate deceptive advertising, this solution is an unrealistic one. Not only are the media ill-equipped to detect fraudulent claims, but the media are limited by finances and time. Furthermore, the media are concerned that if they were required to limit diet industry advertisements, they would be violating the First Amendment by deciding what a publisher could or could not publish.

If weight-loss advertising is truly going to improve, the government needs to step in and take a closer look. In developing more stringent rules, the government might want to study how it has handled tobacco industry advertising, in order to see what types of regulations may or may not be feasible.²⁴⁶ Regardless of how the

²⁴¹FED. TRADE COMM'N, DECEPTION IN WEIGHT LOSS ADVERTISING WORKSHOP, *supra* note 221, at 30.

²⁴²*Id.* Conversely, the FTC's position is that because it is merely "encouraging" the media to improve voluntary screening of scientifically infeasible weight-loss claims, issuance of media guidance does not raise First Amendment concerns. *Id.*

²⁴³Galloway et al., *supra* note 44, at 384. In spite of the FTC bringing case after case against advertisers in this industry, regulation is doing a poor job of protecting consumers from weight-loss ads. There is little doubt that the FTC's efforts to curb those deceptions have largely failed and that new strategies are needed. *Id.*

²⁴⁴*Id.* at 381-82.

²⁴⁵*Id.*

²⁴⁶Most recently, in August 1995, the FDA proposed strict regulations aimed at reducing the number of children and adolescents who smoke. Several of the regulations specifically targeted cigarette advertisements aimed at minors. In August 1996, President Clinton endorsed the final version of these regulations, and most of them were set to go into effect on August

government may approach this task, one thing is clear: any regulation would have to pass the four-part balancing test articulated in *Central Hudson* before commercial speech could be restricted.²⁴⁷

Still, the government should be able to come up with a realistic plan that passes the *Central Hudson* test. Because the diet industry is lawfully allowed to advertise, it would be subject to regulation under *Central Hudson's* first prong. The government likely would be able to prove it has a substantial interest in regulating diet industry advertising under *Central Hudson's* second prong, as the government should be concerned with protecting the health and safety of consumers. Ideally, stricter regulation of diet industry advertising would advance the government's interest in decreasing the number of fraudulent weight-loss claims, under *Central Hudson's* third prong. And finally, under *Central Hudson's* fourth prong, the government likely would be able to prove that regulations on diet industry advertising would not be too restrictive. A less restrictive means of regulation is neither feasible nor effective, as the FTC's regulatory attempts have not improved the situation.

The current regulations that govern diet industry advertising simply do not adequately protect consumers from fraudulent weight-loss claims. The size of the market is enormous, and consumers' desire to lose weight is so strong that they are willing to try almost anything that is advertised as resulting in a "quick and simple" weight-loss solution.²⁴⁸ For people like Jody Gorran, who believed the advertising claims of Atkins Nutritionals, this has resulted in serious health problems. Regulating individual diet programs or dietary supplements after such tragedies have occurred is too little and far too late. Stricter advertising restrictions need to be developed for the diet industry as a whole, and they need to come from the government.

JENNIFER E. GROSS*

28, 1997. The regulations would have prohibited tobacco advertisements within 1000 feet of playgrounds and schools. Billboards more than 1000 feet from schools would have had to be in a black and white, text-only format. Similarly, tobacco advertisements in publications with a youth readership exceeding fifteen percent or two million readers also would have had to be in a black and white, text-only format. The tobacco industry challenged the regulations, however, and in *Brown & Williamson Tobacco Corp. v. FDA*, the court ruled the FDA had gone too far and could not impose those limits on cigarette advertising. A more successful regulation is the Cigarette Labeling Act, which requires manufacturers to place specific health-hazard warnings from the Surgeon General on cigarette packaging, advertising, and billboards. Kathleen M. Paralusz, *Ashes to Ashes: Why FDA Regulation of Tobacco Advertising May Mark the End of the Road for the Marlboro Man*, 24 AM. J.L. & MED. 89, 90-97 (1998). See also *Brown & Williamson Tobacco Corp. v. Food & Drug Admin.*, 153 F.3d 155, 184 (4th Cir. 1998); see Cigarette Labeling Act, 15 U.S.C. § 1333 (2006).

²⁴⁷*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980); see also Paralusz, *supra* note 246, at 105.

²⁴⁸Galloway et al., *supra* note 44, at 383.

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