Charting the Course: The Federal Trade Commission's Second Hundred Years

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Abstract

The 100th anniversary of the Federal Trade Commission ("FTC" or "Commission") provides an opportunity to celebrate the Commission's enviable record of accomplishment. It also gives Commission watchers a chance to reflect on how the lessons learned during the Commission's first hundred years might inform the agency's leadership in charting the Commission's course for its second hundred years. This Article focuses on two areas in which the Commission has taken effective action to protect consumers—safeguarding consumer privacy and combatting deceptive advertising—and argues that these issues will continue to occupy center stage at the FTC and that the Commission should consider fine-tuning the agency's work to better protect consumers.

Table of Contents

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* Professor of Law, Georgetown University Law Center. This Article draws on the author's experience as the Director of the Federal Trade Commission's Bureau of Consumer Protection from 2009 through 2012. This Article is dedicated to the men and women of the FTC's Bureau of Consumer Protection who work tirelessly to protect consumers from deceptive and unfair acts and practices in the marketplace. Thanks to Nathalie Baker, Senior Managing Editor, *The George Washington Law Review*, for her top-notch editorial assistance.

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INTRODUCTION

The Federal Trade Commission has an ambitious and indeed daunting mission: To prevent "unfair or deceptive acts or practices in or affecting commerce." Congress created the FTC to be the first line of defense for consumers in a marketplace often fraught with bad actors. And the FTC has risen to the challenge; it has a proud legacy of protecting consumers from those who make the marketplace dangerous. The agency protects consumers from scam-artists intent on taking the last dollars out of their wallets, from abusive debt collectors, from shady lenders, from advertisers who make false claims about their product's attributes, and from those who hijack consumers' personal information for commercial gain. These missions have long been at the core of the agency's work, and, absent a dramatic change in human nature, will remain so.

This Article focuses on two of the FTC's core consumer protection missions—protecting privacy and fighting false advertising—because the Commission's work in these areas is evolving, as is the applicable law. This Article identifies a number of issues that the Commission should consider as it refines its privacy and advertising work and offers some suggestions as to how the Commission should chart its course for its second hundred years.

I. PROTECTING CONSUMER PRIVACY

Privacy is an issue that will command an increasingly dominant position in the Federal Trade Commission's consumer protection mission. In little more than a decade, the FTC has become the nation's chief privacy regulator, and has had considerable success in protecting consumers from many of the most egregious privacy invasions. The history of the FTC's privacy program is comprehensively set out in a recent law review article by privacy scholars Daniel J. Solove and

Woodrow Hartzog, *The FTC and the New Common Law of Privacy*,[1] and will not be repeated here. After all, this symposium's project is not just to pat the agency on the back, but is also to focus on how the agency may build on its successes as it moves forward.

The Commission's success in building a robust privacy program is attributable to one key insight: the agency has long understood that keeping pace with technology is essential in carrying out the Commission's core mission of protecting consumers in an ever-evolving marketplace.[2] That vigilance must continue. Academics often point to disruptive technologies, like the advent of the Internet and the rapid introduction of mobile devices, and lament that regulators often lag far behind, wringing their hands while the technology becomes entrenched, even when it poses serious, immediate, and preventable risks to consumers.[3]

The FTC did not fall victim to that paralysis. To the contrary, the Commission's work on privacy policy and best industry practices began when the Internet was in its infancy in the late 1990s, and has proceeded without significant interruption since then.[4] When new technologies and technology-based business models enter the marketplace, the Commission responds.[5] Indeed, during my tenure at the Commission, it actively engaged in policy work on many emerging technologies, including mobile technology, mobile applications, mobile payment systems, facial recognition, and other biometric markers, to name just a few.[6]

The agency's regulatory work is also driven by the pace of technological development. For example, as it became clear that emerging

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1 Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014).

2 *See id.* at 625–26 (describing agency efforts to use technology to promote privacy regulation).

3 *See, e.g.*, Nathan Cortez, *Regulating Disruptive Innovation*, 29 BERKELEY TECH. L.J. 175 (2014).

4 *See* Solove & Hartzog, *supra* note 1, at 598–99 & n.53 (describing the arc of the FTC's policy work on privacy).

5 *See id.*

6 *See, e.g.*, FED. TRADE COMM'N, PAPER, PLASTIC . . . OR MOBILE? AN FTC WORKSHOP ON MOBILE PAYMENTS (2013), http://www.ftc.gov/reports/paper-plastic-or-mobile-ftc-workshop-mobile-payments; Press Release, Fed. Trade Comm'n, FTC's Second Kids' App Report Finds Little Progress in Addressing Privacy Concerns Surrounding Mobile Applications for Children (Dec. 10, 2012), http://www.ftc.gov/news-events/press-releases/2012/12/ftcs-second-kids-app-report-finds-little-progress-addressing; Press Release, Fed. Trade Comm'n, *FTC Recommends Best Practices for Companies That Use Facial Recognition Technologies* (Oct. 22, 2012), http://www.ftc.gov/news-events/press-releases/2012/10/ftc-recommends-best-practices-companies-use-facial-recognition.

technologies would undermine protections under the Children's Online Privacy Protection Act ("COPPA"),[7] the Commission responded promptly by initiating a rulemaking to overhaul substantially COPPA's implementing regulations.[8] Indeed, the Commission has amended its COPPA rule three times since it was first issued in 1999, each time to address technological advances.[9] The Commission's success on privacy can be traced to its willingness to lay bare and grapple with emerging technological issues in real time, not as an afterthought.

The same is true with regard to the FTC's use of enforcement cases to ensure that technological advances do not threaten consumers. The FTC brought its first Internet privacy case in August 1998,[10] before the Internet had firmly taken root.[11] The case challenged the deceptive practices of GeoCities, which, at the time, was one of the largest Internet sites, with over two million users.[12] The company fell into the Commission's crosshairs because it sold consumers' personal information to advertisers and third parties despite its promise not to do so.[13] The Commission's order prohibited GeoCities from lying to consumers, but was careful not to drive the company out of business, reflecting the Commission's unbroken commitment to avoid putting roadblocks in the way of responsible innovation.[14]

By 2014, the agency had brought over 170 privacy cases.[15] Not surprisingly, the pace of privacy enforcement is accelerating as the Internet economy continues to expand and mobile devices and applica-

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7 Children's Online Privacy Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified as amended at 15 U.S.C. §§ 6501–6506 (2012)).

8 *See* Children's Online Privacy Protection Rule, 16 C.F.R. pt. 312 (2013).

9 The Commission's COPPA rule, first issued in 1999, Children's Online Privacy Protection Rule, 64 Fed. Reg. 59,911 (Nov. 3, 1999), was revised in 2002, Children's Online Privacy Protection Rule, 67 Fed. Reg. 18,821 (Apr. 17, 2002), and in 2005, Children's Online Privacy Protection Rule, 70 Fed. Reg. 21,104 (Apr. 22, 2005).

10 *See* Press Release, Fed. Trade Comm'n, *Internet Site Agrees to Settle FTC Charges of Deceptively Collecting Personal Information in Agency's First Internet Privacy Case* (Aug. 13, 1998) [hereinafter *Internet Site Agrees to Settle*], http://www.ftc.gov/news-events/press-releases/1998/08/internet-site-agrees-settle-ftc-charges-deceptively-collecting; *see also* Complaint, Geocities, FTC Docket No. C-3850 (Feb. 5, 1999), https://www.ftc.gov/sites/default/files/documents/cases/1999/02/9823015cmp.htm.

11 According to the Pew Research Center, barely one-third of the U.S. population used the Internet in 1998. *See Internet Use Over Time*, PEW RES. CTR., http://www.pewinternet.org/data-trend/internet-use/internet-use-over-time/ (last visited Oct. 19, 2015).

12 *See Internet Site Agrees to Settle*, *supra* note 10.

13 *See id.*

14 *See id*.

15 *See* Solove & Hartzog, *supra* note 1, at 600. This calculation runs from 1997 through February 7, 2014, and includes cases brought under Section 5 of the FTC Act, 15 U.S.C. § 45 (2012), as well as privacy cases brought under the privacy statutes the agency enforces, especially

tions proliferate.[16] More than one-third of the agency's privacy cases were brought between 2009 and 2014, and the rate of enforcement appears to be increasing even more.[17] The FTC continues to bring enforcement cases relating to a broad range of privacy issues.[18]

Enforcement cases play a central role in the Commission's privacy work because they have both a direct impact on the firms subject to FTC consent orders and send a message to the industry about the Commission's view of what conduct crosses the deception and unfairness line. For instance, in crafting the consent order in the Google Buzz case, the Commission sought to accomplish several goals: (1) to ensure that the company keeps its promises to consumers; (2) to guarantee that if the company wants to share personal information with new third parties, it will first obtain the "express affirmative consent" of its users; and (3) to force the company to build a system that takes privacy into account in all phases of a product's lifecycle.[19] Equally important to the Commission, the Google order sent a signal to companies that these measures make good sense, and if followed, will keep the FTC from the company's doorstep.

Robust enforcement has another benefit. According to privacy scholars Daniel Solove and Woodrow Hartzog, the Commission's privacy orders are now so extensive and numerous that they constitute a species of "common law."[20] Through its privacy orders the Commission has developed a "surprisingly rich jurisprudence"[21] that has

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the Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6506, and the Fair Credit Reporting Act, 15 U.S.C. § 1681. *Id.* at 585 n.2.

16 For example, the Commission brought nine privacy-related complaints in 2002, and brought twenty-four in 2012. *Id.* at 600.

17 See Int'l Ass'n of Privacy Professionals, *FTC Casebook*, PRIVACYASSOCIATION.ORG, https://privacyassociation.org/resources/ftc-casebook?start=0&types=iapp_ftc_casebook (last visited Nov. 7, 2015) (appropriate queries show that seventy-eight of the agency's privacy cases were brought or resolved between January 1, 2009 and December 31, 2013; and that forty-seven of the agency's cases were brought or resolved between January 1, 2014 and November 6, 2015).

18 *See Privacy and Security*, FED. TRADE COMM'N, http://www.ftc.gov/tips-advice/business-center/privacy-and-security (last visited Nov. 2, 2015).

19 *See* Agreement Containing Consent Order, Google, Inc., FTC Docket No. 102 3136 (Mar. 30, 2011), https://www.ftc.gov/sites/default/files/documents/cases/2011/03/110330googlebuzzagreeorder.pdf; *see also* Press Release, Fed. Trade Comm'n, *FTC Charges Deceptive Privacy Practices in Googles Rollout of Its Buzz Social Network* (Mar. 30, 2011), https://www.ftc.gov/news-events/press-releases/2011/03/ftc-charges-deceptive-privacy-practices-googles-rollout-its-buzz. For an example of the kind of behavior that the FTC was seeking to incentivize, see Kashmir Hill, *He Won Survivor. Can He Beat This? The Guy Standing Between Facebook and Its Next Privacy Disaster*, FUSION (Feb. 4, 2015, 9:30 AM), http://fusion.net/story/41870/facebook-privacy-yul-kwon/ (discussing Facebook privacy programs and practices).

20 *See* Solove & Hartzog, *supra* note 1, at 586–87 (internal quotation marks omitted).

21 *Id.* at 586.

"codified certain norms and best practices and has developed some baseline privacy protections. . . [s]tandards have become so specific they resemble rules."[22] Creating a stable and easily accessible body of "common law" provides critical guideposts to industry actors and helps encourage compliance with basic norms.[23]

In order for the Commission to sustain its success in protecting consumer privacy, it should consider three measures:

First: The Commission's ability to protect consumers in a time of rapid technological innovation depends on staying current with technological developments. The Commission cannot rest on its technological laurels, but must continue to grow its technological resources. The agency has taken these steps in the past. In 2009, for example, the Commission had no technologists on staff, no Chief Technology Officer ("CTO"), and no capacity to do forensic work on mobile devices.[24] Chairman Jon Leibowitz wanted to close these gaps, and, in short order, he authorized the Bureau of Consumer Protection to begin hiring staff technologists and build a laboratory to do forensic work on mobile devices, making the FTC the first civil law enforcement agency in the world (at least as best as we could tell) with such capacity.[25] Soon thereafter, Leibowitz brought in Princeton computer science professor Ed Felten to serve as the agency's first CTO.[26] Having in-house resources enables the agency to keep pace with the rapid development of mobile devices and applications, and to bring enforce-

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22 *Id.*

23 *See id.* at 607 (remarks of Chris Wolf, a leading privacy lawyer and head of the privacy practice at Hogan Lovells).

24 *See* Randy Shaheen, *Interview with David Vladeck, Consumer Advocate*, ANTITRUST SOURCE, Dec. 2014, at 1, 1 [hereinafter Shaheen-Vladeck Interview], http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec14_vladeck_intrvw_12_16f.authcheckdam.pdf.

25 *See* Joel Schectman, *Q&A David Vladeck, Former Director of FTC Consumer Unit*, WALL ST. J.: RISK & COMPLIANCE J. (Jan. 22, 2014, 3:39 PM), http://blogs.wsj.com/riskandcompliance/2014/01/22/qa-david-vladeck-former-director-of-ftc-consumer-unit/.

26 *See* Press Release, Fed. Trade Comm'n, *FTC Names Edward W. Felten as Agency's Chief Technologist; Eileen Harrington as Executive Director* (Nov. 4, 2010), http://www.ftc.gov/news-events/press-releases/2010/11/ftc-names-edward-w-felten-agencys-chief-technologist-eileen. The agency has since brought in a succession of top-notch technology specialists to assist it in its policy and enforcement work, including Chief Technologists Steve Bellovin, a professor of computer science at Columbia University, LaTonya Sweeney, a professor of computer science at Harvard University, and Ashkan Soltani, as well as other technology experts including Tim Wu, a law professor at Columbia University, and Paul Ohm, a law professor and technologist formerly at the University of Colorado Law School and now on Georgetown University Law Center's faculty.

ment cases that might otherwise be technologically and forensically out-of-reach.[27]

The agency must make a long-term commitment to growing its technological resources. Chairwoman Ramirez has done just that.[28] And her successors would be well-advised to follow her lead. Indeed, it is worth echoing a prediction made by FTC veteran Tom Krattenmaker that it will not be long before, in addition to the Bureaus of Consumer Protection, Competition, and Economics, the FTC will soon include a fourth "Bureau": the Bureau of Technology.[29] That time should not be far off.

Second: the Commission must commit an increasingly large share of its resources to privacy issues. As information-capturing technologies continue to develop at a rapid pace, the challenge of reclaiming consumer control over personal information is becoming even more formidable. Responding to that challenge will take a growing share of the agency's resources. The most obvious reason is that the ability of commercial entities to engage in ubiquitous, and often unconsented-to, data collection makes it difficult, and at times impossible, for consumers to retain any semblance of control over their personal data.[30] As the Commission's expanding privacy enforcement docket shows, too often companies engage in deceptive or unfair practices to obtain personal information, and to use that data in ways inimical to consumer welfare.[31] The agency must continue to root out and put a stop to these practices.

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27 *See, e.g.*, Press Release, Fed. Trade Comm'n, *Peer-to-Peer File-Sharing Software Developer Settles FTC Charges* (Oct. 11, 2011), http://www.ftc.gov/news-events/press-releases/2011/10/peer-peer-file-sharing-software-developer-settles-ftc-charges; Press Release, Fed. Trade Comm'n, *HTC America Settles FTC Charges It Failed to Secure Millions of Mobile Devices Shipped to Consumers* (Feb. 22, 2013), http://www.ftc.gov/news-events/press-releases/2013/02/htc-america-settles-ftc-charges-it-failed-secure-millions-mobile.

28 Chairwoman Ramirez recently authorized the creation of the Bureau of Consumer Protection's Office of Technology Research and Investigation, whose mission is to conduct "investigative research on technology issues involving all facets of the FTC's consumer protection mission, including privacy, data security, connected cars, smart homes, algorithmic transparency, emerging payment methods, big data, and the Internet of Things." *See* Ashkan Soltani, *Booting Up a New Research Office at the FTC*, FED. TRADE COMM'N: TECH@FTC (Mar. 23, 2015, 11:00 AM), https://www.ftc.gov/news-events/blogs/techftc/2015/03/booting-new-research-office-ftc.

29 *See* Shaheen-Vladeck Interview, *supra* note 24, at 10.

30 *See infra* notes 31–36.

31 *See* Press Release, Fed. Trade Comm'n, *FTC Halts Computer Spying* (Sept. 25, 2012), http://www.ftc.gov/news-events/press-releases/2012/09/ftc-halts-computer-spying; Press Release, Fed. Trade Comm'n, *Website Operator Banned from the 'Revenge Porn' Business After FTC Charges He Unfairly Posted Nude Photos* (Jan. 29, 2015) [hereinafter *Website Operator Banned*], http://www.ftc.gov/news-events/press-releases/2015/01/website-operator-banned-revenge-porn-business-after-ftc-charges.

Another reason why privacy has become increasingly integral to the agency's mission is that privacy violations enable new and more dangerous forms of deceptive and abusive conduct in the marketplace, including coercive digital marketing practices,[32] phantom debt collection,[33] unauthorized credit and debit card charges,[34] predatory lending,[35] and abusive denials of credit, housing, employment, or insurance that may be based on nothing more than an algorithm crunching potentially inaccurate personal data.[36] Personal data has become the grist for the deceptive and unfair practices mill, and preventing the wrongful collection or deliberate misuse of personal data to harm consumers lies at the core of much of the agency's current enforcement work.

The final reason why the Commission will have to ramp up the resources it devotes to privacy is that, notwithstanding the mounting focus on privacy by other agencies, the FTC will remain the nation's primary privacy cop.[37] No other civil enforcement agency has the power or expertise to patrol cyberspace effectively, and the task of preserving consumer privacy, as daunting as it is, will remain mainly in the FTC's hands.[38] To be sure, other agencies, including the Federal Communications Commission, the Department of Health and Human Services, the Department of Homeland Security, the Consumer Finan-

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32 *See* Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1027–31 (2014); David C. Vladeck, Response, *Digital Marketing, Consumer Protection, and the First Amendment: A Brief Reply to Professor Ryan Calo*, 82 GEO. WASH. L. REV. ARGUENDO 156 (2014). *See generally* Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497 (2015).

33 *See, e.g.*, Press Release, Fed. Trade Comm'n, *At the FTC's Request, Court Halts Collection of Allegedly Fake Payday Debts* (Oct. 24, 2013), http://www.ftc.gov/news-events/press-releases/2013/10/ftcs-request-court-halts-collection-allegedly-fake-payday-debts.

34 *See, e.g.*, Press Release, Fed. Trade Comm'n, *FTC Obtains Court Order Halting International Scheme Responsible for More Than $10 Million in Unauthorized Charges on Consumers' Credit and Debit Cards* (June 28, 2010), http://www.ftc.gov/news-events/press-releases/2010/06/ftc-obtains-court-order-halting-international-scheme-responsible.

35 *See, e.g.*, Press Release, Fed. Trade Comm'n, *Consumer Reporting Agency to Pay $1.8 Million for Fair Credit Reporting Act Violations* (June 27, 2011), http://www.ftc.gov/news-events/press-releases/2011/06/consumer-reporting-agency-pay-18-million-fair-credit-reporting; Press Release, Fed. Trade Comm'n, *FTC Settlements Require Equifax to Forfeit Money Made by Allegedly Improperly Selling Information About Millions of Consumers Who Were Late on Their Mortgages* (Oct. 10, 2012), http://www.ftc.gov/news-events/press-releases/2012/10/ftc-settlements-require-equifax-forfeit-money-made-allegedly.

36 *See* Press Release, Fed. Trade Comm'n, *Spokeo to Pay $800,000 to Settle FTC Charges Company Allegedly Marketed Information to Employers and Recruiters in Violation of FCRA* (June 12, 2012), http://www.ftc.gov/news-events/press-releases/2012/06/spokeo-pay-800000-settle-ftc-charges-company-allegedly-marketed.

37 *See* Solove & Hartzog, *supra* note 1, at 600.

38 *See id.* at 602–03 & n.71.

cial Protection Bureau ("CFPB"), and others, have important and growing roles to play in protecting consumer privacy.[39] But the jurisdictional reach of those agencies is sector-specific and far more limited than the FTC's.[40] The CFPB, for instance, has overlapping jurisdiction with the FTC to enforce the Fair Credit Reporting Act[41] and the Gramm-Leach-Bliley Act.[42] But its counterpart to the FTC's authority under Section 5 of the FTC Act[43] is far more limited.[44] The CPFB's enforcement authority to prevent unfair, deceptive or abusive acts and practices may be exercised only over "covered person[s]" or "service provider[s]" and only "in connection with a consumer financial product or service . . . ."[45] That leaves most of the economy to the FTC.

Third: The agency needs better tools and more resources to fulfill its privacy protection mission. Notwithstanding the success the FTC has had thus far in protecting consumer privacy, the Commission's statutory tools are far from optimal. As information-capturing technologies continue to develop at a rapid pace, the challenges of protecting consumers from wrongful data collection and misuse of data will become ever more complex, especially given the confines of the Commission's Section 5 deception and unfairness authority.[46] Equally problematic, the key sector-specific privacy statutes the FTC enforces, notably the Fair Credit Reporting Act, the Children's Online Privacy

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39 *See id.*

40 *See id.*

41 Fair Credit Reporting Act, 15 U.S.C. § 1681 (2012).

42 Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 and 15 U.S.C.); *see also* Andrew M. Smith & Peter Gilbert, *Fair Credit Reporting Act Update—2011*, 67 BUS. LAW 585, 586 (2012) (describing the "residual enforcement jurisdiction" of the CFPB and FTC under the Fair Credit Reporting Act).

43 Federal Trade Commission Act, 15 U.S.C. § 45 (2012).

44 *Compare id.* (granting the FTC power to prohibit "unfair or deceptive acts or practices *in or affecting commerce*" (emphasis added)) *with* 12 U.S.C. § 5481 (2012).

45 12 U.S.C. § 5481. Under the Dodd-Frank Act, a "covered person" is a person or institution that offers a "consumer financial product or service." 12 U.S.C. § 5481(6). The Act broadly defines "product" and "service" to include extensions of credit, mortgages, money exchanges, payment processing, check cashing, debt collection, and related services. 12 U.S.C. §§ 5481(5), (15). No doubt the CFPB will exercise its authority within this domain, along with the FTC. But even if one interprets the CFPB's sector-specific authority over providers of financial services and products broadly, the FTC will still be the main privacy enforcement agency for the much of the remainder of the economy.

46 *See* G.S. Hans, Note, *Privacy Policies, Terms of Service, and FTC Enforcement: Broadening Unfairness Regulation for a New Era*, 19 MICH. TELECOMM. & TECH. L. REV. 163, 197–200 (2012).

Protection Act, and the Gramm-Leach-Bliley Act, are outdated.[47] They were designed in a different era, when no one could foresee the pervasiveness of modern data capturing technology, let alone the power of the analytic tools that are now used to target consumers based on their preferences and to automate decisionmaking on matters as consequential as credit, employment, or insurance.

There are steps the Commission should take to remain an effective regulator. For instance, as companies move away from making promises to consumers about data collection and use, the agency should step up its use of its "unfairness" authority to protect consumers against unavoidable but serious harms—even noneconomic harms.[48] The Commission's spyware and revenge porn cases pave the way for enforcement cases where the privacy harm to consumers is palpable, unavoidable, and confers no arguable benefit on society, but where there is no viable deception claim to be made.[49] The Commission should also consider updating its thirty-year-old "Unfairness Statement"[50] to bring it in line with contemporary notions of legally cognizable harm.[51]

Creative Commission lawyering alone, however, will not be sufficient to tackle the privacy issues that lie ahead. The Commission has supported the enactment of baseline privacy legislation in the past,[52] and it needs to help make the case that new legislation is needed that, among other things, (1) recognizes that privacy is a right and not a mere privilege conferred on an ad hoc basis by sector-specific laws,[53]

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47 *See generally* Elizabeth D. De Armond, *A Dearth of Remedies*, 113 PENN. ST. L. REV. 1 (2008).

48 The Commission's use of its unfairness authority was recently vindicated by the Third Circuit's ruling in *FTC v. Wyndham Worldwide Corp*., 799 F.3d 236 (3d Cir. 2015), upholding the Commission's use of its unfairness power to bring an enforcement action against Wyndham for failing to take reasonable measures to secure customers' personal and financial data.

49 *See Website Operator Banned*, *supra* note 31.

50 *See* FED TRADE COMM'N, COMMISSION STATEMENT OF POLICY ON THE SCOPE OF THE CONSUMER UNFAIRNESS JURISDICTION (1980), *reprinted in* Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984).

51 *See, e.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc., 528 U.S. 167, 174, 184–84 (2000) (recognizing that aesthetic injuries may constitute legally cognizable harm); Lujan v. Defenders of Wildlife, 504 U.S. 555, 562–63 (1992) (plurality opinion) (recognizing that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing").

52 *See* FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS viii (2012), http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-report-protecting-consumer-privacy-era-rapid-change-recommendations/120326privacyreport.pdf.

53 This was the basic point made by the White House's proposed privacy "Bill of Rights," which was appended to its 2012 report, THE WHITE HOUSE, CONSUMER DATA PRIVACY IN A

and (2) gives the Commission broader statutory authority to (a) limit the unconsented-to collection of personal data,[54] (b) impose civil penalties against those who misuse personal data, and (c) ensure that companies that collect consumer information take security measures commensurate with the information's sensitivity, including the authority to impose civil penalties against companies that shirk that responsibility. Congress also needs to increase the Commission's resources. Protecting consumer privacy will be a central part of the Commission's work for the foreseeable future, and fulfilling that mission requires highly skilled technical staff as well as the forensic tools to detect violations. It is time for Congress to give the Commission the tools and resources it needs to perform this critical task.

II. Protecting Consumers from Deception in the Marketplace

The 100th Anniversary of the FTC reminds us that ridding the marketplace of deceptive advertising has always been at the heart of the Commission's consumer protection mission. Indeed, as others have pointed out, the first two cases resolved by the FTC involved deceptive advertising, even though they were brought as competition cases.[55] Settled in 1916, these cases involved embroidery thread masquerading as "cilk" (spelled with a "c" rather than an "s"), when in fact the thread was cotton.[56] These cases drive home that advertisers have always had powerful incentives to overstate their products' properties. It is the FTC's job to make sure that information in the

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Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy 47–48 (2012).

54 Informed consent, based on a clear explanation of the uses to which consumer data will be put, is essential if the notion of "consent" is going to retain any meaning. The claim that use restrictions alone will be sufficient to protect privacy is misguided. Use restrictions, like those in the Fair Credit Reporting Act, play an important role. But use restrictions are imposed only after problems of misuse arise; privacy injuries are often hard, if not impossible, to remedy after-the-fact; and use restrictions are extremely difficult to enforce prospectively because although the privacy harm may be manifest, the source of that injury is often impossible to identify. That is why collection restrictions, like those imposed by COPPA, remain essential. *See generally* Edith Ramirez, Fed. Trade Comm'n, Keynote Address at the Technology Policy Institute Aspen Forum: The Privacy Challenges of Big Data: A View from the Lifeguard's Chair (Aug. 19, 2013), http://www.ftc.gov/public-statements/2013/08/privacy-challenges-big-data-view-lifeguard%E2%80%99s-chair.

55 *See* Yagle, 1 F.T.C. 13 (1916); A. Theo. Abbott & Co., 1 F.T.C. 16 (1916). *See generally* Julie Brill, Fed. Trade Comm'n, Keynote Address at the ABA Fall Forum: What's Past is Prologue: FTC's Competition and Consumer Protection Priorities (Nov. 6, 2014), https://www.ftc.gov/system/files/documents/public_statements/597211/141106abafallforum-2.pdf.

56 *See* Yagle, 1 F.T.C. at 15–16; Abbott, 1 F.T.C. at 19–20.

marketplace "flow[s] cleanly as well as freely,"[57] so that consumers get what they pay for and nothing less.

The FTC's recent efforts to combat false advertising have in part focused on unsubstantiated health and wellness claims. This Part of the Article will begin by addressing two recommendations the Commission should consider as its advertising work continues to evolve. It then turns to the Commission's case against POM Wonderful and evaluates the lessons the Commission can glean from the D.C. Circuit's recent ruling upholding, with one exception, the Commission's order against the company.

A. General Observations

The Commission's advertising program has long been one of its crown jewels and the Commission has dedicated considerable resources to ensure that the flow of commercial information to consumers is not tainted by deceptive advertisements. Notwithstanding the Commission's efforts, the market remains rife with advertisements that lack substantiation or, even worse, are contradicted by the company's "substantiation." Consider one example: when Kellogg launched its "Keeps 'em full, keeps 'em focused" advertisement campaign in 2009 for its breakfast cereals, it claimed that serving an elementary school child Frosted Mini-Wheats and milk would make the child "nearly 20%" more attentive at school.[58] Put aside the obvious flaws with Kellogg's claim: the comparator group consisted of children who had no breakfast; a hungry child is a distracted and grumpy child; and the likelihood (perhaps certainty) that a child who had anything to eat, even soda and Twinkies, would be significantly more "attentive" than a child who was given nothing.

Kellogg did not see those flaws as problems. Kellogg's problem was the study's results. As the FTC's complaint explains, in Kellogg's study:

> [O]nly about half the kids who ate Frosted Mini-Wheats® cereal showed any improvement after three hours as compared to their pre-breakfast baseline. In addition, overall, only one in seven kids who ate the cereal improved their attentiveness by 18% or more, and only about one in nine improved by 20% or more.[59]

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57 *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 (1976).

58 Complaint at 3, Kellogg Co., No. C-4262 (F.T.C. July 26, 2009),

59 *Id.* at 6.

In other words, "kids who ate Frosted Mini-Wheats® had an average of 10.6% better attentiveness three hours later than kids who had skipped breakfast; relatively few kids experienced better attentiveness near the 20% level."[60] So instead of using the actual, equivocal study results, Kellogg invented its own, more positive, results.

Kellogg is hardly an isolated case. There is no shortage of cases where national brand companies make claims based on "substantiation" that proves nothing, or, as in *Kellogg*, where the evidence actually undercuts the company's claim. Since 2009, the agency has brought many similar cases alleging unsubstantiated health and wellness claims, including ones against respected companies like Dannon,[61] Nestlé,[62] Skechers,[63] Reebok,[64] Beiersdorf (makers of Nivea skin care products),[65] and POM Wonderful[66]. There is some reason to believe that the Commission's enforcement cases are having an impact. The companies under order have thus far complied, and advertisers appear to be giving increased attention to substantiation.[67]

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60 *Id.* at 7.

61 *See* Press Release, Fed. Trade Comm'n, *Dannon Agrees to Drop Exaggerated Health Claims for Activia Yogurt and DanActive Dairy Drink* (Dec. 15, 2010), http://www.ftc.gov/news-events/press-releases/2010/12/dannon-agrees-drop-exaggerated-health-claims-activia-yogurt.

62 *See* Press Release, Fed. Trade Comm'n, *FTC Approves Final Order Settling Charges That Nestlé Subsidiary Made Deceptive Health Claims for BOOST Kid Essentials* (Jan. 18, 2011), http://www.ftc.gov/news-events/press-releases/2011/01/ftc-approves-final-order-settling-charges-nestle-subsidiary-made.

63 *See* Press Release, Fed. Trade Comm'n, *Skechers Will Pay $40 Million to Settle FTC Charges That It Deceived Consumers with Ads for "Toning Shoes"* (May 16, 2012) [hereinafter Skechers Press Release], http://www.ftc.gov/news-events/press-releases/2012/05/skechers-will-pay-40-million-settle-ftc-charges-it-deceived.

64 *See* Lesley Fair, *FTC's $25 Million Settlement with Reebok Challenges Toning Shoe Ad Claims*, FED. TRADE COMM'N: BUS. BLOG (Sept. 28, 2011, 9:46 AM) [hereinafter Reebok Press Release], http://www.ftc.gov/news-events/blogs/business-blog/2011/09/ftcs-25-million-settlement-reebok-challenges-toning-shoe-ad.

65 *See* Press Release, Fed. Trade Comm'n, *FTC Settlement Prohibits Marketer from Claiming that Nivea Skin Cream Can Help Consumers Slim Down* (June 29, 2011) [hereinafter Nivea Press Release], http://www.ftc.gov/news-events/press-releases/2011/06/ftc-settlement-prohibits-marketer-claiming-nivea-skin-cream-can.

66 *See* Press Release, Fed. Trade Comm'n, *FTC Commissioners Uphold Trial Judge Decision that POM Wonderful, LLC; Stewart and Lynda Resnick; Others Deceptively Advertised Pomegranate Products by Making Unsupported Health Claims* (Jan. 16, 2013), http://www.ftc.gov/news-events/press-releases/2013/01/ftc-commissioners-uphold-trial-judge-decision-pom-wonderful-llc. The D.C. Circuit affirmed the Commission's order in virtually all respects. POM Wonderful, LLC v. FTC, 777 F.3d 478 (D.C. Cir. 2015).

67 Prior to 2009, it appears that the Commission's advertising enforcement efforts were concentrated mainly on companies that were making false claims about dietary supplements and weight loss products. The Commission expanded its work in 2009 to target larger companies who make health and wellness claims without substantiation. *See, e.g.*, *Division of Advertising*

In fact, since 2009 the Commission has adopted two key strategies for enhancing deterrence and sharpening its focus on deceptive advertising that it should continue to pursue, perhaps with some minor modifications.

1. *The Commission Should Continue to Target National Brands in Deceptive Advertising Cases.*

Enforcement priority-setting is always difficult for agencies.[68] The Commission faces a target-rich environment which it must address with resources that are never adequate to the task.[69] As a result, the Commission constantly engages in enforcement triage.[70] At times, however, the Commission has focused its advertising enforcement resources on small targets to the exclusion of the larger national brands.[71] As one advertising industry lawyer put it, "I think for a while [prior to 2009] the bigger brands felt like they were being given a [free] pass."[72]

There are no doubt strategic reasons for the Commission to focus on segments of the advertising industry,[73] but national brands should always be in the Commission's sights.[74] National brands, like the "cilk" sellers of the last century and all other marketers, have incentives to overstate the properties of their products if they can do so at no risk. National brands often dominate a market, and allowing their deceptive claims to go unchallenged places competitors unwilling to

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Practices, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection/our-divisions/division-advertising-practices.

68 *See* David Balto, *Antitrust Enforcement Agencies Face Unprecedented Challenges*, CENTER FOR AM. PROGRESS ACTION FUND (July 27, 2010), https://www.americanprogressaction.org/issues/regulation/report/2010/07/27/8094/antitrust-enforcement-agencies-face-unprecedented-challenges/.

69 *See* FED. TRADE COMM'N, STRATEGIC PLAN FOR FISCAL YEARS 2014–2018, at 5 (2014), https://www.ftc.gov/system/files/documents/reports/2014-2018-strategic-plan/spfy14-fy18.pdf.

70 *See* Balto, *supra* note 68.

71 *See* Shaheen-Vladeck Interview, *supra* note 24, at 3. There are reasons why the Commission would want, at times, to focus its enforcement efforts on smaller players. Larger companies can fight deceptive advertisement campaigns by competitors by bringing lawsuits under the Lanham Act, 15 U.S.C. § 1125 (2012), e.g., POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228 (2014), or by seeking the intervention of the National Advertising Division of the Better Business Bureaus. But those reasons would not warrant giving the national brands a free pass.

72 Shaheen-Vladeck Interview, *supra* note 24, at 3.

73 *See The FTC at 100: Views from the Academic Experts: Hearing Before the H. Subcomm. on Commerce, Mfg., & Trade, Comm. on Energy & Commerce*, 113th Cong. 2 (2014) (statement of Professor J. Howard Beales III, George Washington University School of Business) [hereinafter Beales Testimony], http://docs.house.gov/meetings/IF/IF17/20140228/101812/HHRG-113-IF17-Wstate-BealesH-20140228.pdf.

74 *See* Shaheen-Vladeck Interview, *supra* note 24, at 3.

make unfounded claims at a serious competitive disadvantage.[75] And make no mistake: bringing high visibility cases against national brands helps the Commission by showing the American people that the Commission is working to protect them.[76]

2. *The Commission Should Continue to Seek Redress in Deceptive Advertising Cases as a Matter of Course.*

The Commission's recent practice of seeking redress should be maintained for several reasons. First and foremost, redress is only fair to consumers, who should get what they pay for and nothing less.[77] In most false advertising cases, consumers get little if any of the benefits promised by the advertisement.[78] And in many false advertising cases, consumers also pay a premium for a product that, but for the false claim, would not command a higher price.[79] Deceptive advertising also distorts the market by placing companies who are unwilling to make false promises about their products at a competitive disadvantage.[80] The Commission has long insisted on redress in deception cases for these reasons.[81] Advertising cases should not be treated differently; redress should be the norm, not the exception, in all cases involving deceptive acts or practices.

A few commentators argue otherwise, suggesting that redress is generally unwarranted in advertising cases.[82] They claim that, although the Commission has power to seek redress in actions against companies engaged in "fraudulent" practices, the Commission's authority does not extend to "traditional substantiation case[s]," which typically "involve[ ] a reputable national advertiser making claims about the features or benefits of its product or services."[83] These commentators' legal theory is that Section 13(b) of the FTC Act, which empowers the Commission to file actions in the district courts, autho-

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75 *See supra* note 32 and accompanying text.

76 *See* Shaheen-Vladeck Interview, *supra* note 24, at 10.

77 *See* J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L.J. 1, 13 (2013).

78 *See, e.g.*, Complaint, Kellogg Co., *supra* note 58, at 6–7.

79 *See, e.g.*, Brendan Sasso, *Feds Sue DirecTV for Deceptive Advertising*, NAT'L J. (Mar. 11, 2015), http://www.nationaljournal.com/tech/feds-sue-directv-for-deceptive-advertising-20150311.

80 *See* Mary L. Azcuenaga, Remarks at the Conference on Advertising for Economy and Democracy: The Role of Advertising and Advertising Regulation in the Free Market (Apr. 8, 1997), https://www.ftc.gov/public-statements/1997/04/role-advertising-and-advertising-regulation-free-market. Mary L. Azcuenaga is a former FTC Commissioner. *See id.*

81 *See* Beales & Muris, *supra* note 77, at 3–4.

82 *See* Beales Testimony, *supra* note 73, at 11–13.

83 *See id.*; *see also* Beales & Muris, *supra* note 77, at 31–32.

rizes courts to issue injunctive relief only in "proper" cases, and that advertising substantiation cases against "reputable" companies do not meet the "proper" test, while "fraud" cases do.[84] They also contend that the threat of redress orders may inhibit marketers from making claims that might lack adequate substantiation, but nonetheless convey useful information to consumers.[85]

Neither of these arguments is convincing. As a legal matter, the claim that the Commission lacks authority to seek redress in federal court in deceptive advertising cases has been uniformly rejected, and for good reason.[86] For one, the argument that false advertising cases are not "proper" cases for redress is based on vague notions of moral relativism alien to Section 13(b) of the FTC Act. That section does not use the word "fraud," let alone suggest that "fraud" is somehow "worse" than false advertising by "reputable" companies.[87] What the FTC Act does say, however, is that the FTC should prevent "deceptive acts or practices."[88] That mandate is categorical, and does not depend on the nature of the entity committing a deceptive act or whether the deception meets a "fraud" standard.[89]

Nor do policy considerations support a "no redress" policy in advertisement substantiation cases. Giving companies—"reputable" or not—one free pass at deceptive advertising is fundamentally at odds

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84 *See* Beales Testimony, *supra* note 73, at 12 (citing 15 U.S.C. § 53(b) (2012)).

85 *Id.* at 13.

86 *See, e.g.*, FTC v. Ross, 743 F.3d 886, 891 (4th Cir. 2014); FTC v. Bronson Partners, 654 F.3d 359, 366 (2d Cir. 2011); FTC v. Direct Mktg. Concepts, Inc., 624 F.3d 1, 14–15 (1st Cir. 2010).

87 *See* 15 U.S.C § 53(b). The only reference to "fraud" in the FTC Act comes in Section 19(a)(2), *id.* § 57b(a), which authorizes the Commission to bring actions in district court to challenge violations of existing Commission "cease and desist" orders. *See* Bronson Partners, 654 F.3d at 366 n.3. In those cases, where an entity violates an existing cease and desist order in a way "a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief" spelled out in subsection (b). 15 U.S.C. § 57b(a)(2). But no court has ruled that Section 19's dishonesty or fraud requirement has any bearing on the remedies available under Section 13(b), 15 U.S.C § 53(b). *See supra* note 86. To the contrary, the courts have uniformly ruled that, because Section 13(b) authorizes district courts to issue permanent injunctive relief, the courts may employ all of the remedies traditionally available in equity, including redress. *See id.*

88 15 U.S.C. § 45(a)(1).

89 *Id.*; *see also* FED. TRADE COMM'N, POLICY STATEMENT ON DECEPTION (1983), *appended to* Cliffdale Assoc., Inc., 103 F.T.C. 110, 174 (1984). Even if the Commission could draw a line between fraud cases and other deception cases, advertising substantiation cases would fall squarely on the fraud side of the line. The FTC's advertising substantiation cases involve demonstrably false, material claims, deliberately made, and intended to induce reliance by consumers—the core elements of fraud. *See* RESTATEMENT (SECOND) OF CONTRACTS § 162 (1981); RESTATEMENT (SECOND) OF TORTS § 525 (1977).

with the Commission's consumer protection mandate, which, after all, is to *prevent* deception.[90] And the argument that the threat of redress will chill advertisers from making unsubstantiated claims fails, because the whole point of deceptive advertising enforcement actions is to force advertisers to think twice before making unsubstantiated claims. As the Supreme Court made clear in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[91] the First Amendment does not bar the government from "insuring that the stream of commercial information flow[s] cleanly as well as freely."[92] Companies should have to weigh the risk of paying redress when they make unsubstantiated claims that pollute the stream of commercial information, put their competitors at a disadvantage, and deprive consumers of the benefit of the bargain.[93]

B. Lessons to be Drawn from the Commission's Victory in POM Wonderful

Perhaps the highest profile false advertising lawsuit the Commission has brought in recent years was its September 2010 action against POM Wonderful.[94] In *POM Wonderful, LLC v. FTC*,[95] the Commis-

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90 *See supra* note 88 and accompanying text.

91 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

92 *Id.* at 772.

93 Professor Beales's suggestion that the threat of redress might chill "reputable" advertisers from useful but nonetheless deceptive speech is strained in theory and contradicted by the cases he cites. *See* Beales Testimony, *supra* note 73, at 12–13 & n.50. Measured by any yardstick, none of the "information" in the cases he cites conveyed any "useful" information to consumers. *See id.* The cases include: (1) the FTC's $750,000 redress order against Oreck for falsely claiming that one of its vacuum cleaner models prevented the flu and illness, see Press Release, Fed. Trade Comm'n, *FTC Approves Final Order Settling Charges that Oreck Corporation Made False and Unproven Claims that Its Ultraviolet Vacuum and Air Cleaner Can Prevent Illness* (May 31, 2011), http://www.ftc.gov/news-events/press-releases/2011/05/ftc-approves-final-order-settling-charges-oreck-corporation-made; (2) a $900,000 redress order against Beiersdorf for falsely claiming that a Nivea cream could reduce one's waistline without weight loss, see Nivea Press Release, *supra* note 65; (3) a $2.1 million redress order against NBTY, Inc. (the seller of Disney and Marvel-branded children's vitamins), for claiming that the vitamins would increase brain power, even though the vitamins contained virtually none of the promised ingredient that experts found conferred no discernable benefit, see Press Release, Fed. Trade Comm'n, *FTC Settlement Prohibits Marketers of Children's Vitamins from Making Deceptive Health Claims About Brain and Eye Development* (Dec. 13, 2010), https://www.ftc.gov/news-events/press-releases/2010/12/ftc-settlement-prohibits-marketers-childrens-vitamins-making; (4) a $25 million order against Reebok for making unsubstantiated fitness claims for its toning shoes, see Reebok Press Release, *supra* note 64; and (5) a $40 million order against Skechers for making unsubstantiated fitness claims for its toning shoes, see Skechers Press Release, *supra* note 63.

94 *See* Complaint, POM Wonderful LLC, No. 9344 (F.T.C. Sept. 24, 2010), https://www.ftc.gov/sites/default/files/documents/cases/2010/09/100927admincmplt.pdf.

95 POM Wonderful, LLC v. FTC, 777 F.3d 478 (D.C. Cir. 2015). POM Wonderful filed a

sion alleged that POM marketed its pomegranate juice and pomegranate-based dietary supplements by claiming that its products treat, prevent, or reduce the risk of heart disease, prostate cancer, or erectile dysfunction, without having a reasonable basis to substantiate the claims.[96] The Commission's Complaint further alleged that POM promoted its products through advertising that represented that clinical studies, research, and trials proved that consumption of POM products in certain amounts treats, prevents, or reduces the risks of these diseases, when, in fact, clinical studies, research, or trials did not so prove.[97] The Commission also contended that POM cherry-picked the scientific evidence it used in its advertisements, selectively touting those studies that had arguably favorable results, but ignoring contrary indications from the same or later unfavorable studies.[98]

In May 2012, after a lengthy trial, the Administrative Law Judge found: (1) that nineteen of POM's advertisements were deceptive because they made implied claims that POM products treat, prevent, or reduce the risk of heart disease, prostate cancer, or erectile dysfunction; (2) that POM lacked substantiation for the claims; and (3) that the claims were material to consumers' decision to purchase the products.[99] Both sides appealed to the Commission.[100] POM argued that it should not have been found liable at all; the Commission's complaint counsel argued that sixteen additional advertisements were deceptive, beyond the nineteen identified by the Administrative Law Judge, and that the Commission should impose a broad injunctive order preventing POM from making disease prevention, mitigation, or cure claims without adequate substantiation.[101]

In January 2013, the Commission issued a detailed ruling against POM, rejecting POM's arguments and entering an Order requiring, among other things, POM to base any future unqualified disease treatment, prevention, or mitigation claim for any of its food products on at least two randomized, controlled trials ("RCTs").[102] POM sought

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Petition for a Writ of Certiorari with the U.S. Supreme Court on October 26, 2015. Petition for Writ of Certiorari, *POM Wonderful*, No. 15-525 (Oct. 23, 2015).

96 *Id.* at 483; *see also* Opinion of the Commission at 2, POM Wonderful LLC, No. 9344 (F.T.C. Jan. 10, 2013), http://www.ftc.gov/system/files/documents/public_statements/568951/130116pomopinion.pdf.

97 Opinion of the Commission, POM Wonderful LLC, *supra* note 96, at 2.

98 *See POM Wonderful*, 777 F.3d at 488.

99 *Id.* at 488–89.

100 *Id.* at 489.

101 *Id.*

102 *Id.*

review of the Commission's Order in the U.S. Court of Appeals for the District of Columbia Circuit.[103]

On January 30, 2015, the D.C. Circuit issued its ruling in the *POM Wonderful* appeal, giving the Commission not only an important win, but also providing much-needed judicial feedback on virtually every facet of the Commission's efforts to ensure that advertisers possess adequate substantiation for their health and wellness claims. And for the most part, that feedback was decidedly positive. The court upheld the Commission's rulings on every major issue, including the Commission's approaches to advertisement interpretation and substantiation, the Commission's analysis of the intersection between its enforcement work and the First Amendment, and, with one exception, the Commission's approach to remedies.[104]

It is important that the Commission tap the rich vein of teachings in the *POM Wonderful* opinion. Before doing so, however, it is worth observing that the *POM Wonderful* litigation shows that the Commission's staff will not be out-muscled or out-lawyered in cases involving complex scientific issues, no matter how dedicated, well-funded and determined its adversary. *POM Wonderful* involved a welter of challenging scientific issues, disputes between experts with top-notch credentials, difficult legal and evidentiary issues, and battle-seasoned adversaries backed by inexhaustible resources. The Commission's success in the case is a tribute to the ability, expertise, and perseverance of the agency's staff.

1. *The Court's Endorsement of the Commission's Liability Findings in* POM Wonderful.

The court of appeals affirmed the Commission's liability ruling in its entirety.[105] There are many take-home lessons from the court's opinion:

Advertisement Interpretation. The linchpin of the Commission's false advertising jurisprudence is determining whether an advertise-

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103 *Id.* For readers unfamiliar with POM's advertising campaign, POM's advertisements are worth looking at—they are brilliant, creative, and often humorous, even if deceptive. *See* FED. TRADE COMM'N, APPENDIX B: POM FIGURES APPENDIX, https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130116pomappendixb.pdf.

104 *See POM Wonderful*, 777 F.3d at 490–505. The court concluded that the Commission's order was "valid to the extent it requires disease claims to be substantiated by at least *one* RCT" but could not "categorically" impose a two-RCT-substantiation requirement on the basis of the record before the court. *Id.* at 505 (emphasis added).

105 *Id.* at 499–500.

ment is, in fact, deceptive.[106] The court endorsed the agency's approach, and thus the court's opinion breaks no new ground on this point, but the court does make two significant observations. First, the court noted that advertisement interpretation is a job for the Commission, and made no suggestion that extrinsic evidence might be needed to interpret POM's advertisements. While POM contended that there was no express disease-related claim in their advertisements, the court agreed with the Commission's finding that POM made disease-related claims through inference—a conclusion that viewing the advertisements makes inevitable.[107] The question of whether extrinsic evidence was required had been raised by one Commissioner, though the Commission rejected the suggestion that it needed assistance in construing the claims.[108] Second, the court cites approvingly to the Commission's *In re Telebrands Corp.* ruling,[109] which held that an advertisement may be found deceptive if "a significant minority of reasonable consumers" would "likely" interpret the advertisement to assert the misleading claim.[110] Having the court's imprimatur on the *Telebrands* "significant minority" test[111] is an important step in solidifying the Commission's position on that recurring issue.

Establishment Claims. A hotly contested issue was whether the Commission erred in concluding that thirty-four of POM's advertisements claimed that scientific evidence "established" POM's disease-related claims.[112] POM contested that conclusion, arguing that its advertisements made, at most, "efficacy" claims; that is, that POM's

106 *Id.* at 490. As the court pointed out, the Commission looks at three factors in determining whether an advertisement is deceptive: (1) what claims are conveyed by the advertisement; (2) whether the claims are false, misleading, or unsubstantiated; and (3) whether the claims are material to consumers. *Id.*

107 *Id.* at 490–92 (observing that "[t]he Commission 'examines the overall net impression' left by an ad . . . ." (citing Kraft, Inc. v. FTC, 970 F.2d 311, 314 (7th Cir. 1992))).

108 *Compare* POM Wonderful, 155 F.T.C. 1, 198 (2013) (concurring statement of Commissioner Maureen K. Ohlhausen) (arguing that extrinsic evidence was needed to interpret some of POM's claims), *with id.* at 209–10 (concurring statement of Commissioner J. Thomas Rosch) (arguing that the Commission is well positioned to ascertain the advertisement meaning).

109 Telebrands Corp., 140 F.T.C. 278 (2005), *aff'd*, 457 F.3d 354 (4th Cir. 2006).

110 Telebrands, 140 F.T.C. at 291. Of course, nothing in *Telebrands* broke new legal ground; the Commission had long held that where an advertisement is susceptible of more than one interpretation, the Commission could conclude that the advertisement was "misleading if at least a significant minority of reasonable consumers are likely to take away the misleading claim." *Id.* Nor did the court have to address this issue, because it agreed with the Commission's determination that POM's advertisements made implied disease-related claims. *POM Wonderful*, 777 F.3d at 490.

111 *POM Wonderful*, 777 F.3d at 489–90.

112 *Id.* at 491 (observing that the Commission found that thirty-four of the thirty-six advertisements under review made establishment claims).

products *might* be effective in helping combat these diseases.[113] As the court explained, this issue was pivotal because the Commission requires far more substantiation for an establishment claim than for an efficacy claim: an advertiser need only possess a "reasonable basis" for an efficacy claim.[114]

On the other hand, an "establishment claim" requires exacting proof because it "suggests that a product's effectiveness or superiority has been scientifically established."[115] Where the advertiser specifies the substantiation, it must "possess the specific substantiation claimed."[116] And where the advertiser makes non-specific establishment claims—for example, an advertisement touting a product as "medically-" or "clinically-proven" to have a specific treatment result—"the advertiser 'must possess evidence sufficient to satisfy the relevant scientific community of the claim's truth.'"[117] Although POM's advertisements hyped the results of specific scientific studies, the company argued that references to medical studies did not necessarily constitute "establishment" claims.[118] As POM put it, "connecting a food product to possible health benefits" could not be fairly construed to imply "the vastly broader claim that there is 'clinical proof' that the product treats, cures, or prevents a disease."[119]

The court flatly rejected POM's argument, noting that in POM's advertisements the "study results are referenced in a way that suggests they are convincing evidence of efficacy."[120] The court's repudiation of POM's argument has two messages. First, it makes clear that courts will not condone the kind of game-playing POM engaged in by hyping scientific studies to support its claims but then denying that the studies were anything more than suggestive. And second, it puts a judicial imprimatur on at least some of the factors the Commission has identified as constituting an "establishment" claim. Among the signposts the court points to are: (1) POM's advertisements "drew a logical connection between the study results and [the product's] effectiveness for the particular diseases"; (2) the advertisements "invoked medical sym-

113 *See id.* at 490–92.

114 *Id.* at 490–91 (citing Pfizer Inc., 81 F.T.C. 23, 62 (1972)).

115 *Id*. at 490.

116 *Id.* at 491 (citing Removatron Int'l Corp. v. FTC, 884 F.2d 1489, 1492 n.3 (1st Cir. 1989)).

117 *Id.* (quoting Bristol-Myers Co., 102 F.T.C. 21, 32 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984)).

118 *Id.* at 492.

119 *Id.* (internal quotation marks omitted).

120 *Id.*

bols, [and] referenced publication in medical journals"; and (3) the advertisements "described the substantial funds spent on medical research, fortifying the overall sense that the referenced clinical studies establish the claimed benefits."[121]

POM's Use of Non-Qualifying Qualifiers. POM also argued that its use of qualifying language in describing the results of medical studies negated any suggestion that it was making establishment claims.[122] POM's advertisements invariably described study results as "promising," "preliminary," "hopeful," or "initial."[123] These qualifiers, POM claimed, were sufficient to take their advertisements out of the "establishment" category.[124] Indeed, as POM saw it, the qualifiers rendered the advertisements "truthful" and thus protected by the First Amendment.[125]

The court of appeals disagreed. Endorsing the Commission's opinion, the court found that the use of these qualifying adjectives, in the context of POM's advertisements, "do not neutralize the claims made when the specific results are otherwise described in unequivocally positive terms."[126] Nor did the "use of one or two adjectives" alter the "net impression" consumers would take away from the advertisement, especially when the chosen adjectives (such as "promising" and "hopeful") "provide a positive spin on the studies rather than a substantive disclaimer."[127] The court made clear that a more effective disclaimer, such as a statement that the "evidence in support of this claim is inconclusive," might have sufficed.[128] But in the absence of any meaningful qualification, POM's advertisements were deceptive because they made establishment claims that were not backed up with adequate substantiation.[129]

Requiring Randomized Controlled Trials ("RCT") to Substantiate Disease Claims for Foods. A major issue in the court of appeals was

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121 *Id.*

122 *Id.* at 492–93.

123 *Id.*

124 *Id.* at 492–93.

125 *Id.* at 493, 499–500.

126 *Id.* at 493 (internal quotation marks omitted).

127 *Id.* (internal quotation marks omitted).

128 *Id.* (quoting Pearson v. Shalala, 164 F.3d 650, 659 (D.C. Cir. 1999)).

129 *Id.* at 494. The court also agreed that POM's argument about the truthfulness of its advertisements was refuted by POM's "selective touting of ostensibly favorable study results and nondisclosure of contrary indications from the same or a later study." *Id.* The court thus affirmed the Commission's conclusion that there were "many omissions of material facts in [the] ads that consumers cannot verify independently." *Id.* (alteration in original) (citing POM Wonderful, LLC, 155 F.T.C. 1, 68 (2013).

whether the Commission had erred in determining that RCTs were necessary to substantiate POM's claims that its products treat, prevent, or reduce the risk of heart disease, prostate cancer, or erectile dysfunction.[130] POM argued that because its products were "foods" (i.e., juice and supplements derived from juice), they were presumptively safe.[131] It also claimed that conducting RCTs on foods is impracticable, expensive, and unethical.[132] For those reasons, POM argued that its claims should be judged under a less rigorous substantiation standard than similar claims for riskier products, like drug and other dietary supplements.[133]

In rejecting POM's arguments, the court made several important rulings. One is that the FTC is entitled to considerable deference in determining the level of substantiation needed for health claims. The court was "mindful of the Commission's 'special expertise in determining what sort of substantiation is necessary to assure that advertising is not deceptive,'"[134] and that the court's job was "only to determine that there is in the record such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[135]

Even without deference, however, the court would have rejected POM's full-on assault against the Commission's finding that one or more RCTs were necessary to support claims against the disease-related benefits of POM's products.[136] The court carefully reviewed the extensive record on what evidence experts in heart disease, prostate cancer, and erectile dysfunction would require to substantiate disease-related claims, and found that the Commission's determination that RCTs were required was amply supported by extensive expert testimony.[137]

Next, the court gave the back of its hand to POM's core argument that disease claims for food products do not require RCTs. Most significantly, the court rejected POM's contention that disease treatment or prevention claims for food products are presumptively different than disease treatment or prevention claims made for drugs, dietary supplements, or other products[138] To the contrary, the court held that

130 *Id.* at 495–97.

131 *Id.*

132 *See id.*

133 *Id*.

134 *Id*. at 493 (quoting Thompson Med. Co. v. FTC, 791 F.2d 189, 196 (D.C. Cir. 1986)).

135 *Id.* at 496 (quoting Am. Home Prods. Corp. v. FTC, 695 F.2d 681, 686 (3d Cir. 1982)).

136 *Id*. at 493–94.

137 *Id.* at 494.

138 *Id.* at 496–97.

substantiation requirements are claims-driven, not product-driven.[139] RCTs were required here because POM threw down the gauntlet by telling consumers that RCTs established the disease prevention and treatment claims POM made for its products.[140]

Nor was the court swayed by POM's argument that RCT testing is too costly and impractical because, as POM colorfully put it, it is "difficult, if not impossible, to blind a fruit."[141] The court found POM's argument contradicted by its own practice. For one thing, POM's dietary supplements, POM_x Liquid and POM_x Pills, are plainly amenable to blinding, and POM had conducted RCTs on these supplements.[142] POM had also conducted several RCTs on its juice products, a fact that belied its claims of impossibility and undue cost.[143] Perhaps most far-fetched was POM's assertion that it would be "unethical" to perform RCTs on its products because it was "impossible to create a zero intake group for nutrients in an ethical matter."[144] After all, POM claimed, doctors could not test to see "whether Vitamin C helps prevent cancer," because that would mean "depriv[ing] a control group of patients all Vitamin C for a decade."[145] That may be so, the court observed, but "[POM] give[s] us no reason to believe that it would be unethical to create a zero intake group for pomegranate juice."[146] As the court concluded, having made express (albeit deceptive) representations about certain RCTs that POM had previously sponsored, POM could not now credibly complain about the requirement of RCTs to substantiate its claims.[147]

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139 *Id.*

140 *Id*. at 497. One of POM's objections was that the Commission failed to apply the correct standard in assessing the few of POM's advertisements that did not make direct "establishment" claims but only "efficacy" claims. *Id.* at 498. It is settled Commission law that *efficacy* claims are evaluated under the multi-factor *Pfizer* standard. *See* Pfizer Inc., 81 F.T.C. 23, 62 (1972). POM's contention was that all of its advertisements should be judged under *Pfizer*, and that under *Pfizer* the Commission was wrong to impose an RCT requirement. *See POM Wonderful*, 777 F.3d at 490–91. The court squarely rejected this argument as well, pointing out that the Commission, in applying *Pfizer* in the past, had ordered RCTs to be conducted to support claims that "a nonprescription product is effective in treating minor burns and sunburns," and to make efficacy claims for a "topical analgesic marketed to treat minor arthritis." *Id.* at 498 (citing Pfizer, 81 F.T.C. at 66 (sunburn) and Thompson Med. Co., 104 F.T.C. 648, 826 (1984) (minor arthritis pain)).

141 *Id.* at 496 (internal quotation marks omitted).

142 *Id.*

143 *Id*.

144 *Id*.

145 *Id*. (internal quotation marks omitted).

146 *Id*. at 497.

147 *Id.*

2. *The Court, with One Modest Exception, Endorsed the Commission's First Amendment Rulings.*

To POM, this case was all about the First Amendment. Its main argument was that its advertising claims—qualified with adjectives like "preliminary," "hopeful," and "promising," and based only on preliminary studies or portions of studies that had favorable results—were truthful and thus entitled to full-bore First Amendment protection.[148] The Commission rejected that argument, and the court of appeals affirmed.[149]

As to the Commission's liability finding, the court began by rejecting POM's argument that the First Amendment required the court to engage in de novo review of the facts underlying the agency's deception findings.[150] The court found ample precedent to apply the "ordinary (and deferential) substantial evidence standard, even in the First Amendment context."[151] Not content to let POM's argument go fully unanswered, the court made clear that it "would reach the same conclusion even if [it] were to exercise de novo review."[152]

The court next addressed the Commission's determination to require RCTs for all future disease-related claims for all of POM's products. In upholding the Commission, the court said emphatically that "[r]equiring RCT substantiation as a forward-looking remedy is perfectly commensurate with the Commission's assessment of liability for petitioners' past conduct: if past claims were deceptive in the absence of RCT substantiation, requiring RCTs for future claims is tightly tethered to the goal of preventing deception."[153] And the court

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148 *Id.* at 499.

149 *Id.*

150 *Id.* at 499 (citing Bose Corp. v. Consumers Union of U.S., 466 U.S. 485, 505 (1984)).

151 *Id.* In so ruling, the court made clear that it was referring to "the nineteen ads determined misleading by the administrative law judge and held by the Commission to form a sufficient basis for its liability determination and remedial order." *Id*. at 500.

152 *Id.* at 500. The court's caveat reflects the Commission's determination to base its order not on the full thirty-six advertisements at issue, but on the nineteen advertisements the full Commission agreed supported a liability finding. In light of the Commission's decision, it would have been improper for the court to do more. However, the court did signal its recognition that the other sixteen advertisements at issue were equally deceptive. The court cites many of those advertisements in its opinion to support its conclusion that POM's advertisements made deceptive establishment claims. *Compare* POM Wonderful, LLC, 155 F.T.C. 1, 199–200 (concurring statement of Commissioner Maureen K. Ohlhausen) (identifying advertisements that, in her view, did not expressly convey establishment claims or are properly qualified), *with POM Wonderful,* 777 F.3d at 486–87 (citing advertisement at Figure 10, at 5), *and id.* at 486 (citing advertisement at Figure 19), *and id.* at 487–88 (citing advertisements at Figures 37, 39), *and id.* at 487 (citing advertisement at Figure 17), *and id.* at 488 (citing advertisements at Figures 36 and 38).

153 *POM Wonderful*, 777 F.3d at 501.

agreed that the requirement of RCT substantiation should apply to all of POM's products, because requiring POM to produce at least one RCT "directly advances, and is not more extensive than necessary to serve, the interest in preventing misleading commercial speech."[154]

The court then held that the "Commission fails adequately to justify a categorical floor of two RCTs for any and all disease claims."[155] In explaining its reasoning, the court observed there might be "a situation in which the results of a large-scale, perfectly designed and conducted RCT show that a dietary supplement significantly reduces the risk of a particular disease, with the results demonstrated to a very high degree of statistical certainty."[156] In those cases, "there would be a substantial interest in assuring that consumers gain awareness" of the supplement's benefits and the supporting science—a conclusion the court noted had been reached by the Food and Drug Administration.[157] The court thus found that the Commission's categorical order of two RCTs did not allow flexibility in such a situation.[158]

But the court also took pains to note that its ruling was "not at all to say that the Commission would be barred from imposing a two-RCT-substantiation requirement in any circumstances," and that two-RCT orders would be appropriate is some cases.[159] By way of illustration, the court pointed to past cases in which the Commission had more clearly justified the need for two RCTs, including cases involving comparative effectiveness claims for analgesics and cases in which expert testimony more explicitly pinpoints the need for two RCTs to substantiate discrete claims.[160] And the court suggested that the FDA's approach to approving disease-related claims for foods, which permits approvals to be based on a wider range of evidence, including observational studies, might be an appropriate remedy.[161] The Commission should reconsider this option in cases where a company makes disease-related claims for foods.

Finally, the court's opinion is careful to leave the Commission with ample tools to ensure that POM does not revive its disease-related claims on the basis of a single skimpy or inadequate RCT, or revert to its practice of selectively drawing on favorable studies while

154 *Id.* at 502.
155 *Id.*
156 *Id.*
157 *Id.*
158 *Id.* at 503.
159 *Id.* at 505.
160 *See id.* at 503–05.
161 *Id.*

disregarding unfavorable ones. The safeguarding tools, in the court's view, are within the Commission's Order, which separately provides that POM's representations must be judged "in light of the entire body of relevant and reliable scientific evidence."[162]

3. *The Commission Should Continue to Mandate Specific Substantiation Standards in Its Orders in Health Claim Cases.*

POM Wonderful was one in a series of cases in which the Commission sought to provide more specificity in its orders in cases involving health or wellness claims.[163] For more than thirty years, the Commission's orders in health claim cases have required the respondent "to have a reasonable basis, consisting of competent and reliable scientific evidence," to substantiate its health claims.[164] And for quite some time, there has been concern that the "reasonable basis" and "competent and reliable" language is not sufficiently specific to give the Commission meaningful relief in an order enforcement case, where the company could dispute what constitutes a "reasonable basis," and what scientific evidence is "competent and reliable."[165] To be sure, there are other provisions in the Commission's orders, like the provision cited by the *POM Wonderful* court and quoted above, that are intended to cabin that inquiry, but disputes continue.

In fact, the Commission has frequently been forced to litigate the meaning of the "reasonable basis" and "competent and reliable" language, often at great time and expense, and often in ways that undercut the enforceability of the Commission's orders. For instance, in *FTC v. Garden of Life, Inc.*,[166] the district court rejected a Commission effort to find a company in violation of a Commission order, even though the company (1) advertised that its products were soy-free

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162 *Id.* at 505 (emphasis omitted).

163 *See, e.g.*, Dannon Co., 151 F.T.C. 62 (2011); *see also* Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief, FTC v. Iovate Health Sciences USA, Inc., No. 10-CV-587 (W.D.N.Y. July 29, 2010), http://www.ftc.gov/sites/default/files/documents/cases/2010/07/100729iovatestip.pdf.

164 *See, e.g.*, Am. Home Prods. Corp. v. FTC, 695 F.2d 681, 710 (3d Cir. 1982) (pointing out that the language could be more precise).

165 The orders generally defined "competent and reliable scientific evidence" as "tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results." Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief, FTC v. Iovate Health Sciences USA, Inc., *supra* note 165, at 8. *See generally* FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965).

166 FTC v. Garden of Life, Inc., 845 F. Supp. 2d 1328 (S.D. Fla. 2012).

when they in fact contained soy; (2) claimed that a children's dietary supplement boosts brain development and cognitive function on the basis of scientific evidence that was, at best, thin; and (3) said that its "raw" calcium product was superior to other calcium supplements, again based on scant evidence.[167] According to the district court, so long as the company could point to independent, expert opinion that supported its claim, it was not in violation of the order.[168] The court of appeals affirmed in most respects.[169]

The specificity of the Commission's order was also at issue in *FTC v. Lane Labs-USA, Inc.*,[170] another order enforcement case involving health claims for calcium products.[171] Lane Labs' advertisements claimed that its calcium products were more absorbable than their competitors' products and actually increased bone density, instead of just preventing bone loss.[172] The FTC alleged that these claims violated prior consent orders because they lacked scientific support.[173] But as in *Garden of Life*, the district court in *Lane Labs* concluded that, because experts were willing to say that there was some evidence to support the company's claims, there was sufficient evidence to meet the order's "competent and reliable scientific evidence" standard.[174] Although the court of appeals vacated the district court's opinion, and ruled that many of the company's claims violated existing orders,[175] the case nonetheless shows the potential for mischief that the older health and wellness claim order language poses.

Perhaps the most problematic case is *Basic Research, LLC v. FTC*,[176] where the Commission is engaged in ongoing litigation with Basic Research, a major dietary supplement company.[177] The case involves two of the company's products: Akavar, a weight loss supplement heavily advertised with the tag line "Eat All You Want and Still Lose Weight," and Relacore, another weight loss product, which is touted as the "most popular 'Belly Fat' pill."[178] Finding that Basic Re-

167 *Id.* at 1331.

168 *Id.* at 1338.

169 FTC v. Garden of Life, Inc., 516 F. App'x 852 (11th Cir. 2013).

170 FTC v. Lane Labs-USA, Inc., 624 F.3d 575 (3d Cir. 2010).

171 *See id.* at 578–79.

172 *Id.*

173 *Id.* at 581.

174 *Compare Garden of Life*, 516 F. App'x at 860–61, *with Lane-Labs*, 624 F.3d at 581.

175 *Lane Labs*, 624 F.3d at 592.

176 Basic Research, LLC v. FTC, 807 F. Supp. 2d 1078 (D. Utah 2011).

177 *Id.* For an in-depth look at Basic Research, see Michael Specter, *Miracle in a Bottle*, NEW YORKER, Feb. 2, 2004, at 64, http://www.michaelspecter.com/2004/02/miracle-in-a-bottle/.

178 *Basic Research*, 807 F. Supp. 2d at 1086–87.

search had a "reasonable basis" for its claims, the district court rejected any suggestion that it had to look beyond the fact that the company had offered scientific evidence of its own to support its claims.[179] The court was unwilling to credit FTC experts who testified that both the animal and in vitro studies proffered by the company could not be extrapolated to humans, or why correlations and inferences should not be drawn from the company's data. Perhaps most troubling, the court refused to examine the evident implausibility of the Akavar claim—namely that one could spend the day lying on a couch eating chocolates and chips and still lose weight.[180]

The lesson to be learned from these cases is that the Commission is on the right track building greater specificity into its orders in health and wellness cases. As the Commission has recognized, it makes no sense to approve an order that might not be enforced. And the recent spate of cases in which the Commission's older orders have hamstrung the agency from ridding the marketplace of products sold on the basis of false and deceptive claims suggests that the time has come to institutionalize new, far more specific order language, which will end the kind of rear-guard action that is still being fought out in *Basic Research*.[181]

Conclusion

As the Commission embarks on its second 100 years, it should in the main hold steady to the course it is now on. Commitment to stability is one of the Commission's core strengths. Modest course corrections will be needed as the marketplace evolves, but the Commission has been well-served by its deep institutional reluctance to make course alterations quickly or dramatically. Incremental change has served the Commission well. This Article suggests that the Commission should consider some fine-tuning as it moves ahead, but it should otherwise stay the course.

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179 *See* Memorandum Decision and Order, Basic Research, LLC v. FTC, No. 2:09-cv-779, slip op. at 1–2 (D. Utah Nov. 25, 2014), http://www.fdalawblog.net/Basic%20Research%20LLC%20v%20FTC%20-%20Memorandum%20Decision%20and%20Order.pdf.

180 *See id.* at 24–27.

181 Most recently, the district court in New Jersey rejected the FTC's attempt to hold the Bayer Corporation in contempt for violating a 2007 order requiring that it have "competent and reliable scientific evidence" to back up health claims for its products. This case involved health claims for Bayer's colon health product, Philips Colon Health. *See* United States v. Bayer Corp., Civil Action No. 07-01(JLL), 2015 WL 5822595, at *1 (D.N.J. Sept. 24, 2015).