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RECENT TRENDS IN THE LAW OF ENDORSEMENT ADVERTISING: INFOMERCIALS, CELEBRITY ENDORSERS AND NONTRADITIONAL DEFENDANTS IN DECEPTIVE ADVERTISING CASES

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and

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I. INTRODUCTION

Endorsements sell products. There is much evidence in the advertising research literature that consumers will buy products whose virtues are touted by celebrities and others.¹ These endorsements can be any of several types, including testimonials from the average consumer ("person on the street"), celebrity endorsements, and expert endorsements. Groups can also be endorsers, and groups that lend either expertise or notoriety enhance the credibility of an advertisement. Endorsement advertisements are most effective when the consumer identifies with the endorser because of perceived similarities between himself and the endorser, or when the consumer believes what the endorser says either because the endorser is perceived to be personally credible or is perceived to be an expert.² The use of ce-

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1. See, e.g., Caballero, Lumpkin & Madden, *Using Physical Attractiveness As An Advertising Tool: An Empirical Test of the Attraction Phenomenon*, J. ADVERT. RES., Aug./Sept. 1989, at 16 [hereinafter Caballero & Lumpkin]; Kaikati, *Celebrity Advertising: A Review and Synthesis*, 6 INT'L J. ADVERT. 93 (1987); Ohanian, *Construction and Validation of a Scale to Measure Celebrity Endorsers' Perceived Expertise, Trustworthiness, and Attractiveness*, 19 J. ADVERT. 39 (1990); Miller, *Celebs' Sweet Smell of Success Generates Dollars and Scents*, MKTG. NEWS, Sept. 25, 1989, at 8; Oneal, Finch, Hamilton & Hammonds, *Nothing Sells Like Sports: Business Pours Billions Into Fun and Games*, BUS. WK., Aug. 31, 1987, at 48; Slinker, *Would You Buy a Burger From This Man? A Car? Some Stocks?*, MADISON AVE., Apr. 1984, at 52.

2. See Sternthal, Dholakia & Leavitt, *The Persuasive Effect of Source Credibility: Tests*

lebrities to increase the marketability of consumer products has existed throughout the history of advertising.³ The commercial use of a celebrity's persona is "intended to increase the value or sales of the product by fusing the celebrity's identity with the product and thereby siphoning some of the publicity value . . . in the celebrity's persona into the product."⁴ To some extent, the consumer relies on the endorser in making a product selection, and this is exactly what the advertiser hopes will happen. Endorsers are selected by advertisers with the intention of making the advertising message more effective in inducing product purchases.⁵

In other words, endorsement advertising attempts to induce reliance on the message given by the endorser and tries to induce purchase action by the consumer. In some circumstances this kind of induced reliance can lead to liability if the consumer is injured as a result of a defective product or is financially injured by the deception. There have been a number of recent cases involving celebrity endorsers of products and services in which plaintiff-consumers claimed injury as a result of reliance on the endorsements and asserted novel legal claims against the celebrities and other deep-pocket defendants. The pursuit of celebrities and other deep-pocket defendants is more likely when the advertising sponsor is insolvent. Cases have included claims brought under state consumer protection laws, common law fraud and negligence actions and claims made under the Racketeer Influenced and Corrupt Organizations Act (RICO). There has also been a great deal of state and federal regulatory activity in the area of endorsements as a result of another new phenomenon known as infomercials, which rely heavily on testimonials or endorsements from the "person on the street" (consumer) or on endorsements from celebrities to sell products. The infomercial, or program-length commercial, is a five- to thirty-minute advertisement that often takes

of Cognitive Response, 4 J. CONSUMER RES. 252 (1978) (studying the credibility of communicators' effects on advertising); Woodside & Davenport, *The Effect of Salesman Similarity and Expertise on Consumer Purchasing Behavior*, XI J. MKTG. RESEARCH 198 (1974); See also Ohanian, *The Impact of Celebrity Spokespersons' Perceived Image on Consumers' Intention to Purchase*, J. ADVERT. RES., Jan./Feb. 1991, at 46-54.

3. See Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199 (1986). See also, Ohanian, *supra* note 1 (discussing the history of using celebrities in advertising).

4. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 834, 603 P.2d 425, 438, 160 Cal. Rptr. 323, 336 (1979).

5. See Baker & Churchill, *The Impact of Physically Attractive Models on Advertising Evaluations*, XIV J. MKTG. RES. 538 (1977); Caballero & Lumpkin, *supra* note 1, at 20.

the form of an interview or talk show, a product demonstration, or a consumer information program. Infomercials have caused a great deal of concern to government regulators and to the United States Congress, which has recently held hearings about infomercials.⁶ The concerns exist because the format used in many infomercials disguises the commercial nature of the program and, in many cases, unsubstantiated claims are made to sell products of dubious value.

In order to examine these recent trends in the law of endorsement advertising, this article will briefly describe the laws that apply to deceptive advertisements and the sanctions against misleading endorsement advertising that are provided by federal and state regulations. It will also discuss whether private rights of action exist under federal and state laws and under the common law. In addition, this article will examine the liability of the creator of the advertising message (including the sponsor and the advertising agency that creates the advertisement) when the endorsement message is somehow false or misleading. It will then explore the legal liability of an endorser when the endorser intentionally or unknowingly makes misleading claims that lead to consumer injury.

II. FEDERAL GOVERNMENT REGULATION OF ADVERTISING

The Federal Trade Commission (FTC) has regulatory authority to prohibit deceptive acts and practices and unfair methods of competition because such activities, whether directed at consumers or competitors, undermine the rational functioning of the marketplace.⁷ The FTC does not engage in full-scale monitoring of print or television advertising. Instead, the FTC investigates advertising practices based on letters from consumers or businesses, Congressional inquiries, and advice from consumer protection advocates.⁸ When the FTC takes

6. See *Consumer Protection and Infomercial Advertising: Hearing Before the Subcomm. on Exports, Tax Policy and Special Problems and the Subcomm. on Regulation, Business Opportunities and Energy of the House of Reps. Comm. on Small Business*, 101st Cong., 2d Sess. 60 (1990) [hereinafter *Consumer Protection Hearing*]. See also *Infomercials: Marketing Government Small Business Loan and Grant Programs for Profit: Hearing Before the Subcomm. on Exports, Tax Policy and Special Problems of the House of Reps. Comm. on Small Business*, 101st Cong., 2d Sess. 9 (1989) [hereinafter *Small Business Loan and Grant Programs Hearing*].

7. See 15 U.S.C. § 45 (1988) (commonly referred to as the Federal Trade Commission Act § 5).

8. FEDERAL TRADE COMMISSION, *A GUIDE TO THE FEDERAL TRADE COMMISSION* 3, 17 (1987) [hereinafter *A GUIDE TO THE FEDERAL TRADE COMMISSION*].

action against false or deceptive advertising, it is most often under section 5 of the Federal Trade Commission Act, which prohibits any "unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce."⁹ FTC enforcement activities can result in various remedial actions: companies may seek advisory opinions from the FTC prior to taking a particular action to avoid FTC enforcement; or if the FTC believes a violation has already occurred, it may seek a consent order in which the disputed practice is voluntarily discontinued without an admission of guilt.¹⁰ Other remedies to which the FTC may agree include restitution or damages.¹¹ If the FTC cannot obtain consent to a proposed remedy, an administrative hearing, which is similar to a trial, may be initiated.¹² The administrative hearing can result in penalties, including cease and desist orders, and fines of up to \$10,000 for each violation of an order.¹³ The determination resulting from an administrative hearing is appealable to the full Commission, and the Commission's final determination is appealable to a United States Court of Appeals.¹⁴ Among other available remedies, the FTC may seek an injunction and may seek further equitable relief, including corrective advertising.¹⁵ In

9. 15 U.S.C. § 45(a)(1) (1988). While most of the Federal Trade Commission's actions against commercial advertising have been brought under that part of the FTC Act which prohibits "deceptive acts or practices," the FTC also has jurisdiction to prohibit "unfair methods of competition." See Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (Dec. 17, 1980) (letter to Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,203, at 20,907 (1988). This letter was written in response to a request by the Subcommittee that the FTC issue a statement explaining its unfairness jurisdiction. Unfair acts and practices jurisdiction is generally directed against sales techniques other than commercial advertising. Abuses in advertising usually involve some form of "deception," while "unfairness" typically involves a different kind of injurious practice. Examples of unfairness include sales practices such as physical coercion of the consumer, refusal to leave a consumer's home while selling door-to-door until something is purchased, and the "Eyeglasses Rule," which required optometrists to give consumers a written copy of the eyeglasses prescription to enable them to purchase glasses from sources other than the prescribing optometrist. *Id.* at 20,909-10; 4 Trade Reg. Rep. (CCH) ¶ 13,205, at 20,911-13.

10. 15 U.S.C. § 45(b) (1988). See also A GUIDE TO THE FEDERAL TRADE COMMISSION, *supra* note 8, at 17.

11. 15 U.S.C. § 45(b) (1988). See also A GUIDE TO THE FEDERAL TRADE COMMISSION, *supra* note 8, at 17.

12. 15 U.S.C. § 45(b) (1988). See also A GUIDE TO THE FEDERAL TRADE COMMISSION, *supra* note 8, at 17.

13. See 15 U.S.C. § 45(m) (1988). Each broadcast or separate commercial can be treated as a separate violation, so fines are potentially quite large.

14. *Id.* § 45(c).

15. *Id.* § 45(l).

addition to section 5, section 12 of the FTC Act grants the FTC additional statutory authority to prevent false advertising of food, drugs, devices or cosmetics as unfair or deceptive acts or practices.¹⁶

A. *The FTC Guidelines*

As part of its regulatory mandate to prohibit deceptive acts or practices, the FTC has issued guidance to advertisers including the "Guides Concerning Use of Endorsements and Testimonials in Advertising" (the Guides).¹⁷ Although the Guides are not themselves statutory or regulatory authority, they outline the Commission's position on endorsements and testimonials and give guidance about what the Commission considers to be unfair or deceptive practices. There are a number of law review articles, written at the time that the FTC Endorsement Guides were issued, that contain good descriptions of the Guides and reiterate the policy considerations that underlie them.¹⁸ For purposes of this article, a brief description of the Guides will serve as a basis for a discussion of the use of endorsements and testimonials in advertising ("endorsements" and "testimonials" are used interchangeably throughout the Guides).

The FTC Guides were first proposed in 1975.¹⁹ After the FTC received suggestions from industry groups and consumers, the modified Guides were released in final form in January, 1980, and have remained unchanged since that date.²⁰ The purpose of the Guides is

16. *Id.* § 52(a).

17. *See* Guides Concerning Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (1990) [hereinafter Guides]. A guide is an "administrative interpretation by the Commission of the laws it administers . . . [and] does not have the force or effect of law and is not legally binding . . . in an enforcement action." Report of the ABA Section on Antitrust Law Special Committee to Study the Role of the FTC (Apr. 7, 1989), reprinted in Report on the Role of the Federal Trade Commission [Extra Ed. No. 46] Trade Reg. Rep. (CCH), at 61 (Apr. 13, 1989) (quoting FTC OPERATING MANUAL 8.3.2 (emphasis in original)). The Guides themselves are not enforceable and in order to enforce the theory that is embodied in the Guides, there must be a violation of the underlying statute. In other words, although the Guides are simply policy interpretations they are given weight and are important in FTC enforcement decision-making.

18. *See, e.g.*, Hall, Dickler, Lawler, Kent & Howley, *Use of Testimonials and Endorsements in Advertising*, 49 ANTITRUST L.J. 823 (1980); Jones, *Celebrity Endorsements: A Case for Alarm and Concern for the Future*, 15 NEW ENG. L. REV. 521 (1980); Washburn, *FTC Regulation of Endorsements in Advertising: In the Consumer's Behalf?*, 8 PEPPERDINE L. REV. 697 (1981).

19. *See* Guides Concerning Use of Endorsements and Testimonials in Advertising, 40 Fed. Reg. 22,127 (proposed May 21, 1975).

20. *See* Guides, *supra* note 17, § 255 (codifying 45 Fed. Reg. 3872 (proposed Jan. 18, 1980)).

to describe standards that must be observed in order to avoid using misleading endorsements.²¹ The standards imposed by the Guides all have the common premise that, because consumers may rely on the opinions of endorsers, in order not to constitute deceptive acts or practices, those opinions must be truthful and not misleading. The FTC Guides set forth several slightly different standards for the use of endorsements, depending on the status and perceived expertise of the endorser, including special requirements for consumer endorsers, expert endorsers and endorsements by groups. In each case, the Guides prescribe standards for advertisers to follow in using the various types of endorsements. In all cases the standards require that the endorsement actually represent the beliefs and opinions of the endorser, and that when performance claims are made by an endorser, they must be typical of the performance a consumer would expect to receive from a product.

Endorsements are given, in part, to persuade consumers to base their purchasing decisions on the opinions expressed or implied in the endorsement. An endorsement is defined as an

advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser.²²

When an announcer who is not identified and is not a person familiar to consumers speaks "not on the basis of his own opinion, but rather in the place of and on behalf of the [sponsor],"²³ consumers cannot reasonably consider his statements to be an endorsement. In other words, someone who is clearly an unidentified actor or voice-over announcer is not an endorser. Similarly, there is no endorsement when unknown actors act out a script in which they express "opinions" about products in an "obvious fictional dramatization of a real life situation."²⁴ The Guides offer an example of such a situation as a commercial in which two women in a supermarket aisle hold a discussion about the merits of different brands of laundry deter-

21. *Id.*

22. *Id.* § 255.0(b).

23. *Id.* § 255.0 example 3.

24. *Id.* § 255.0 example 2.

gent.²⁵

The endorsement does not have to be represented to be the endorser's personal opinion if the endorser lends his or her professional reputation to the message. For example, a well-known automobile racing driver who speaks of the "smooth ride, strength, and long life of tires" may be considered to be an endorser even if he never states that he is declaring his personal opinion.²⁶ The FTC is particularly concerned that consumers believe that the driver would not speak for the product unless the driver "actually believed in what he/she was saying and had personal knowledge sufficient to form that belief."²⁷ According to the FTC, even if that is not explicitly stated, consumers will think that the advertising message reflects the driver's personal views. It is this attribution of personal views that is the essence of the endorsement.

The FTC is particularly concerned that the endorsement reflect the "honest opinions, findings, beliefs, or experience of the endorser."²⁸ The endorsement need not be represented in the exact words of the endorser, but any rewording cannot be presented out of context or in a way that distorts the endorser's personal opinion.²⁹ The endorsement may be used as long as the advertiser has "good reason to believe" that the endorser continues to agree with the opinion presented.³⁰ The advertiser must comply with this requirement by consulting the endorser at "reasonable intervals" or when there is a change in the nature of the product that was endorsed.³¹ The Guides also require that if an advertisement represents that the endorser uses the product, he or she must have been a bona fide user at the time of the endorsement and must also continue to be a bona fide user of the product as long as the advertisement is used.³²

There is, of course, a further requirement that the endorser not

25. *Id.*

26. *Id.* § 255.0 example 4.

27. *Id.*

28. *Id.* § 255.1(a).

29. *Id.* § 255.1(b).

30. No precise definition of "good reason to believe" is provided, except that "[a]n advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals . . ." *Id.*

31. What constitutes "reasonable intervals" is to be determined by "such factors as new information on the performance or effectiveness of the product, a material alteration of the product, changes in the performance of competitors' products, and the advertiser's contract commitments." *Id.*

32. *See id.* § 255.1(c).

make deceptive representations that could not be substantiated if the advertiser made them directly.³³ In other words, an advertiser cannot use a deceptive statement claiming that it is merely the opinion of the endorser. There must be a reasonable basis for making claims in testimonials "irrespective of the veracity of the individual consumer testimonials"³⁴ For example, in *In re Cliffdale Associates*, fuel economy testimonials were given by satisfied users of the "Ball-Matic Gas Saver Valve."³⁵ Even though the consumer endorsers may have believed what they said about the product, the claims that they made about fuel economy were not verifiable.³⁶

The Guides distinguish among consumer, expert, and organization endorsements. Consumer endorsements must represent a typical experience of a consumer using the product. If an atypical experience is presented, the advertiser must disclose that the endorser's experience is not typical.³⁷ This requires the advertiser to have "adequate substantiation" for whatever representation is made, and requires that any limited applicability of the experience be conspicuously disclosed.³⁸ If advertisements present endorsements of "actual consumers," they must either use actual consumers or disclose the fact that actors were used.³⁹ Similarly, expert endorsers must actually have the expertise that they are represented as having.⁴⁰ An expert is "an individual, group or institution possessing . . . knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary

33. *See id.* § 255.1(a).

34. *In re Cliffdale Assocs.*, 103 F.T.C. 110, 171 (1984).

35. *Id.* at 110.

36. *But see* R.J. Reynolds Tobacco Co. v. FTC, 192 F.2d 535 (7th Cir. 1951). There is perhaps a minor exception to the requirement that all the claims be completely accurate.

A testimonial, for instance, might not be factually true in all respects, but still immaterial to the subject matter of the instant proceeding in that it bore no relation to the public interest, and it would virtually make petitioner an insurer of the truthfulness of every statement contained in a testimonial, no matter how immaterial or beside the issue in controversy it might be.

Id. at 538.

37. *See* Guides, *supra* note 17, § 255.2(a).

38. *See, e.g., In re MacMillan, Inc.*, 96 F.T.C. 208 (1980) (concerning testimonials of correspondence school graduates).

39. *See* Guides, *supra* note 17, § 255.2(b). Examples in the Guides include consumers who compared cake mixes to home-baked cakes and a consumer who stated that her television was taken in for repairs only once in a two-year period of ownership. *Id.* § 255.2 examples 1 & 2. There are also special rules that govern "hidden camera" testimonials. *Id.* § 255.2 example 3.

40. *Id.* § 255.3(a).

individuals.”⁴¹ The endorsement must be based on the expert having used his or her expertise in evaluating the product.⁴² The expert must have examined or tested the product to the extent that would normally be necessary to make the conclusions presented in the endorsement.⁴³ It may be necessary, therefore, for an expert to conduct comparison tests if representations of superiority are made.⁴⁴ Independent investigation of claims, rather than reliance on an analysis of the advertiser-provided data, will also generally be appropriate. The Guides give the example of an endorsement of an automobile by someone described as an “engineer.” The endorsement would be considered to be deceptive if the endorser’s field was something other than automotive engineering, for example, chemical engineering,⁴⁵ and would also be deceptive if the expert had not used his or her expertise in evaluating the product.

The application of these Guides can be illustrated by a 1988 case that involved both “consumer” testimonials and expert opinions, in which the FTC obtained a consent order to cease and desist against Buckingham Productions, Inc. and an individual expert.⁴⁶ This case involved advertisements for variations of The Rotation Diet in which many exaggerated and false claims were made. These particular advertisements contained an expert opinion by a psychologist who made unsubstantiated claims about the “usual” or “average” weight loss on the diet when no competent and reliable surveys or scientific evidence for substantiation were available.⁴⁷ In addition, testimonials and before and after pictures from various purported users were prominently displayed in the advertising materials but most were photographs of Buckingham employees. The FTC was concerned about the testimonials because the photographs did not depict typical experiences and the lack of independence of the endorsers was undisclosed. The false claims, the unsubstantiated expert claims, the lack of typical experience, and the undisclosed lack of independence of the endorsers were all misleading.

41. *Id.* § 255.0(d).

42. *See id.* § 255.3(b).

43. *Id.*

44. *Id.*

45. *See Id.* § 255.3 example 1. *See also In re Cooper, Jr.*, 94 F.T.C. 674 (1979) (holding that an astronaut-engineer is not a qualified automotive engineer).

46. *See In re Buckingham Prods., Inc.*, [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,270 (Sept. 20, 1985).

47. *Id.*

A similar result was reached in a case that involved an expert endorser of an acne home-treatment kit.⁴⁸ An FTC consent order was entered into with the distributor, who agreed to stop making false claims about the product and to send refund offers to all customers who had purchased the kit. The FTC order enunciated a standard for making scientific claims about a product. It declared that "two well-controlled clinical studies, conducted independently, are required as evidence" before an advertisement may make scientific claims about a product.⁴⁹ The FTC further required that any such studies be conducted by experts experienced in the specific area about which the claim is made. Beyond these standards for asserting scientific claims of performance, an order was also entered against a dermatologist who endorsed the products and who was listed as the author of a booklet included in the acne kit. The expert endorser was required to have a "reasonable basis" for any future endorsements, a standard "more rigorous than the standard appropriate for lay persons."⁵⁰

The FTC is also concerned with organizational endorsements, especially expert ones.⁵¹ The Guides state that such endorsements would be viewed by the consumer as representing "the judgment of [the] group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors which vary from individual to individual."⁵² The advertiser, therefore, has the responsibility to determine that the endorsement "reflects the collective judgement of the organization."⁵³ If the organization is also considered to be an expert organization, its opinion is also evaluated under section 255.3 of the Guides, which refers to expert endorsements. It can be a deceptive practice to create the

48. See *In re San-Mar Labs., Inc.*, [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21,620 (Jan. 15, 1980).

49. *Id.*

50. *Id.*

51. William MacLeod, director of the FTC's Bureau of Consumer Protection, in describing the consent agreement in *In re Black & Decker (U.S.), Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 22,755 (Jan. 10, 1990) stated that

endorsements, particularly ones by expert organizations, are an important source of information to consumers about the quality of goods and services. Claims that a particular product has received such a certification or endorsement can be a persuasive factor to consumers in selecting products. It is therefore important that expert endorsements be supported by real expertise.

Id. (ruling that endorsement of an iron by the National Fire Safety Council was misleading because that organization did not have the expertise to evaluate or test the appliance's safety).

52. See Guides, *supra* note 17, § 255.4.

53. *Id.*

appearance that an independent or expert group performed an evaluation of a product if it did not. The Guides offer the example of an association of professional athletes that "selected" a beverage as its "official breakfast drink."⁵⁴ Because nutrition would be a particular concern of athletes, the group would be considered expert by consumers. Stating that the drink was "official" and "selected" implies that comparisons between brands had been made. "Hence, the advertisement would be deceptive unless the association has in fact performed such comparisons . . . in terms of nutritional criteria, and the results of such comparisons conform to the net impression created."⁵⁵

It is, of course, deceptive to create an endorsement from what appears to be an independent testing or consumer organization that was not a bona fide testing group and was not independent from the advertiser.⁵⁶ Even if an independent group existed, its endorsement would have to be based on scientific tests in order not to be deceptive. For example, a consent order was entered into with the National Association of Scuba Diving Schools in which it agreed to cease and desist from affixing its seal of approval on any scuba related product.⁵⁷ The seal displayed the words "integrity," "safety," and "instruction" as well as the Association name, thereby implying that the product met safety standards. However, no testing or evaluation of products had occurred before the seal was attached.⁵⁸ It is also deceptive to imply in an advertisement that particular groups have endorsed a product when they have not.⁵⁹ Likewise, it is a misrepresentation to advertise approval or recommendation by a government agency if that has not in fact occurred.⁶⁰

A separate section of the Guides requires full disclosure of mate-

54. See *id.* § 255.3 example 5.

55. *Id.*

56. See *id.* § 255.3 example 2 (discussing automobile parts approved by the "American Institute of Science").

57. See *In re Nat'l Ass'n of Scuba Diving Schools*, [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21,921 (July 30, 1982). See also *In re Black & Decker (U.S.), Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 22,755 (Jan. 10, 1990).

58. *Id.*

59. See, e.g., *In re Biopractic Group, Inc.*, 104 F.T.C. 845 (1984) (concerning an advertisement that asserted that "Ice Therapy" was praised by doctors, physical therapists, health clinics, professional athletic teams, U.S. and Russian Olympic Track Teams); *In re Bristol-Myers Co.*, 102 F.T.C. 21 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984) (concerning an advertisement that asserted that doctors recommend Bufferin more than other pain relievers).

60. See, e.g., *In re Emergency Devices, Inc.*, 102 F.T.C. 1713 (1983). See also *In re Estee Corp.*, 102 F.T.C. 1804 (1983) (describing an alleged recommendation of fructose-based foods by the FDA).

rial connections between the endorser and the seller of the product that "might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience)."⁶¹ Simply paying an expert or well-known celebrity endorser to be an endorser is not a material connection that requires disclosure because consumers expect that the endorser has been paid. The Guides give an example in which a film star endorses a particular food product, but is not an expert because the film star endorses "points of taste and individual preference."⁶² The viewer expects that the star has been paid and compensation does not have to be revealed.⁶³

However, when the endorser is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reasons to know or to believe that if the endorsement favors the advertised product some benefit, such as an appearance on TV, would be extended to the endorser.⁶⁴

Disclosure is also required when the celebrity endorser has a more substantial link to the company whose product is endorsed than a consumer would normally assume. For example, in *In re Cooper, Jr.*,⁶⁵ the FTC ordered disclosure of the particular method of compen-

61. Guides, *supra* note 17, § 255.5. There has been a series of recent advertisements in which high-ranking company officials or owners "pitch" their companies' products. Their connection to the company is an integral part of the advertisement. The founder of Wendy's believed his product was so good that he named the company after his daughter; Victor Kiam liked Remington shavers so much that he bought the company; Frank Perdue regularly praises chicken parts; and Lee Iacocca mentions the risks he took to improve Chrysler. It can be assumed that these represent the true opinions of the endorsers, and the relationship to the sponsor is clearly disclosed. One wonders about the extent of any liability of the executive endorser if any representations made should prove to be untrue. Advertising studies have shown that executives are usually not persuasive as endorsers and are therefore not effective. Schultz, *Would-Be Iacoccas Beware*, ADWEEK, Aug. 4, 1986, at C.R.C. 32. Therefore, it may not even be worth the risk of liability for a company official to endorse his or her company's product.

62. Guides, *supra* note 17, § 255.5 example 2.

63. *Id.* § 255.5.

64. *Id.* See also *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984) (holding that it was a deceptive practice to have testimonials in advertisements by "consumers" who were, in reality, friends of the manufacturer).

65. *In re Cooper, Jr.*, [1976-1979 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21, 591

sation used. In that case, a former astronaut-endorser received compensation that was determined as a percentage of the products' sales. This fee arrangement constituted a more direct financial interest in the product sales than is usual, and should have been disclosed.⁶⁶ A similar result was reached in an FTC action that involved a series of acne product endorsements by singer Pat Boone because the products were sold by a company that the singer owned.⁶⁷ Failure to disclose the ownership was found to be misleading. Consumers would not ordinarily expect such direct financial interests in products endorsed by celebrities.⁶⁸

B. Infomercials

As we have seen, the FTC has taken action against advertisements in which testimonials by average consumers made unsubstantiated claims⁶⁹ and those in which experts made claims without appropriate scientific evidence.⁷⁰ The FTC has also acted against advertisers who used endorsements in which the lack of independence of the endorser from the advertiser was not disclosed.⁷¹ Many of these elements, as well as some unique format-related questions, arise in the newest form of commercial—the program length commercial or infomercial.

Infomercials are big business, with one commentator estimating that 300 million dollars would be spent on airtime in 1990.⁷² Infomercials may become more important to broadcast and cable stations as they feel pressure to fill unsold late-night and weekend air time. Much of the concern about infomercials has been motivated by the kinds of products advertised with this format, including get-rich-quick advice, diet aids, baldness remedies, impotence cures, and the like. The claims made for such products are often exaggerated and can be deceptive. Beyond exaggerated and deceptive claims for the products, a second concern of regulators is the potential misrepresentation caused by the format itself. These commercials, which

(July 13, 1979).

66. *Id.* at 696.

67. *In re Cooga Mooga, Inc.*, 98 F.T.C. 814 (1981).

68. *Id.* at 814-15.

69. *See supra* notes 33-36 and accompanying text.

70. *See supra* notes 40-50 and accompanying text.

71. *See supra* notes 50-68 and accompanying text.

72. *See Jouzaitis, Critics or Not, 30-Minute Spots are Selling Big*, Chicago Tribune, July 1, 1990, § 7 (Business), at 1.

last between five and thirty minutes, often take the form of talk shows, interview shows, investigative reports, consumer programs and entertainment programs. Because the Federal Communications Commission (FCC) requires only minimal sponsorship identification, a late-night channel-switcher may not know that what he or she is watching is a commercial.⁷³ In contrast, there is no similar concern about obvious program-length commercials like Home Shopping Network or Parade of Homes, in which viewers are asked directly to purchase a product or to contact the seller for more information in an obvious sales pitch format. In the latter case, the consumer is presumably aware that what is being watched is a long advertisement.

At the recent Congressional hearings, legislators concluded that at present, no new legislation is necessary to deal with the perceived problems with infomercials.⁷⁴ Instead, the chairman of the House subcommittee urged government agencies to use existing mechanisms to eliminate abuses found in the program-length commercial format.⁷⁵ The two primary federal regulatory bodies that have some authority over infomercials are the FCC and the FTC. The FCC has no specific regulations that deal with infomercials. Prior to 1984, the FCC processing guidelines limited the number of commercial minutes per hour that could be run on television stations, and the FCC also had a policy that discouraged licensees from running program-length commercials.⁷⁶ Deregulation in 1984 caused the elimination of the commercial guidelines. Deregulation was undertaken based on both first amendment and market-based rationales. While there is no constitutional impediment to the regulation of deceptive advertising, the first amendment does protect commercial speech so long as it is not misleading and concerns lawful activity.⁷⁷ The FCC acted to deregulate before a first amendment case was brought against it by a disgruntled licensee.

Deregulation was also grounded on a market-based theory. The FCC was confident that competition would effectively limit the number of advertisements appearing on any station. It is not clear that the long-form commercial was considered by the FCC. As a result of

73. See 47 C.F.R. §§ 73.1212(f), 76.221(e) (1989). (requiring that an announcement of the sponsor's name or product need be made only once during the course of the sponsored broadcast).

74. *Consumer Protection Hearing*, *supra* note 6.

75. *Id.*

76. *Small Business Loan and Grant Programs Hearing*, *supra* note 6, at 35.

77. See *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

deregulation, current federal regulation of long-form commercials is limited to the requirement that the licensee assure that sponsorship is identified when broadcast material is paid for, and that the sponsoring party is named.⁷⁸ There are similar rules for cable systems.⁷⁹ The only exception occurs when the advertisement is targeted to a special audience that needs more protection. The recently enacted Children's Television Act re-regulates television programming and commercials as they relate to children.⁸⁰ In particular, the Act restricts the amount of advertising during children's programming, and it charges the FCC with the responsibility of studying and reporting to Congress on "program-length" commercials targeted at children, which tend to be cartoon programs based on children's toys.⁸¹ At the same time that the FCC was deregulating commercial time restrictions, the Justice Department brought an antitrust enforcement action against the National Association of Broadcasters (NAB).⁸² As part of the settlement of the action, the NAB agreed to abandon those parts of its formal Advertising Standards that limited the total amount of commercial time per hour and the number of commercials during program interruptions, and that restricted the content of each sixty-second commercial to one product.⁸³

The FTC has no specific regulations that deal with infomercials; instead, its authority to regulate depends on FTC Act section 5, which empowers it to prevent unfair and deceptive acts and practices.⁸⁴ In October 1983, the FTC issued a statement elaborating on its enforcement policy against "deceptive" acts and practices.⁸⁵ In that statement, the majority of the Commission, represented by then Chairman James C. Miller III, concluded that certain elements are involved in all deception cases against which the Commission would proceed. Deception exists if there has been a representation, omission, or practice that is likely to mislead a consumer; if the consumer is acting reasonably under the circumstances; and if the representation, omis-

78. See 47 C.F.R. § 73.1212(a) (1989).

79. See *id.* § 76.221(a).

80. Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 998.

81. *Id.*

82. See *United States v. National Ass'n of Broadcasters*, 536 F. Supp. 149 (D.D.C. 1982).

83. See *United States v. National Ass'n of Broadcasters*, 553 F. Supp. 621 (D.D.C. 1982).

84. See *supra* notes 7-16 and accompanying text.

85. FTC Policy Statement on Deceptive Acts and Practices, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,205, at 20,911 (Oct. 14, 1983) [hereinafter Deception Policy Statement].

sion, or practice is a "material" one.⁸⁶ The three elements of deception under the FTC statement are similar to, but are generally easier to prove than, the common law action for fraud and deceit, which is discussed below.⁸⁷

The Commission need not show that there has been actual deception, only that an advertisement is "likely" to deceive.⁸⁸ Whether an advertisement is likely to deceive is based on whether it was "reasonable" for members of the buying public to be influenced by the representation in making a purchasing decision.⁸⁹ The average person test is applied unless the advertisement is aimed at a special audience, such as children, or to a specialized audience of expert consumers.⁹⁰ However, some types of claims are not deceptive, and are permissible "puffing," in that an ordinary consumer would understand the claims to be exaggeration.⁹¹ But any practice or representation (express or implied), including exaggeration, studies, consumer research, endorsements and testimonials, or demonstrations, that creates a deceptive impression is considered to be deceptive in fact.⁹² Similarly, a failure to disclose information can also be misleading if, in light of expectations and understanding of the typical buyer, it would be appropriate to make a disclosure.⁹³ Representations must be evaluated from the perspective of the average audience member-consumer as he or she would interpret the representation. The FTC may consider extrinsic evidence about consumer interpretation of the questioned advertisement, including consumer surveys.⁹⁴ A representation is considered to be material if it is likely to affect a consumer's conduct,

86. *See id.* at 20,911-12.

87. *See infra* text accompanying notes 180-96.

88. *See* Deception Policy Statement, *supra* note 85, at 20,912.

89. *Id.* at 20,912-13. *See also* Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1970); *In re* Kirchner, 63 F.T.C. 1282 (1963).

90. *Id.* at 20,913-14. Potentially misleading acts or practices are considered by the Commission "in light of the sophistication and understanding of the persons to whom they were directed." *Id.* (quoting *In re* Horizon Corp., 97 F.T.C. 464 (1981)). For a definition of "expert," see *supra* note 41 and accompanying text.

91. Deception Policy Statement, *supra* note 85, at 20,916.

92. In addition, the literal truth of the individual components of the advertisement is not a defense to deceptiveness if the advertisement on the whole creates a misleading impression. Not only may literal truth not be a defense, but an ambiguous statement or a statement that relies on secondary meaning or that has a secondary meaning can also be deceptive. Analysis of Law of Deception by Commissioners Patricia P. Bailey and Michael Pertschuk, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,207, at 20,933 (July 13, 1988) [hereinafter *Analysis of Law of Deception*]. *See also* Deception Policy Statement, *supra* note 85, at 20,912-13.

93. *Analysis of Law of Deception*, *supra* note 92, at 20,935.

94. Deception Policy Statement, *supra* note 85, at 20,917.

including a consumer's purchasing decision.⁹⁵ In applying the materiality test, the Commission generally presumes that the advertiser thought that an express or implied claim for a product was likely to influence consumer behavior if the claim was included in the advertisement.⁹⁶

While the *FTC Statement on Deception* gives guidance on what will be considered deceptive, the statement has been controversial because two of the five FTC Commissioners dissented, arguing that it enunciated a "new" standard that gave less protection to consumers than previous law.⁹⁷ Particular exception was taken to the first part of the three-part test, that is, the requirement that the representation, omission or practice be "likely" to mislead consumers. According to the dissenting opinion, in the past the Commission had simply asked whether an act or practice had a "tendency or capacity" to mislead consumers without requiring that it be "likely" to mislead.⁹⁸ The dissenters were concerned that the "likely" to deceive standard gave consumers less protection than the "tendency or capacity" to deceive standard, and that the new standard required a higher burden of proof for enforcement action.⁹⁹ Many commentators have tried to distinguish these standards with little success.¹⁰⁰ In any event, it is clear that the FTC standard is easier to prove than the common law tort standard for fraud and deceit, which requires that the consumer be "actually" misled.

The dissenters were also concerned about whether the reliance had to be "reasonable," which is a requirement of the common law tort standard. Their concern was that less sophisticated consumers might not be protected by a reasonableness standard in cases in which reliance actually occurred but in which such reliance would not have

95. *Id.* at 20,916-17.

96. *Id.* For discussion of advertising agency liability, see *infra* notes 122-29 and accompanying text.

97. See Deception Policy Statement, *supra* note 85, at 20,918 (dissenting statement of Commissioner Bailey, joined by Commissioner Pertschuk). The dissenting Commissioners took issue with whether the standard for deception in the statement was an accurate summary of the law. See also Bailey & Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U.L. REV. 849 (1984) [hereinafter Bailey & Pertschuk].

98. Deception Policy Statement, *supra* note 85, at 20,918-19 (dissenting statement of Commissioner Bailey).

99. *Id.*

100. See Shafer, *Developing Rational Standards for an Advertising Substantiation Policy*, 55 U. CIN. L. REV. 1 (1986). See also Craswell, *Interpreting Deceptive Advertising*, 65 B.U.L. REV. 657 (1985); Preston & Richards *Consumer Miscomprehension and Deceptive Advertising: A Response to Professor Craswell*, 68 B.U.L. REV. 431 (1988).

been reasonable for an informed, experienced, or trained person.¹⁰¹ The dissent also took issue with the requirement that the act or practice would be deemed deceptive only if it was material and if injury resulted. The dissenters argued that "[t]his proposition is inconsistent not only with other portions of the statement, but also with a substantial body of law holding that the Commission need not show actual injury or prejudice to consumers in order to find an act or practice material."¹⁰² At least one federal appeals court agreed with the minority view that the Miller-FTC standard placed a greater burden on the FTC to prove that a violation of section 5 had occurred than had prior law.¹⁰³ One problem created by the FTC's 1983 *Statement on Deception* occurs in the infomercial area; there, even if exaggerated claims are made for products that might be considered to be material misrepresentations, the consumer must be acting reasonably under the circumstances. It is arguable that a reasonable person would not be likely to buy 'easy money' schemes, or miracle obesity, baldness, or impotence cures. Such products are, of course, aimed at the more vulnerable members of the viewing public and they might not make the same reasoned judgments as a more informed consumer. If the FTC adheres strictly to its 1983 standard, those lured by some infomercials might not be protected by that standard.¹⁰⁴

In any event, there is no private right of action under the FTC Act, so injured consumers can find no specific individual relief here.¹⁰⁵ In addition, the FTC does not monitor television advertisements and instead relies on complaints from the public to begin investigations. As a result of complaints and of Congressional concern, the FTC has begun to take a new tack in pursuing deceptive infomercials. The FTC has begun enforcement actions against the program producers because they tend to control the production facilities, and have access to the connections necessary to distribute the commercials to a large number of cable and broadcast television stations.¹⁰⁶

101. Deception Policy Statement, *supra* note 85, at 20,919 (dissenting statement of Commissioner Bailey) (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965)).

102. *Id.*

103. *See Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1436 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986).

104. *See Bailey & Pertschuk, supra* note 97, at 858.

105. *See infra* notes 150-58 and accompanying text.

106. *Consumer Protection Hearing, supra* note 6, at 96-97. *See also* A.J. Sternio, Jr.'s remarks before the Society of Consumer Affairs Professionals in Business (Mar. 20, 1990), *reprinted in* [Extra Ed. No. 34] *Trade Reg. Rep. (CCH)*, at 7 (Mar. 26, 1991) (commenting that "the agency has pursued a theory of enforcement that attacks not only the fraudulent

As part of the FTC's heightened interest in infomercials, it recently entered into consent agreements with Twin Star Productions, Inc., and some of its officers¹⁰⁷ with regard to infomercials for such products as EuroTrym Diet Patch, which was advertised on "The Michael Reagan Show," a hair loss product called FoliPlex, which was advertised on a thirty-minute commercial called "Break-Through '88," and an impotence remedy called Y-Bron, which was sold through a thirty-minute commercial called "Let's Talk with Lyle Waggoner."¹⁰⁸ Michael Reagan is the son of former President Ronald Reagan, and Lyle Waggoner is a former Carol Burnett Show regular; their presence on the infomercials helped create the impression that the programs were something other than commercials. Under the consent agreement, the programs' producers agreed to discontinue these infomercials and to refrain from making false and misleading claims about the effectiveness of these products.¹⁰⁹ The consent agreement labeled many of the representations made on infomercials for these products as "false, misleading and deceptive."¹¹⁰

Exaggerated claims of effectiveness were made in all of the cases cited and these claims in themselves constituted deception. In addition, the infomercials were deceptive because of the program-like format that each used.¹¹¹ All of the infomercials that were subject to the consent agreement made significant use of endorsements and testimonials. Satisfied users of the products would explain how the products had changed their lives. Often the consumer endorsements were presented in an interview format. Additionally, for realism, the

marketer, but also the suppliers and other entities that sponsor, facilitate or otherwise participate in the fraudulent scheme [T]he . . . correct metaphor might be the killing of the 'crabgrass' rather than 'dandelions.'" *Id.*

107. *In re* Twin Star Prods., Inc., 5 Trade Reg. Rep. (CCH) ¶ 22,821 (Oct. 2, 1990). See also *In re* Robert Francis, 5 Trade Reg. Rep. (CCH) ¶ 22,920 (Mar. 4, 1991).

108. *In re* Twin Star Prods., Inc., No. 882-3199 (F.T.C. Mar. 13, 1990) (LEXIS, Trade library, FTC file).

109. *Id.* at 16.

110. *Id.* Among other things, representations were made that the EuroTrym Diet Patch prevented feelings of hunger and enabled users to lose substantial weight when, in fact, it did neither of these things. Representations were also made that FoliPlex curtailed hair loss and promoted new hair growth when, in fact, it did neither of these things. Further representations were made that Y-Bron cured impotence and increased sexual libido when, in fact, it did neither of these things. *In re* Twin Star Prods., Inc., No. 882-3199 (F.T.C. Mar. 13, 1990) (LEXIS, Trade library, FTC file). See also *JS&A Group*, 53 Fed. Reg. 44,014 (1988) (to be codified in 16 C.F.R. part 13) (consent agreement); 54 Fed. Reg. 12,595 (1989) (to be codified in 16 C.F.R. part 13) (consent order).

111. *In re* Twin Star Prods., Inc., 5 Trade Reg. Rep. (CCH) ¶ 22,821 (Oct. 2, 1990).

format also often included periodic "commercials" in which the interviewer interrupted the "program" for a direct sales pitch, complete with a toll free number. The endorsements helped give the appearance that the long form commercials were consumer programs or interview shows that were independent of the products endorsed. The so-called "endorsements" from "satisfied" customers violated the FTC Guides on Endorsements and Testimonials because they were obtained from individuals and entities that were not independent of the marketers of the products, and this lack of independence was not disclosed.¹¹²

Additional enforcement action has been taken by the FTC against TV, Inc., for its program-length commercials created for bee pollen products.¹¹³ These infomercials made exaggerated claims about the effectiveness of bee pollen as a remedy for treating allergies, reversing aging, curing impotence, promoting weight loss, and relieving arthritis. One of the program-length commercials was staged as an interview with a doctor who appeared to be engaged in a spontaneous and unscripted exchange with an independent interviewer. Instead, the thirty-minute program was a long commercial for sales of bee pollen products.¹¹⁴

The FTC entered into a similar consent agreement with Wayne Phillips and others with regard to a thirty-minute commercial that promoted a book by Mr. Phillips.¹¹⁵ The talk-show format commercial was called "Money, Money, Money," and Mr. Phillips was interviewed by a purportedly neutral interviewer about "Wayne's road to wealth." Large parts of this infomercial contained endorsements of Mr. Phillips and his book by purportedly disinterested and satisfied customers. The complaint alleged that many of the endorsements either were from interested parties or were grossly overstated.¹¹⁶ The FTC has proposed a cease and desist order requiring that the Phillips advertisements stop any endorsement unless the advertisers have good reason to believe that the "endorsements reflect the honest opinions, findings, beliefs, or experience of the endorser and contain no false or unsubstantiated representations."¹¹⁷ The orders also prohib-

112. *Id.* at 12.

113. *In re TV, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 22,827 (July 25, 1990).

114. *In re TV, Inc.*, No. 902-3037 (F.T.C. Jan. 23, 1989) (LEXIS, Trade library, FTC file).

115. *In re Wayne Phillips*, 5 Trade Reg. Rep. (CCH) ¶ 23,029 (July 31, 1991); *In re Money, Money, Money, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 22,847 (Oct. 2, 1990).

116. *In re Wayne Phillips*, No. DO9237 (F.T.C. Feb. 12, 1990) (LEXIS, Trade library, FTC file), at 3-5.

117. *In re Money, Money, Money, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 22,847 (Oct. 2,

it the defendants from making "any commercial that misrepresents that it is an independent program and not a paid commercial."¹¹⁸ Commercials over fifteen minutes long will be required to contain a disclosure identifying the program as a paid advertisement.¹¹⁹

C. *The Role of the Advertising Agency*

We have seen that advertisers can be liable in an FTC action for false or misleading statements made in an endorsement. Our next inquiry is about what standards of potential liability should be applied to other participants, such as the advertising agency and the endorser, when misleading claims are made for products or services. We will then explore whether a defense to liability is available when the advertising agency or endorser claims a lack of knowledge regarding the falsity of claims.

The advertiser, the endorser, and the advertising agency all want to avoid the allegations that an endorser's statements are deceptive and that the advertisements are misleading. The standard applied to endorsement veracity is found in the FTC Guides discussed above, which are clear in the requirement that, in matters other than taste and style, the endorser's reported experience has to be typical of what an average consumer would expect from a product, or any differences must be disclosed.¹²⁰ A stricter standard is applied to an expert endorser, who must conduct whatever verification would be appropriate to substantiate the type of factual statements that are made in the endorsement.¹²¹ In some cases this might mean careful study of data provided by the advertiser (if the research design appeared to be sound). In other cases, however, the expert might be required to perform a completely independent analysis of the product and the claims for the product. This need for inquiry is reminiscent of an analogous problem that is faced by advertising agencies who participate in advertising campaigns. The FTC in recent years has brought "deceptive practices" actions against advertising agencies and has required that they share liability with the advertiser/client under sections 5 and 12 of the FTC Act for false and deceptive claims made

1990).

118. *Id.*

119. *Id.* See also *In re Wayne Phillips*, 5 Trade Reg. Rep. (CCH) ¶ 23,029 (July 23, 1991).

120. See *supra* notes 28-39 and accompanying text.

121. See *supra* notes 40-60 and accompanying text.

in advertisements.¹²² The agency's liability is very similar to that of the endorser and provides some insight into whether the endorser has an independent duty of inquiry about the truthfulness of product claims.

At one time, an agency might have avoided liability for deceptive claims if it could show that it acted at all times at the direction and control of the client, and that final authority and responsibility for the advertisements rested with the client.¹²³ Those days are over, however, and the ad agency can now be the subject of an FTC enforcement action based on its part in creating and disseminating misleading claims about products. One of the most important cases in this area is *In re American Home Products Corp.*¹²⁴ American Home Products was the manufacturer of Anacin and Arthritis Pain Formula. Advertisements for these products implied that they contained analgesics that were superior to competitors' aspirin products. The superiority claim was found to be a misrepresentation, as was the failure to disclose the fact that aspirin was the primary analgesic in both products. A reasonable consumer could have gotten the impression from the advertisements that there was substantial scientific evidence to support the claims of superiority made for the two products. The FTC asserted that an advertising agency could be held liable if it was an active participant in the preparation of the advertisement, and if it knew or should have known that the advertisements were false and deceptive.¹²⁵ In response, the advertising agency argued that it had relied on a scientific study supplied by the client to substantiate the disputed claims and, therefore, it could not be held liable if the claims were false.¹²⁶ The FTC found that the agency's reliance was not reasonable because the study upon which it had relied was, on its face, inadequate to support the claims that were made in the advertisements in question. "An advertising agency may, of course, rely on a *reliable* study provided by its client to substantiate advertising claims. If a study is on its face defective, however, such reliance

122. See *infra* notes 124-36 and accompanying text.

123. See *In re Bristol-Myers Co.*, 46 F.T.C. 162, 176 (1949), *aff'd*, 185 F.2d 58 (4th Cir. 1950) (dismissing the complaint against the advertising agent based on an advertising campaign involving a misleading survey and other health claims for Ipana toothpaste because the advertising agent acted under the direction and control of its client, who had the final say on all decisions regarding the advertisement).

124. 98 F.T.C. 136 (1981), *aff'd and modified on other grounds*, 695 F.2d 681 (3d Cir. 1982).

125. *Id.* at 396.

126. *Id.* at 397.

cannot be considered reasonable."¹²⁷

Generally, however, an advertising agency, unlike an expert endorser, is not required to conduct its own independent tests to verify the data supplied by clients. Instead, it can rely on the client's evaluation of technical data for matters beyond the agency's usual expertise if the evaluation is not a "facially inadequate study."¹²⁸ The reasonable reliance test, which stresses the need to obtain a separate independent appraisal, is analogous to the FTC Guides' requirements for endorser liability that there be a reasonable basis for claims made, and that experiences be typical of what an average consumer could expect. The problem, of course, is that any determination of what is "reasonable" is a factual one to be decided on a case by case basis.¹²⁹

Actual knowledge of the falsity of an advertising claim may not be required in order to hold liable an endorser who participates in making false claims. Under sections 5 and 12 of the FTC Act, simply participating in false advertisements can create liability.¹³⁰ For example, in *Porter & Dietsch, Inc. v. FTC*,¹³¹ a drug store retailer allowed its name to be printed on cooperative advertisements, furnished by a manufacturer, that made false claims about a diet product. The court held that the weight reduction tablets advertisements were false and misleading because they contained statements from consumers that were not typical of the experiences of actual consumers. The retailer, Pay'n Save, was not permitted to rely on the line of older cases in which an agent could avoid liability if it acted under the direction and control of the advertiser.¹³² Instead, the court found that intent to deceive is not an element of a section 12 violation and good faith is not determinative of whether the advertising claims were deceptive and misleading.¹³³ The court considered Pay'n Save's "un-

127. *Id.* (emphasis in original).

128. *Id.* at 398.

129. See *Carter Prods., Inc. v. FTC*, 323 F.2d 523 (5th Cir. 1963); *In re Merck & Co.*, 69 F.T.C. 526, 559 (1966), *aff'd sub nom. Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921 (6th Cir. 1968) (stating that "[t]he agency, more so than its principal, should have known whether the advertisements had the capacity to mislead or deceive the public. This is an area in which the agency has expertise.>").

130. 15 U.S.C. § 52 (1988).

131. 605 F.2d 294 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1990).

132. *Id.* at 308-09. The court held that the issue of whether Pay'n Save should have known of the misrepresentation was irrelevant because section 15 (15 U.S.C. § 54 (1988)) imposes a strict liability standard on disseminators of false advertising. *Id.*

133. *Id.* at 309.

critical" participation in the advertising campaign to be a factor only in determining the extent of a remedy directed against it.¹³⁴

Under these cases and the Guides it would be unreasonable for a celebrity endorser or an advertising agency to make no inquiry about the truthfulness of claims made in the advertisements. In *In re ITT Continental Baking Company*,¹³⁵ the FTC placed an affirmative burden on the advertising agency to ascertain the status of scientific knowledge before making nutrition claims. In that case, Ted Bates & Co. developed an advertising campaign for Wonder Bread and Hostess Snack Cakes based on nutritional claims, many of which were exaggerated and untrue. Bates claimed it had no reason to know the claims were untrue, but no assertion was made that Bates had relied on third-party scientific tests. The FTC found that Bates "had a clear duty to assemble all of the facts bearing on the nutritional value of these products if it intended to use this product attribute as its central selling message."¹³⁶ The FTC held that "[u]nless advertising agencies were under a duty to make independent checks of information relied upon to frame their advertising claims, the law would be placing a premium on ignorance."¹³⁷ The FTC held the advertising agency to a high standard, requiring it to take responsibility for the claims that it made about the products. It was impermissible for the agency to make

sweeping absolute claims or ambiguous claims and later assert in defense to charges of misrepresentation that it had no reason to know that the state of scientific knowledge on which these claims rested would not support them in the form in which they were made in the advertisement [Bates] . . . had a clear duty in these circumstances to make certain that these advertisements did not have a capacity to deceive. It clearly violated this duty.¹³⁸

In cases where the substantiation for the claims is scientific or technical, the agency has a lower standard of inquiry. Clearly, the more scientific or technical the data, the less the agency must make an independent inquiry. To some extent, the agency is entitled to rely on a survey or data provided by the client that on its face appears to be

134. *Id.*

135. 83 F.T.C. 865 (1973).

136. *Id.* at 969.

137. *Id.* (citing *In re Dolcin*, 247 F.2d 524, 534 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 988 (1957)).

138. *Id.*

complete and accurate.¹³⁹ Advertising agencies are not "obligated to perform statistical or clinical analyses of their representations to determine the 'substantiality' of the question or its 'materiality.'"¹⁴⁰

In addition, there is another basis on which to find that an agency has engaged in a deceptive practice. An agency engages in deceptive practices if it is an active participant in the creation of a false impression based on correct information supplied by the client. A good example of creating a false impression arose in a case involving Sucrets.¹⁴¹ The ingredients in Sucrets killed certain bacteria in a laboratory dish, including strep, and a commercial campaign focused on this and other scientific facts.¹⁴² The problem, however, was that the product did not affect the causes of strep throat; strep throat is caused by an internal infection, not by superficial strep germs in the throat. Thus, the advertising agency misused correct scientific data to create a misleading impression and accordingly was found guilty of a deceptive practice under the FTC Act.

The Court of Appeals in *Standard Oil Co. v. FTC*¹⁴³ listed the factors showing involvement of the agency that can establish that the agency knew or should have known the advertising was false. These include most of the standard activities of advertising agencies, such as "the agency's role in writing and editing the text of the ad, its work in creating and designing the graphic or audio-visual material, its research and analysis of public opinions and attitudes, and its selection of the appropriate audience for the advertising message."¹⁴⁴ *Standard Oil* concerned television commercials that promoted a gasoline additive known as F-310 using "before" and "after" F-310 exhaust results. The FTC complaint focused on the fact that a very dirty engine had been purposely used to dramatize the test of exhaust fumes without that fact being disclosed. This is similar to the deception involved in using testimonials that are not typical of the results an ordinary consumer might expect. What is particularly striking about the *Standard Oil* case is that no allegations were made that the product was ineffective. In fact, F-310 did reduce some types of emissions.¹⁴⁵ However, "[t]he misrepresentations in the ads pertained

139. *In re Bristol-Myers Co.*, 102 F.T.C. 21, 265-66 (1983).

140. *Id.* at 310.

141. *In re Merck & Co.*, 69 F.T.C. 526 (1966), *aff'd sub nom. Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921 (6th Cir. 1968).

142. *Id.* at 548-49.

143. 577 F.2d 653 (9th Cir. 1978).

144. *Id.*

145. *Id.* at 656-57. In fact, the court stated that "[t]he FTC's charges that the product

to the extent of pollution reduction; they did not amount to a wholly false claim about an inferior product."¹⁴⁶ The advertising agency involved argued that it was entitled to rely on its elaborate system of safeguards, including independent laboratory tests and the independent tests run by Scott Carpenter, a former NASA astronaut and engineer who made an independent review of the technical reports on F-310 before agreeing to act as announcer on the advertisements. The court found that the agency's safeguards and procedures were relevant to the claim that it exercised diligence in investigating the accuracy of the advertisements. However, this diligence did not focus on the "accuracy of the *implicit* representations the ads conveyed to the viewing public."¹⁴⁷ The advertising agency was found liable because it participated in the creation of false impressions through the implicit representations in the commercials even though the explicit claims made were not false.

These cases represent a change from the original position taken by the FTC under which the advertising agency was not liable if it simply took information furnished by the client and created advertising copy from it.¹⁴⁸ The FTC has expanded the role of the advertising agency and made it another monitoring force to prevent false and misleading advertising from reaching the public. The more involved the agency is in the creation of the misleading advertisement, the more likely it is that liability will be found. The standard of care "increases in direct relation to the advertising agency's participation in the commercial project."¹⁴⁹ This is likely to be the same standard imposed on endorsers; that is, the greater their expertise and participation in the creation of the misleading impression, the higher the standard imposed on them.

III. PRIVATE RIGHTS OF ACTION

Most of the cases examined in which endorsements were alleged to be misleading were FTC enforcement actions. This section will now examine the absence of a private right of action under the FTC Act and will also examine non-FTC causes of action, especially state law claims against deceptive endorsement advertising. The FTC Act

did not reduce pollution were . . . wholly without merit." *Id.* at 657.

146. *Id.* at 663.

147. *Id.* at 660 (emphasis added).

148. See *In re Bristol-Myers Co.*, 46 F.T.C. 162 (1949).

149. *Standard Oil*, 577 F.2d at 659.

authorizes the FTC to proceed against offenders when such proceedings are in the public interest.¹⁵⁰ The FTC undertakes action only after a substantial number of complaints about a particular activity bring it to the FTC's attention,¹⁵¹ it then acts to restrain the activity or to impose other remedies to recompense the public rather than individuals.¹⁵² Although exclusive enforcement power for section 5 violations is vested in the FTC, many consumers and competitors have tried to bring private actions under the FTC Act. Nevertheless, the overwhelming majority of federal courts have refused to find an implied private right of action under the FTC Act.¹⁵³ A case that offers the most comprehensive analysis of the private right of action issue involved a class action suit against the manufacturer of the nonprescription analgesic called Excedrin.¹⁵⁴ In this case a group of consumers claimed to have been financially injured by the manufacturer's false and deceptive advertising representations that Excedrin was more effective than aspirin. The U.S. Court of Appeals for the District of Columbia Circuit went through a lengthy discussion of the FTC's role in the enforcement of the FTC Act and concluded that Congress had not intended to create a private right of action, but instead intended the FTC to have exclusive enforcement power against alleged deceptive acts and practices.¹⁵⁵ The court was particularly concerned about the problems that would result from piecemeal private litigation and uncoordinated enforcement of the FTC Act. The court was also impressed by the statutory scheme that centralized the FTC enforcement power and allowed it to act in an advisory capacity and to resolve controversies without resorting to litigation.¹⁵⁶

150. See *Holloway v. Bristol-Myers Co.*, 485 F.2d 986, 991 (D.C. Cir. 1973).

151. See A GUIDE TO THE FEDERAL TRADE COMMISSION, *supra* note 8, at 17 (stating that the FTC may bring an action as a result of specific letters, congressional inquiry, or articles on consumer or economic subjects).

152. *Id.*

153. See *Freedman v. Meldy's, Inc.*, 587 F. Supp. 658 (E.D. Pa. 1984) (holding that a franchisee could not bring an action under the FTC Act against a franchisor for violations of FTC disclosure requirements. This result occurred in spite of the FTC's intention to allow a private right of action to injured franchisees and the FTC's intention to encourage private enforcement of its franchise disclosure rules. The court found that the FTC rules alone could not provide an implied private right of action). See also *Carlson v. Coca-Cola Co.*, 483 F.2d 279 (9th Cir. 1973) (holding that individuals could not bring actions under the FTC Act against a company for a deceptive promotional game); *Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232 (2d Cir. 1974) (holding that a competitor does not have standing to sue for unfair advertising under the FTC Act).

154. *Holloway*, 485 F.2d 986.

155. *Id.* at 989.

156. For extensive discussions of the private right of action, see Note, *Implied Civil*

Because of FTC deregulation in the 1980's and the perceived weakening of consumer protection under the Deception Guidelines issued while James C. Miller was FTC Chairman, the FTC has been accused of being ineffective in redressing consumer deception.¹⁵⁷ The enforcement void has been filled to some extent by the states, which are beginning to take a closer look at all forms of advertising, particularly celebrity endorsements.¹⁵⁸

Remedies for Consumers Under the Federal Trade Commission Act, 54 B.U.L. REV. 758, 762 (1974); 1 S. KANWIT, FEDERAL TRADE COMMISSION § 1.07 (Regulatory Manual Series) (1979). The single case in which a court found an implied private right of action involved a circumstance in which the FTC was not adequately protecting consumers. In the case, the FTC had previously issued a cease and desist order against the defendant company, but had not taken action when the company violated the order. See *Guernsey v. Rich Plan of the Midwest*, 408 F. Supp. 582, 586 (N.D. Ind. 1976).

157. See Karns, *The Federal Trade Commission's Evolving Deception Policy*, 22 U. RICH. L. REV. 399 (1988) (analyzing the retreat from consumer protection). See also Report on the Role of the Federal Trade Commission [Extra Ed. No. 46] Trade Reg. Rep. (CCH) (Apr. 13, 1989) at 30-60. Since 1989, when Janet Stieger was appointed FTC chairperson, the FTC may have begun to pursue consumer complaints more aggressively. See Barrett & Sadler, *Two Regulatory Chiefs Stir Up Business: Under Stieger FTC Has Ended "No Go" Stance*, Wall St. J., May 16, 1991, at B1, col. 5.

158. State insurance regulators are extremely concerned about the problem of celebrity endorsements and have begun to regulate this type of advertising for health and life insurance products. In recent years, advertisements have appeared in which these products were endorsed by celebrities such as Dick Van Dyke, Art Linkletter, Betty White, Tennessee Ernie Ford, and Gavin MacLeod. Advertisements for life insurance or health insurance are often directed at the worst fears of the elderly and are often incomplete, if not outright deceptive or misleading. Many of the life insurance policies offer no benefits for considerably long periods of time or pay nothing after a certain age. In November, 1987, Florida's insurance commissioner filed administrative complaints against four insurance companies using celebrity spokespersons. The complaints also cited two additional advertisements with non-celebrity spokespersons. See *Fla. Files to Stop TV Celebrity Ads of Four Insurers*, Nat'l Underwriter - Life & Health/Fin. Servs. Ed., Nov. 23, 1987, at 1. In 1988, the Florida law was changed to require insurers to file any advertisements with the insurance department thirty days before they were to be aired or disseminated. In addition, paid spokespersons must be licensed as insurance agents under the Florida Insurance Code if they solicit or discuss policy benefits. FLA. ADMIN. CODE ANN. r. 4-6.008 (1989). In 1989, New Jersey adopted a similar rule through legislation, which requires compensated endorsers to be licensed under the insurance code. N.J. ADMIN. CODE tit. 11, § 2-11.6 (Supp. 1989). The statute also mandates that any testimonials in advertisements must be honest.

The National Association of Insurance Commissioners (NAIC) has adopted many model rules governing advertisements for Medicare supplemental insurance, accident and sickness insurance, and life insurance. The new rules for Medicare supplemental insurance were adopted in December, 1987. See Freedman, *Celebrity Endorsements: Must the Show Go On?*, BEST'S REV. LIFE/HEALTH INS. ED., June 1988, at 40. They required, among other things, that the phrase "paid endorsement" be used in celebrity spokespersons' advertisements. There are also many specific rules that prohibit describing the policy in certain ways or omitting to state certain basic provisions of the policies. In addition, and in keeping with the FTC Guides, the "testimonials and endorsements used in advertisements must be genuine, rep-

A. State Regulation and Consumer Remedies

Although precluded from private actions under the FTC Act, injured consumers have the right to damages under many state unfair and deceptive acts and practices (UDAP) statutes. Most states have adopted UDAP statutes modeled after the Federal Trade Commission Act, often called "Little FTC" Acts, and these states generally rely on the FTC interpretations and cases for definitional matters.¹⁵⁹ In fact, many statutes include directives to construe the state law using the FTC and federal court interpretation of the FTC Act as guidance.¹⁶⁰ A few states have adopted UDAP statutes based on the Uniform Consumer Sales Practices Act, which forbids deceptive and unconscionable practices in consumer transactions. In other states, UDAP statutes are based on the Uniform Deceptive Trade Practices Act. Although the Uniform Deceptive Trade Practices Act gives remedies to businesses when competitors use deceptive practices to gain customers, it has also been applied to consumer cases. The remaining states have adopted common law remedies and have enacted consumer fraud statutes that prohibit deception, fraud, false pretense, misrepresentation, knowing concealment and suppression of material facts. Some of these types of statutes also prohibit unfair or unconscionable acts.¹⁶¹

The vast majority of state statutes expressly provide consumers with a private right of action, or such a right may be implied under the UDAP statute.¹⁶² Under the state UDAP statutes, consumers generally have several forms of relief available, including injunctions,

resent the current opinion of the author, be applicable to the policy advertised, and be accurately reproduced." *Id.* at 40. According to Ms. Freedman's article, the first draft of the model rule would have done away with celebrity endorsements altogether, but this was viewed as raising potential first amendment free speech problems. See also Landes, *Senior Citizens' Complaints Stir N.Y. Medigap Changes*, Nat'l Underwriter Life & Health/Fin. Servs. ed., July 10, 1989, at 4.

159. This category of statutes is broken down further into three alternative legislative schemes. In the most common of these schemes, the state law is modeled after the FTC Act and prohibits unfair methods of competition and unfair or deceptive acts or practices. A second alternative prohibits unfair and deceptive acts and also enumerates prohibited practices that are considered to be unfair, including selling altered or used goods as new, disparagement, using bait and switch advertising, deceptive pricing and any other practice that is unfair or deceptive. A third alternative prohibits false, misleading or deceptive practices. See J. SHELDON, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 3.4.1.2.1 (Consumer Credit and Sales Legal Practice Series) (2d ed. 1988 and Supp. 1989) [hereinafter J. SHELDON].

160. K. PLEVAN & M. SIROKY, ADVERTISING COMPLIANCE HANDBOOK 293-94 (1991)

161. J. SHELDON, *supra* note 159, §§ 3.4.1.2.2-3.4.1.2.4.

162. K. PLEVAN & M. SIROKY, *supra* note 160, at 290.

ally have several forms of relief available, including injunctions, damages and attorney's fees. Some UDAP statutes go so far as to allow compensatory and punitive damages or even double or treble damages in certain cases; many also authorize class actions.¹⁶³ Generally, the existence of a UDAP statute does not preclude common law actions in fraud, deceit, or misrepresentation,¹⁶⁴ but because the common law remedies are more difficult to prove, actions are generally brought under UDAP statutes.

A good example of the use of a UDAP statute by disgruntled consumers is a series of recent cases involving two celebrity endorsers, Lloyd Bridges and George Hamilton.¹⁶⁵ In these cases, the celebrity endorsers, the attorneys, the accountants and the advertising agency who were involved with a mortgage broker and an investment company that went bankrupt in 1986 were all sued by small investors who lost a great deal of money. The consumer plaintiffs went after these deep-pocket defendants in part because of the advertising sponsors' bankruptcy. Numerous suits were brought, all of which involved the same basic allegations; however, the most interesting suits involved actor Lloyd Bridges, who played Mike Nelson on the old TV show "Sea Hunt," and who has starred in many movies. Bridges made a series of advertisements for the investment firm of A.J. Obie and Associates in which he urged investors to invest in securities issued by Obie and secured by mortgages obtained by its affiliated lender Diamond Mortgage Company. It was alleged that Bridges and others violated the state UDAP statute by misrepresenting the risks and returns associated with the Obie/Diamond investment scheme by misrepresenting the integrity of the companies, by misrepresenting the investment as a conservative one, by misrepresenting Diamond as a "corporation you could count on," by misrepresenting that the investments were backed by mortgages, and by endorsing a fraudulent scheme.¹⁶⁶ In theory, Diamond Mortgage Company was

163. *Id.* at 291-93.

164. J. SHELDON, *supra* note 159, § 9.4 (citing *Wildstein v. Tru Motors, Inc.*, 227 N.J. Super. 331, 547 A.2d 340 (N.J. Super. Ct. Law Div. 1988)).

165. Several other celebrity suits were dismissed, including *Diamond Mortgage Corp. v. Puglisi*; *Abdullah v. Commerce Mortgage Corp.*; *Alex v. Bridges*; and *Nicholson v. Hamilton* (all cited in *In re Diamond Mortgage Corp.*, 105 Bankr. 876, 878 n.3 (N.D. Ill. 1989)). Other suits were settled, including *Ramson v. Layne*, 668 F. Supp. 1162 (N.D. Ill. 1987); *Aramowicz v. Bridges*, 118 Bankr. 575 (N.D. Ill. 1989); *Ritter v. Hamilton* (cited in *In re Diamond Mortgage Corp.*, 105 Bankr. at 878 n.3); *In re Diamond Mortgage Corp.*, 105 Bankr. at 878 & n.3.

166. *Ramson*, 668 F. Supp. at 1164.

supposed to have obtained secured loans and mortgages from high risk borrowers, who paid high rates of interest because they were unable to obtain financing elsewhere. Obie raised the capital from private investors and matched investor advances to Diamond mortgages which were the collateral and the source of repayment for an Obie investment. In fact, however, the investor's money paid off other investors or was pocketed by the principals in Obie/Diamond in what the bankruptcy court in a related case called a "classic Ponzi scheme."¹⁶⁷

Several investors sued Mr. Bridges and others for damages under the Illinois Consumer Protection Act, alleging violations of section 262, which declares unlawful any

[u]nfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression, omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact.¹⁶⁸

The primary defense raised was that the celebrity endorser made no knowing misrepresentations and was as much deceived by the Obie/Diamond principals as were the consumers. This defense was rejected by the court, which found that even innocent misrepresentations are actionable.

Under the statute, state of mind is immaterial, and a defendant need not be motivated by an intent to deceive Even innocent misrepresentations may be actionable By its own terms, the statute requires only that a violator intend for a purchaser to *rely* on his acts or omissions. A party is considered to intend the necessary consequences of his own acts or conduct.¹⁶⁹

The reliance necessary to state a claim is inferred from the fact that the advertising message was intended to influence consumer behavior. The defendant had suggested that the FTC Act (and, by implication, any UDAP Act upon which it is based) requires knowledge of the

167. *In re Diamond Mortgage Corp.*, 105 Bankr. at 878.

168. *Ramson*, 668 F. Supp. at 1164-65 (quoting Illinois Consumer Fraud and Deceptive Practices Act, ILL. REV. STAT. ch. 121½, para. 262).

169. *Id.* at 1170 (quoting *Warren v. LeMay*, 142 Ill. App. 3d 550, 556, 491 N.E.2d 464, 474 (1986) (emphasis in original)).

falsity of the representations in order to impose liability on the endorser. In fact, in *Ramson v. Layne*, the court referred to a 1980 consent order that established that the "endorser would not violate the order if he had neither actual nor constructive knowledge of the falsity of the representations made."¹⁷⁰ The court was reluctant to find that the FTC had promulgated a "knowing" deception requirement when such an "interpretation" appeared only in a consent decree rather than an adjudication.¹⁷¹ In any event, it may not be necessary to decide whether an unknowing misrepresentation is actionable based on this case. "Scienter" or guilty knowledge can be established by proving that a reasonable inquiry would have established the truth or falsity of a particular statement. There is much case law to indicate that intentionally "not knowing" something is not a defense to the charge that the statements were untrue.¹⁷² In this case, the record shows that the principals of Obie/Diamond had been charged with numerous securities law violations in neighboring states for similar schemes.¹⁷³ Apparently, Bridges had made no inquiry that would have disclosed this information. In another case arising out of the same factual circumstances, the celebrity, Bridges again defended himself by asserting that he had no knowledge of the falsity of the representation and could not, therefore, be held liable.¹⁷⁴ The bankruptcy court in *Aramowicz v. Bridges*¹⁷⁵ held that the celebrity endorsers and the advertising agencies that had created the campaign had a "duty to independently determine whether their own statements [were] true," however innocently such statements were made.¹⁷⁶ Both cases against Bridges were settled for undisclosed amounts without an admission of liability by Mr. Bridges.¹⁷⁷

170. *Id.* (citing 95 F.T.C. at 253).

171. *Ramson*, 668 F. Supp. at 1170.

172. *See, e.g., Clark v. Haggard*, 141 Conn. 668, 109 A.2d 358 (1954).

In matters susceptible of actual knowledge, if the party who has and is known to have the best means of knowledge, makes an affirmation contrary to the truth, in order to secure some benefit to himself, the law treats him as stating that he knows that where of he affirms, and so as guilty of a fraud, although he spoke in ignorance of the facts; because he asserts that he knows what he does not know.

Id. at 672, 109 A.2d at 361 (quoting *Scholfield Gear & Pulley Co. v. Scholfield*, 71 Conn. 1, 19, 40 A. 1046, 1051 (1898)). *See also Pumphrey v. Quillen*, 165 Ohio St. 343, 135 N.E.2d 328, 329-31 (1956); *Mayfield Motor Co. v. Parker*, 222 Miss. 152, 75 So. 2d 435, 437 (1954).

173. *Ramson*, 668 F. Supp. at 1164.

174. Sanborn, *Caveat Endorser*, NAT'L L. J., Feb. 19, 1990, at 6.

175. 118 Bankr. 575 (N.D. Ill. 1989).

176. Sanborn, *supra* note 174, at 6.

177. Bridges' lawyer Jacqueline A. Criswell said, "[t]he case indicates that celebrities and

Beyond the state UDAP statutes, which establish claims resembling common law actions in fraud and deceit, there are also several tort theories that may impose liability upon an endorser.¹⁷⁸ To establish a claim of tortious misrepresentation or deceit, a plaintiff must show that the defendant made a false representation of a material fact, that the defendant knew or believed that the representation was false or had insufficient information from which to infer its truth, that the defendant intentionally induced the plaintiff to rely upon the misrepresentation, that the plaintiff justifiably relied on the misrepresentation, and that the plaintiff was damaged as a result of his or her reliance.¹⁷⁹ Numerous law review articles explain these factors.¹⁸⁰ This article compares a common law deceit claim with the FTC Act and the state UDAP statutes.

The elements of common law deceit differ from the state and federal statutes that prohibit unfair or deceptive practices, and are more difficult to prove. The primary differences are that common law requires proof of scienter, intent to deceive, and justifiable reliance. The FTC Act and most state UDAP statutes do not require a finding either of scienter or of intent to induce reliance. In the usual case, one presumes celebrity endorsers would not purposefully risk damage to their reputations by knowingly making false representations in

advertising agencies could be held accountable for even innocent representations in advertising under state consumer fraud statutes." *Id.*

178. For example, under section 324A of the *Restatement of Torts*, liability exists for physical injury resulting to third persons from "[n]egligent performance of an undertaking" necessary for the protection of that third person. RESTATEMENT (SECOND) OF TORTS § 324A (1965). The Underwriters Laboratory (UL) was found liable under this theory when injuries resulted from an exploding fire extinguisher that UL had endorsed with its seal of approval. *Hempstead v. General Fire Extinguisher Corp.*, 269 F. Supp. 109 (D. Del. 1967). Section 324A liability is likely to be limited in application, however, because the provision only compensates for physical harm and would apply only to claims wherein the statement at issue was made for the protection of a third person.

179. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS, § 105, at 728 (5th ed. 1984) [hereinafter PROSSER & KEETON]. The representation need not be literally false. Ambiguous statements are also considered false representations if they are reasonably capable of having both a true and a false meaning and the false meaning is intended or known to be accepted. Statements that are literally true but that would create false impressions in the mind of the consumer are also considered to be misrepresentations. Furthermore, words or acts that create false impressions covering up the truth are considered false representations. *Id.* §106, at 736. See also Bailey & Pertschuk, *supra* note 97, at 877-78.

180. See, e.g., Burger, *Negligent Misrepresentation: A New Trap for the Unwary?*, 27 LOY. L. REV. 1184 (1981); Prosser, *Misrepresentation and Third Persons*, 19 VAND. L. REV. 231 (1966); Weisiger, *Bases of Liability for Misrepresentation*, 24 U. ILL. L. REV. 866 (1930).

advertisements. However, if the celebrity makes representations with conscious ignorance of the facts, or otherwise recklessly disregards the falsity of a representation, scienter will be found.¹⁸¹ Even those state statutes that have an intent requirement construe the requirement narrowly.¹⁸² Nonetheless, a celebrity endorser could hardly argue that he or she did not intend to induce consumers to purchase a product since that is the purpose of doing the endorsement.

Common law actions also differ from state and federal law actions in the requirement of proof that plaintiff justifiably relied on the defendant's representations. This is a troublesome element under common law, but is less problematic in the context of the FTC Act and state UDAP statutes. At common law there are two aspects to this element: the plaintiff must be justified in believing that the representation is true, and he or she must be justified in relying on that representation to make a decision.¹⁸³ At common law, however, a party may not rely on a statement of opinion as a representation of fact and, as previously noted, only a misrepresentation of fact gives rise to liability. Since endorsements purport to be the opinion of the endorser (and must be so according to FTC Endorsement Guides), a consumer may never be justified in relying on the endorsement to make a decision. The courts, however, have developed exceptions to this rule: a person may rely on a statement of opinion when the statement carries with it an implied assertion that the speaker knows of nothing that would preclude the opinion, and that he or she knows facts that would justify it. Such an assertion is implied when the speaker is understood to have "special knowledge of the matter which is not available to the plaintiff."¹⁸⁴ One can argue that consumers expect that advertising endorsers are not lying and that they know more about the product or service about which they are expressing an opinion than does the consumer.¹⁸⁵

The UDAP statutes approach the issue of actual reliance several

181. See *supra* note 172 and accompanying text.

182. J. SHELDON, *supra* note 159, § 4.2.4. See also *Thomas v. Sun Furniture & Appliance Co.*, 61 Ohio App. 2d 78, 81-82, 399 N.E.2d 567, 570 (1978) ("[t]o require proof of intent would effectively emasculate the act and contradict its fundamental purpose.").

183. PROSSER & KEETON, *supra* note 179, § 108, at 753.

184. *Id.* § 109, at 760-61.

185. On the other hand, one could argue that reliance on a celebrity or an expert opinion is not reasonable or justifiable when there is no obvious connection between the product or service and the endorser's area of expertise or celebrity. See, e.g., Note, *Liability of Advertising Endorsers to Third Parties for Negligent Misrepresentation*, 31 OHIO ST. L.J. 571, 578 (1970).

ways: under some statutes it is not required; under others it may be an element of proof; and still others define the standard as whether a reasonable person would have relied upon the representation.¹⁸⁶ As noted in the discussion of the Miller majority *FTC Policy Statement on Deceptive Practices*, the consumer must be acting reasonably under the circumstances to satisfy the FTC standard. The FTC Act was intended to make it easier to prove that deception had occurred than under common law. As under the common law, the FTC standard of reasonableness is based on an average person test.¹⁸⁷ Of course, if the representation is aimed at a particular group, reasonableness must be determined from the perspective of that group. In this regard, one specific group that must be considered differently from the average person is children.¹⁸⁸ Under the prior FTC standard, the test was whether the representation had a "tendency to mislead even a minority of consumers."¹⁸⁹ Many states follow this older standard, considering whether the "ignorant, the unthinking, the credulous, and the least sophisticated consumer would be deceived."¹⁹⁰ Accordingly, an advertisement that might not be deceptive to the average consumer may, nevertheless, still be deceptive to certain consumers.¹⁹¹ Either of these two FTC standards presents an easier burden to overcome than does the justifiable reliance component of common law deceit.

All the elements of common law misrepresentation or deceit may be more difficult to prove than the less stringent tests applied under UDAP statutes that tend to follow one of the more lenient FTC deception standards.¹⁹² In addition, the UDAP statutes usually require

186. J. SHELDON, *supra* note 159, § 4.2.12.2.

187. Reliance is justifiable at common law if the representation relates to a matter about which a reasonable person would attach importance in determining a choice of action. See RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (1977).

188. See Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 11 (1974); Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 998. See also Charren, *Children's Advertising: Whose Hand Rocks the Cradle?*, 56 U. CIN. L. REV. 1251 (1988). Of particular concern is the fact that very young children cannot distinguish commercials from regular programs. Under the recently enacted Children's Television Act, the Federal Communications Commission has been charged with the responsibility of studying and reporting to Congress on children's cartoons that are based on pre-existing toys. Opponents of these cartoons call them "program-length" commercials and criticize them as deceptive because they are targeted at the naivety of children.

189. J. SHELDON, *supra* note 159, § 4.2.11.2.

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

191. J. SHELDON, *supra* note 159, § 4.2.11.1.

192. "The purpose of our Consumer Fraud Act is to protect consumers by adding a 'claim for relief that is easier to establish than is common law fraud. To require the higher degree of proof would frustrate the legislative intent.'" Poulin v. Ford Motor Co., 513 A.2d

merely a preponderance of evidence as the burden of proof.¹⁹³ While common law misrepresentation or deceit claims are more difficult to assert than are state UDAP claims, they are still asserted in cases that fall outside the UDAP statutes' scope and in those in which punitive damages are sought because only a few UDAP statutes authorize punitive damages.¹⁹⁴ In New Jersey, for example, the UDAP statute does not preempt a common law misrepresentation claim and, thus, the claims may be brought concurrently.¹⁹⁵ Since the elements of common law deceit are more stringent than are the elements of statutory unfair acts or practices, if a court finds for the plaintiff/consumer on the common law claim, the court must then, as a matter of law, find for the consumer on the UDAP violation claim as well.

The possibility of non-UDAP tort liability for celebrity endorsers has often been the subject of academic speculation and publication.¹⁹⁶ Nonetheless, only one case, *Kramer v. Unitas*,¹⁹⁷ has been brought in the past ten years based upon such a theory, and it failed. Johnny Unitas, a former football quarterback for the Baltimore Colts, appeared in an advertising campaign by First Fidelity, a licensed mortgage/investor broker. Unitas became First Fidelity's spokesman and in radio spots reminded his audience of his athletic reputation and introduced "friends at First Fidelity."¹⁹⁸ A First Fidelity representative would then announce the details of the investment, including its high yield, insurance, and the "fact" that it met "all prudent man requirements."¹⁹⁹ Unitas would then close by inviting the public to call First Fidelity for more information.²⁰⁰

Neither Unitas nor his agent ever investigated the soundness of First Fidelity or of its investment offerings. The "investment" turned out to be a fraudulent scheme in which worthless paper was issued to

1168, 1172 (Vt. 1986) (quoting *Dunlop v. Jimmy GMC, Inc.*, 136 Ariz. 338, 343, 666 P.2d 83, 89 (Ariz. Ct. App. 1983)).

193. J. SHELDON, *supra* note 159, § 4.2.2. See also *Poulin*, 513 A.2d at 1168.

194. J. SHELDON, *supra* note 159, § 9.4.

195. *Id.* § 9.4 (citing *Wildstein v. Tru Motors, Inc.*, 227 N.J. Super. 331, 547 A.2d 340 (N.J. Super. Ct. Law Div. 1988)).

196. See, e.g., Carlin, *Liability of the Product Endorser - Developing A New Perspective*, 15 N.Y.L.F. 835 (1969); Bentofsky, *Private Judicial Remedies for False and Misleading Advertising*, 25 SYRACUSE L. REV. 747 (1974).

197. 831 F.2d 994 (11th Cir. 1987).

198. *Id.* at 995.

199. *Id.* at 995-96.

200. *Id.* at 996.

investors. The company filed for bankruptcy, and the investors lost practically all of their money. The plaintiff then sued Unitas and his agent for common law fraud, among other things. Both the lower court and the Eleventh Circuit Court of Appeals, applying Florida law under diversity jurisdiction, granted Unitas' motion for summary judgment because the plaintiffs had not made out a prima facie case of fraud.²⁰¹ The lower court found that the un rebutted fact was that Unitas did not make any representation upon which the plaintiffs relied and thus no actionable fraud claim could be made against him.²⁰² Additionally, the Eleventh Circuit held that the plaintiffs failed to surmount "one elementary hurdle: neither [the agent] nor Unitas made *any* false representations regarding First Federal's [sic] investment offerings."²⁰³ Instead the court found that Unitas participated in the radio spots and asked people to call for more information.²⁰⁴ Under Florida law, all of the following elements must be proven in a fraud action: "a false representation of material fact, with knowledge of the representation's falsity or a negligent representation without a reasonable basis; intent to induce reliant action; and damage resulting from justifiable reliance."²⁰⁵ Here, the court made the determination that, as a matter of fact, the agent and Unitas did not endorse First Fidelity. "Rather, Unitas merely introduced the company and suggested that the audience call and investigate for themselves."²⁰⁶ The court held that at most Unitas' statements were sales talk or puffing, which alone do not constitute fraud. The request that people make further inquiries was not a material representation upon which the plaintiffs could justifiably rely. The result might have been different had this been a FTC enforcement action because under the FTC Guides, discussed above, the celebrity is an endorser if he is known to the audience and implicitly endorses a product. Under the Guides, the actual words used are less important to an endorsement than the fact that the celebrity attached his reputation or persona to the product.²⁰⁷

201. *Id.* at 996-99.

202. *Id.* at 997.

203. *Id.* at 998 (emphasis in original).

204. *Id.* There was no evidence in the case that Unitas knew or approved of newspaper advertisements and brochures that also contained no representations by Unitas.

205. *Id.* (citing *Cameron v. Outdoor Resorts of America, Inc.*, 608 F.2d 187, 195 (5th Cir. 1979), modified on reh'g, 611 F.2d 105 (5th Cir. 1980)).

206. *Id.*

207. See Guides, *supra* note 17, § 255.0(b).

B. Negligence and Publisher's Liability

The "endorser" who lends persona to a product with the intention of influencing the consumer to purchase the product may be liable for deceptive claims made about the product. An advertising agency can also be liable for its participation in creating a deceptive advertising campaign if, for example, it failed to fully investigate claims made for advertised products. One can ask whether that liability extends to the medium in which the advertisement appears because its acceptance of the advertisement might be taken by a consumer to be an endorsement. The answer is that there is generally no endorser liability for merely publishing an advertisement. However, some tort actions, usually negligence, have nonetheless been brought against the media by injured consumers.²⁰⁸

There are cases in which the injured party tried to argue that the publisher had a duty to do something more than simply publish the advertisement.²⁰⁹ In *Yugas v. Mudge*,²¹⁰ the publisher of *Popular Mechanics* magazine was sued by a consumer who was injured by a fireworks product purchased through paid advertising in the magazine. The plaintiff argued that the magazine was a pseudo-scientific publication that had acquired an "aura of authentativeness" [sic] in the public's eye and thus it owed the reading public a duty to investigate and test inherently dangerous products advertised in its publication.²¹¹ The New Jersey Superior Court held that no such legal duty exists *unless* the publisher undertakes to "guarantee, warrant or endorse" the product.²¹² The court held that it would be impractical and unrealistic and "would have a staggering adverse effect on the commercial world and our economic system" if such a legal duty were imposed.²¹³

A similar result was reached in *Pittman v. Dow Jones & Co.*²¹⁴ On a motion for summary judgment, the United States District Court dismissed the complaint by newspaper readers who had invested in an

208. See *infra* notes 209-42 and accompanying text.

209. See, e.g., *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (Cal. Ct. App. 1969) (holding that the publisher owed consumers a duty of ordinary care in the issuance of endorsements of products).

210. 129 N.J. Super. 207, 322 A.2d 824 (N.J. Super. Ct. App. Div. 1974).

211. *Id.* at 209, 322 A.2d at 825.

212. *Id.*

213. *Id.* at 209-10, 322 A.2d at 825.

214. 662 F. Supp. 921 (E.D. La. 1987).

unstable Texas financial institution pursuant to advertisements in the *Wall Street Journal*. There were no allegations that the *Wall Street Journal* was aware of the falsity of the statements made in the advertisements. The court held that "a newspaper has no duty, whether by way of tort or contract, to investigate the accuracy of advertisements placed with it which are directed to the general public, unless the newspaper undertakes to guarantee the soundness of the products advertised."²¹⁵ The effect of a contrary holding would be to discourage the publication of advertisements containing valuable information that enables people to make informed choices. "Quite simply, [the] courts have placed more value on the societal benefits of information availability than on the rights of private persons who claim to have been harmed."²¹⁶ There is simply no duty in tort for a newspaper publisher to investigate every advertiser or the correctness of its advertisements even though, for example, the *Wall Street Journal* is a publication that is arguably held in "high esteem" and "whose very stature lends credibility to the advertisements themselves."²¹⁷ Of course, if the publisher of an advertisement that contains false or misleading information publishes material maliciously, or with intent to harm another, or with reckless disregard of the consequences, then that misrepresentation is actionable.²¹⁸

The courts have also addressed the issue of whether the publisher, simply by undertaking to publish the ad, acts in reckless disregard of the consequences and becomes a type of guarantor. *Eimann v. Soldier of Fortune Magazine*²¹⁹ is a case that sets out the standard of care required by a publisher who accepts advertising. *Soldier of Fortune* magazine accepted classified advertisements for mercenaries

215. *Id.* at 922.

216. *Id.*

217. *Id.* at 923.

218. *See, e.g., Goldstein v. Garlick*, 65 Misc. 2d 538, 318 N.Y.S.2d 370 (N.Y. Sup. Ct. 1971) (granting summary judgment to the defendants in a suit by a funeral parlor alleging that newspapers were liable for publishing obviously misleading and false advertisements). *See also Blinick v. Long Island Daily Press Publishing Co.*, 67 Misc. 2d 254, 323 N.Y.S.2d 853 (N.Y. Civ. Ct. 1971), *appeal dismissed*, 71 Misc. 2d 986, 337 N.Y.S.2d 859 (N.Y. Sup. Ct. 1972) (holding that a newspaper was not permitted to rely on an advertiser's submission, and that the newspaper was thus liable when the advertisement mistakenly printed the plaintiff's telephone number). *But see Daniel v. Dow Jones & Co.*, 137 Misc. 2d 94, 520 N.Y.S.2d 334 (N.Y. Civ. Ct. 1987) (holding that a publisher was not liable when an investor relied on misinformation in a computer news service data base).

219. 680 F. Supp. 863 (S.D. Tex. 1988), *rev'd*, 880 F.2d 830 (5th Cir. 1989). In this case, the district court denied a summary judgment motion, and subsequently a jury verdict was entered. The Fifth Circuit overturned the jury verdict. 880 F.2d 830 (5th Cir. 1989).

and others. When one such advertisement led a reader to hire a hit man to kill his wife, the lower court awarded a judgment of 9.4 million dollars against *Soldier of Fortune* magazine for negligence in publishing the advertisement.²²⁰ The Fifth Circuit overturned that judgment.²²¹ The advertisement in *Eimann* was ambiguous on its face and simply indicated that an ex-Marine Vietnam veteran would accept "high risk assignments [in the] U.S. or overseas."²²² The victim's husband (who was subsequently prosecuted for murder) had contacted the advertiser and hired him to kill the victim. Although the case has many interesting first amendment problems, it was presented by the court as a straightforward negligence action revolving around the primary issue of whether *Soldier of Fortune* knew or should have known that the advertisement was an offer to perform illegal acts. The court analyzed negligence liability in terms of the classic requirements: the existence of a duty, a breach of that duty and an injury proximately caused by the breach.²²³

Duty basically requires that a person conform to a legally enforceable standard of conduct.²²⁴ The courts require that the probability and gravity of the threatened harm be contrasted with the burden of preventing that harm.²²⁵ The question in *Eimann* was whether *Soldier of Fortune* was required to investigate its advertisers for accuracy and whether the magazine could reasonably be required to recognize that an ambiguous advertisement was an offer to engage in illegal activity. The court refused to impose such a heavy burden on the advertising publisher. Although there was an extremely grave possibility of harm, it was not outweighed by the onerous burden that the

220. *Eimann*, 880 F.2d at 833.

221. *Id.* at 838. This is to be contrasted with the holding in *Norwood v. Soldier of Fortune Magazine*, 651 F. Supp. 1397 (W.D. Ark. 1987). Mr. Norwood brought a case against *Soldier of Fortune* magazine because of physical injuries suffered when individuals were hired to murder him as a result of advertisements that appeared in *Soldier of Fortune*. The District Court for the Western District of Arkansas held that *Soldier of Fortune* magazine did not have absolute first amendment protection against liability for injury that might occur as a result of advertisements in the magazine. *Id.* at 1398-1400. The court further concluded that genuine issues of material fact existed as to whether the injuries allegedly suffered were foreseeable consequences of the "gun-for-hire" advertisements, and denied summary judgment for the corporation. *Id.* at 1402. See also *Braun v. Soldier of Fortune Magazine*, 757 F. Supp. 1325 (M.D. Ala. 1991) (jury awarded \$12.4 million verdict against *Soldier of Fortune*, blaming a gun-for-hire advertisement for an arranged murder).

222. *Eimann*, 880 F.2d at 831.

223. *Id.* at 834.

224. See, e.g., PROSSER & KEETON, *supra* note 179, § 53, at 356.

225. *Eimann*, 880 F.2d at 835.

plaintiff sought to place on the publisher.²²⁶ The court held that publishers were not obligated "to reject all ambiguous advertisements for products or services that might pose a threat of harm."²²⁷ This conclusion is consistent with the decision of the court in *Pittman*.²²⁸ It is also consistent with the decision in *Walters v. Seventeen Magazine*,²²⁹ a California case in which the publisher of *Seventeen* magazine was not held liable in tort to a minor who contracted toxic shock syndrome after using Playtex tampons, which were advertised in *Seventeen* magazine. The advertisement was adjacent to an article about menstruation, which the plaintiff claimed acted as an endorsement. The California Court of Appeal in the *Walters* case said that it was reluctant to "create a new tort of negligently failing to investigate the safety of an advertised product" that would impose on publishers a requirement to scrutinize and test all advertised products.²³⁰ The court basically weighed the cost of insurance and maintaining staffs for scrutinizing and testing products with the efficacy of allowing the advertisements to be published.

Liability can be imposed, however, where the publisher specifically undertakes to endorse the product that is advertised. Thus, liability may ensue to a publisher in its capacity as an endorser.²³¹ In *Hanberry v. Hearst*,²³² Hearst published the monthly magazine *Good Housekeeping* and permitted its advertisers to attach the "Good Housekeeping Consumer's Guaranty Seal" to their products. The seal included a certification that the products and services advertised "are good ones" and that the advertising claims made are "truthful."²³³ Hearst was sued by a plaintiff who was injured in a fall caused by a pair of shoes that were allegedly defective in manufacture and design. Plaintiff stated that she relied on the Good Housekeeping Seal in

226. For example, there are many cases in which courts have rejected efforts to hold handgun manufacturers liable, in either negligence or strict liability, to gunshot victims injured during crimes "despite the real possibility that such products can be used for criminal purposes." *Id.* at 837. *See, e.g.,* *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1275 (5th Cir. 1985); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 775 (D.N.M. 1987); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530, 536 (S.D. Ohio 1987).

227. *Eimann*, 880 F.2d at 838.

228. *Pittman v. Dow Jones & Co.*, 662 F. Supp. 921 (E.D. La. 1987).

229. 195 Cal. App. 3d 1119, 241 Cal. Rptr. 101 (Cal. Ct. App. 1987).

230. *Id.* at 1122, 241 Cal. Rptr. at 103.

231. *See, e.g.,* *Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (Cal. Ct. App. 1969).

232. *Id.*

233. *Id.* at 682, 81 Cal. Rptr. at 521.

making her decision to purchase. The issue before the court on appeal was

whether one who endorses a product for his own economic gain, and for the purpose of encouraging and inducing the public to buy it, may be liable to a purchaser who, relying on the endorsement, buys the product and is injured because it is defective and not as represented in the endorsement.²³⁴

The court concluded that such liability may exist and that a cause of action existed. The California Court of Appeal took the position that the Good Housekeeping Seal implied that reasonable steps had been taken to investigate independently the product endorsed, and also that the Good Housekeeping Seal itself represented to the public that that Hearst Corporation possessed superior knowledge and special information concerning the endorsed product.²³⁵ This superior knowledge or special information may be the basis for liability for negligent misrepresentation of either fact or opinion.²³⁶

The court in *Hanberry* relied on a negligence theory for imposing liability because the magazine voluntarily "loaned its reputation to promote and induce the sale of a given product."²³⁷ Further, the seal enhanced the advertising value of *Good Housekeeping* magazine because the seal and certification "tend to induce and encourage consumers to purchase products advertised."²³⁸ The magazine therefore had a duty to use "ordinary care" in the issuance of the seal in order to protect members of the public who reasonably relied on the endorsements. The duty arises out of the voluntarily assumed relationship rather than privity of contract.²³⁹ The court further rejected the

234. *Id.* at 682-83, 81 Cal. Rptr. at 521.

235. *Id.* at 684, 81 Cal. Rptr. at 522.

236. PROSSER & KEETON, *supra* note 179, § 109, at 760-61.

237. *Hanberry*, 276 Cal. App. 2d at 684, 81 Cal. Rptr. at 522.

238. *Id.*

239. *Id.* at 684-85, 81 Cal. Rptr. at 523. The other allegation made in *Hanberry* was that whatever inspection was made of the shoes was done in a careless and negligent manner. If, in fact, the tests were not done or the seal was given without inspection even though there was a representation to the public that *Good Housekeeping* possessed superior knowledge and special information concerning the product, the Court held that representation under those circumstances would, for those reasons, be negligent.

Although the consumer stated a cause of action for negligent misrepresentation, the court rejected her contractual warranty and strict liability in tort claims. Warranty protection would have been limited to replacement of the shoes or refund of the purchase price, a remedy the court assumed would not interest the plaintiff. There were no grounds supporting the contention that strict liability in tort was applicable. *Id.* at 687, 81 Cal. Rptr. at 524.

argument that the contractual limitation of liability (in this case a limitation to replacement or refund of a defective product) was applicable. Tort liability can exist in addition to whatever contractual obligation *Good Housekeeping* assumed in issuing the seal.²⁴⁰

One can fairly conclude that a publisher, simply by publishing an advertisement that appears on its face to be true, and that, on its face, does not advocate the commission of an illegal act, will not be liable to someone who relies on the advertisement unless the publisher undertakes an endorsement. Generally, publication of an advertisement is not, by itself, an endorsement. This conclusion is reinforced by *Yanase v. Automobile Club*,²⁴¹ a recent California Court of Appeal case in which an auto club's listing and rating of hotels and motels in a tour book was treated as an advertisement rather than an endorsement.²⁴² The club published informational listings as part of its membership service, but received no consideration from the listed hotels. Therefore, the court concluded that the auto club had no duty of care with respect to neighborhood safety and security measures at the hotels listed in the tour book. Although it was not dealt with by the court, the issue might have been raised as to what factors the ratings purported to measure, and whether the public perceived the ratings to be endorsements. If the public perceives the listings to be endorsements, or the publisher purports to measure certain characteristics and invites the public to rely on its report, it is possible that a negligently done or false "endorsement" could be grounds for tort liability. The auto club may be more like an endorser and less like a publisher depending on what the public perceives the listing to mean. Negligence in ascertaining the truthfulness of claims made for a product in an endorsement may thus be a basis for liability of the endorser.

C. RICO

Another theory for imposing liability on the part of the endorser who participates in a fraudulent scheme may be provided by the Racketeer Influenced and Corrupt Organizations Act (RICO).²⁴³ RICO was enacted in 1970 as part of the Organized Crime Control Act

240. *Id.*

241. 212 Cal. App. 3d 468, 260 Cal Rptr. 513 (Cal. Ct. App. 1989).

242. *Id.*

243. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988).

and was designed to be a weapon against the "infiltration of legitimate business by organized crime."²⁴⁴ The provisions of RICO, however, are very broadly written. In addition to providing criminal penalties,²⁴⁵ they also allow private civil actions for treble damages and for attorney's fees.²⁴⁶ RICO has increasingly been used to pursue "garden variety" fraud claims.²⁴⁷

Among other things, RICO prohibits any person from being engaged in a "pattern of racketeering" that involves an interstate enterprise.²⁴⁸ It also prohibits conducting or participating in the conduct of an enterprise through a pattern of racketeering or a conspiracy to do the same.²⁴⁹ RICO lists several acts that might qualify as racketeering activities, including many crimes such as mail fraud, wire fraud and securities fraud.²⁵⁰ A "pattern" is established by at least two instances of these activities within a ten-year period.²⁵¹ The civil remedies provided by RICO were intended to deter racketeering activities because they could be applied even in cases in which the criminal sanctions were either inadequate or difficult to impose.²⁵² "Any person injured in his business or property" by a RICO violation has standing to sue.²⁵³ And, as in civil antitrust actions, a RICO plaintiff may recover treble damages and legal costs.²⁵⁴ The civil remedy, of course, is more flexible than a criminal RICO prosecution and requires a lower standard of proof than the criminal sanction.²⁵⁵ Many states have civil RICO statutes that are

244. Note, *Enterprise Liability in Private Civil RICO Actions*, 45 WASH. & LEE L. REV. 1447, 1452 (1988).

245. See 18 U.S.C. § 1963 (1988).

246. See *id.* § 1964.

247. See, e.g., Brace, *Marketers Could Be Labeled Under RICO*, Marketing News, May 10, 1985, at 6, col. 1. State RICO is also used in such fraud cases. J. SHELDON, *supra* note 159, § 9.2.10

248. See 18 U.S.C. § 1962(b) (1988).

249. See *id.* § 1962(c).

250. See *id.* § 1961(1).

251. See *id.* § 1961(5).

252. See generally Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991); Comment, *RICO "Pattern" Before and After H.J. Inc: A Proposed Definition*, 40 AM. U.L. REV. 919 (1991).

253. 18 U.S.C. § 1964(c) (1988).

254. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 487 (1985). RICO actions, of course, are limited to economic injuries to one's business or property, rather than personal injury or emotional distress. See Odom & McHenry, *Creative Applications of Civil RICO*, 11 AM. J. TRIAL ADVOC. 245, 255 (1987).

255. See, e.g., Note, *supra* note 244, at 1453.

similar to the federal statute.²⁵⁶

The scope of civil RICO actions was greatly broadened in *Sedima, S.P.R.L. v. Imrex Co.*²⁵⁷ In that case, Sedima was a joint venturer with Imrex and, in the course of their business dealings, Sedima came to believe that Imrex was systematically over-billing in certain transactions. Sedima filed a civil RICO action against Imrex and two of its officers based on mail and wire fraud. Imrex was never criminally convicted of mail or wire fraud, but the court ruled that, under RICO, it was not necessary to have been convicted of the predicate criminal racketeering activities, only that the activities be indictable.

The United States Supreme Court held that RICO was very expansive and that Congress intended to reach both legitimate and illegitimate enterprises.²⁵⁸ Any defect in the language of the statute was for Congress to correct, not the judicial branch. Although there have been many efforts in Congress to limit the reach of civil RICO, none has been successful.²⁵⁹ The opponents of RICO are concerned about its scope and about the fact that most of the actions brought do not involve organized crime.²⁶⁰ According to an American Bar Association Task Force formed in 1985, of the known civil RICO actions at the trial court level, seventy-seven percent involved securities or common law fraud in a business setting and only nine percent involved organized crime.²⁶¹ RICO cases have been brought for many wrongful business practices including wrongful employee discharge,²⁶² le-

256. See J. SHELDON, *supra* note 159, § 9.2.10.

257. 473 U.S. 479 (1985).

258. *Id.* at 488.

259. See *RICO Reform Act of 1989: Hearings on H.R. 1046 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1990); *Racketeer Influenced and Corrupt Organizations Reform Act: Hearings on S. 438 Before the Sen. Comm. on the Judiciary*, 101st Cong., 1st Sess. (1990); *RICO Reform: Hearings on H.R. 3240 and Related Bills Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong. 1st & 2d Sess. (1989); *Proposed RICO Reform Legislation: Hearings on S. 1523 Before the Sen. Comm. on the Judiciary*, 100th Cong., 1st Sess. (1989); *RICO Reform: Hearings on H.R. 2517, H.R. 2943, H.R. 4892, H.R. 5290, H.R. 5391 & H.R. 5445 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong. 1st & 2d Sess. (1987); *Oversight on Civil RICO Suits: Hearings Before the Sen. Comm. on the Judiciary*, 99th Cong., 1st Sess. (1986).

260. See generally Goldsmith & Linderman, *Civil RICO Reform: The Gatekeeper Concept*, 43 VAND. L. REV. 735 (1990); Koeinig, *What Have They Done to Civil RICO: The Supreme Court Takes Racketeering Requirement Out Of Racketeering*, 35 AM. U.L. REV. 821 (1986).

261. See *Sedima*, 473 U.S. at 499 n.16 (citing REPORT OF THE AD HOC CIVIL RICO TASK FORCE, 1985 ABA SEC. CORP. BANKING. & BUS. L. 55-56).

262. See, e.g., *Williams v. Hall*, 683 F. Supp. 639 (E.D. Ky. 1988). *But see Hect v.*

gal malpractice,²⁶³ sexual harassment,²⁶⁴ labor management relations,²⁶⁵ employee benefit laws,²⁶⁶ bankruptcy,²⁶⁷ and accountant's liability.²⁶⁸ These cases have increasingly been brought against deep pocket defendants such as accounting firms, banks, insurance companies, and manufacturers.²⁶⁹ It is possible that consumer deception or fraud cases could also be brought under RICO. Two phone calls or mailings in furtherance of a single fraudulent scheme could lead to a RICO claim.²⁷⁰ Telemarketing, direct mail advertising or newspaper advertising that is deceptive could also lead to civil RICO charges if a "pattern" exists.

In fact, such a RICO claim was made in one of the cases brought under the Bridges and Obie/Diamond facts discussed above.²⁷¹ In the case, a plaintiff sued a group of defendants who were all alleged to be affiliated with Obie and Diamond in one capacity or another. Plaintiff brought the action under the RICO statute claiming damages from alleged fraud. That particular complaint was dismissed *sua sponte* because the fraud claim was not stated with particularity, but the opinion labeled the claim "potentially viable." In the court's order, it was stated that a pattern of racketeering could have been established if the defendants had made mail fraud misrepresentations to a large number of people, the plaintiff being one part of the pattern.²⁷²

IV. THE CELEBRITY'S RIGHT OF PUBLICITY

Most of the recent trends examined here thus far have concerned the rights of injured consumers and the actions of regulators in pro-

CCH, Inc., 897 F.2d 21 (2d Cir. 1990) (holding that an employer's RICO violations were not the proximate cause of an employee's injuries that were sustained as a result of his dismissal for refusing to act illegally).

263. See, e.g., Churchfield Mgmt. & Inv. Corp. v. Winston & Strawn, No. 84-C-10904 (N.D. Ill. 1984).

264. See, e.g., Hunt v. Weatherbee, 626 F. Supp. 1097 (D. Mass. 1986).

265. See, e.g., Yellow Bus Lines, Inc. v. Drivers Chauffeurs & Helpers Local Union 639, 839 F.2d 782 (D.C. Cir. 1988).

266. See, e.g., Saporito v. Combustion Eng'g, Inc., 843 F.2d 666 (3d Cir. 1988).

267. See, e.g., Ashland Oil Co. v. Arnett, No. L-84-0158 (N.D. Ill. 1987).

268. See, e.g., Nelson v. Bennett, 662 F. Supp. 1324 (E.D. Cal. 1987).

269. See Harrison, *Look Who's Using RICO*, A.B.A. J., Feb. 1989, at 56, col. 1.

270. To establish a "pattern" a plaintiff must show at least two acts by the defendant in violation of RICO. 18 U.S.C. § 1961(5) (1988).

271. See Ramson v. Layne, No. 86-C-10239 (N.D. Ill. Jan. 8, 1987).

272. *Id.*

protecting the public against deceptive advertising. The law of celebrity endorsements has another aspect because the rights of the celebrities are also protected against improper actions taken by advertisers. For example, a celebrity may claim to have been duped into participating in the deceptive advertising. If the celebrity is sued by injured consumers for damages, the celebrity is likely to seek indemnification from the advertising sponsor. After all, the consumer litigants have begun to sue the deep pocket advertising agency and endorsers for their role in the creation of the deceptive advertisements. As a result, most advertising agencies now seek a written contractual right to indemnification for expenses and damages if liability is asserted against them.²⁷³ That indemnification has value when the advertiser is a well-known and stable company. However, such claims for indemnification may prove to be virtually worthless in a subsequent bankruptcy proceeding against an insolvent sponsor. Lloyd Bridges and George Hamilton may have found this to be the case in *In re Diamond Mortgage Corp.*²⁷⁴ In yet another case arising out of their endorsements, Bridges, Hamilton, and the advertising agency that provided sales campaigns for Diamond and for A.J. Obie and Associates, had claims in bankruptcy against Obie/Diamond for indemnification of expenses arising out of the litigation that followed the collapse of Obie/Diamond.²⁷⁵ The advertising agency also made a claim for its fee for advertising services rendered. Claims for indemnification of employees and independent contractors, though, are paid only after all the other unsecured creditors of the debtors, including the defrauded investors, are paid. In this particular case, it was clear that most of the creditors in a higher priority class would only receive thirty to forty percent of their claims and the creditors' group in which the indemnification claims were put would receive nothing. That made the indemnification agreements virtually worthless.²⁷⁶

Indemnification may be the least of a celebrity's concerns when that celebrity considers whether to do endorsements. The celebrity must decide whether to attach part of his or her credibility to a commercial product and many choose not to get involved with commercials at all. One aspect of misleading advertising can arise when the

273. See, e.g., McGrew, *It's Time to Review Those Agency Agreements*, AD FORUM, March 1985, at 27, col. 1.

274. 105 Bankr. 876 (N.D. Ill. 1989).

275. *Id.*

276. *Id.*

celebrity's image or persona is appropriated in some form for unauthorized use by a commercial entity. Misappropriation has two separate aspects. Most of the litigated cases concern protection of the celebrity's rights,²⁷⁷ but the public is also entitled to protection if, in fact, the celebrity did not participate in the purported endorsement, but the advertiser created the appearance that the celebrity did participate.

Celebrities are used in endorsements to lend their credibility to a product. The celebrity's persona, including his or her name, photograph, likeness, or personal attributes, has real value for advertising and other purposes, and is a property right over which the celebrity has control.²⁷⁸ This property value that celebrities have in their persona has come to be known as the right of publicity.²⁷⁹ Many state statutes have codified various aspects of the right of publicity and such a right is recognized in the common law of many states, although the scope of protection varies considerably from state to state.²⁸⁰ Some states merely prohibit misappropriation of a name or photograph. Others go much further and prohibit any representation of identity or image without permission.

Some of the strongest state laws are found in California²⁸¹ and

277. See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (permitting a racing car driver to recover when a photo of his distinctive car was used in a print advertisement); *Haelan Lab. v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953); *Booth v. Colgate-Palmolive Co.*, 362 F. Supp. 343 (S.D.N.Y. 1973) (holding that the actress who played the television character named "Hazel" could not recover, either under New York law or the Lanham Act, from an advertiser who imitated her voice on a radio commercial); *Lombardo v. Doyle, Dane, & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977) (finding no liability for the use of an actor who imitated Lombardo's mannerisms while conducting a band during a New Year's Eve party).

278. See *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970) (holding that a game manufacturer could not use the names of professional baseball players in a product without their permission).

279. CAL. CIV. CODE § 3344 (West Supp. 1991); FLA. STAT. ANN. § 540.08 (West 1990); KY. REV. STAT. ANN. § 391.170 (Michie/Bobbs-Merrill 1991); MASS. ANN. LAWS ch. 214, § 3A (Law. Co-op. 1986); NEB. REV. STAT. § 20-202 (1989); N.Y. CIV. RIGHTS. LAW §§ 50-57 (McKinney 1991); OKLA. STAT. ANN. tit. 21 § 839.1 (West 1990); R.I. GEN. LAWS § 9-1-28 (1990); TENN. CODE ANN. §§ 47-25-1101 to 1108 (1988 & Supp. 1990); UTAH CODE ANN. §§ 45-3-1 to 5 (1991); VA. CODE ANN. § 8.01-41 (1991); WIS. STAT. ANN. § 88.50 (West 1983 & Supp. 1990).

280. Some states treat the right of publicity as an aspect of the right of privacy. See Note, *The Right of Publicity and Vocal Larceny: Sounding Off on Sound-Alikes*, 57 FORDHAM L. REV. 445 (1988).

281. CAL. CIV. CODE § 3344 (West Supp. 1991).

New York,²⁸² where a great number of celebrities live. The United States Court of Appeals, in *Midler v. Ford Motor Co.*,²⁸³ explained the scope of California law. The case concerned the Young and Rubicam, Inc. (Y & R)/ Ford-Lincoln-Mercury commercial campaign, which used several pop record hits from the '60s and '70s as background music. Y & R tried to hire the original artists when possible for the campaign. Bette Midler, who does not do commercials, was asked to sing her version of the song "Do You Want to Dance," but refused. Unable to hire Midler, the advertiser hired one of her former back-up singers and instructed her to sound as much like the record as possible. Most people who heard the commercial believed that the voice was Midler's, although no such claim was made. No disclaimer was made either. Midler sued Y & R and Ford, alleging that they had violated the California misappropriation statute by misappropriating part of her distinctive identity.

The court found that Midler had no statutory protection under section 3344 of the California Civil Code which allows damages only to a person injured by one who uses that person's "name, voice, signature, photograph or likeness, in any manner."²⁸⁴ Here, Y & R did not actually use Midler's name or likeness and did not use her voice, but rather used the voice of the back-up singer. The court found, however, that Y & R and Ford had appropriated an "attribute" of Midler's identity and had committed a tort.²⁸⁵ In an opinion that is probably limited in application, the court held that "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California."²⁸⁶ In other words, the deliberate appropriation for profit of part of a celebrity's distinctive identity constitutes a tort in California. In many states however, the celebrity is protected only if an actual photograph or likeness is used or the celebrity's name is used without permission. Nonetheless, this case exemplifies an emerging view of misappropriation that considerably broadens the narrow view and applies to advertisements that intentionally evoke the celebrity's identity.

For example, the advertisement in *Onassis v. Christian Dior-New*

282. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1991).

283. 849 F.2d 460 (9th Cir. 1988).

284. CAL. CIV. CODE § 3344(a) (West Supp. 1991).

285. *Midler*, 849 F.2d at 463.

286. *Id.*

*York, Inc.*²⁸⁷ showed a look-alike model who resembled Jacqueline Kennedy Onassis attending a wedding ceremony for the Diors, a fictional *menage-à-trois*. Several real celebrities including Ruth Gordon and Shari Belafonte were actually in the advertisement. Under New York state law, it is a misdemeanor criminal offense, and there is a civil remedy for, the use of the name, portrait or picture of any living person for advertising purposes without his or her consent.²⁸⁸ Christian Dior, Inc., argued that Jacqueline Onassis' name, portrait, or picture were not actually used and, therefore, no offense had been committed. The New York Supreme Court took an extremely broad view of what the New York statute covers. The essence of the statute "is the exploitation of one's identity as that is conveyed verbally or graphically."²⁸⁹ The court was particularly concerned that the impression of Mrs. Onassis' participation was created by juxtaposing the counterfeit Jacqueline Onassis behind real life personalities. The end result was "trading on the name or features of another and the unwarranted commercial exploitation of a person who has not consented to be commercially exploited."²⁹⁰

All the celebrity look-alike and sound-alike cases have at their core the misleading of the public by misappropriation of the celebrity's attributes. That is, by artifice, the public is misled into believing that the celebrity has participated in the advertisement. This is an emerging theory of misappropriation because the older cases do not give the celebrity a cause of action.²⁹¹ Even if the cases and statutes apply only in the cases in which the celebrity's name or likeness has actually been appropriated, there is another possible theory that protects the celebrity's persona and property rights in that

287. 122 Misc. 2d 603, 472 N.Y.S.2d 254 (N.Y. Sup. Ct. 1984).

288. N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 1991).

289. *Onassis*, 122 Misc. 2d at 611, 472 N.Y.S.2d at 261.

290. *Id.* at 614, 472 N.Y.S.2d at 262. The court pointed out the irony in Christian Dior-New York's advocating of passing off the counterfeit as real as a legitimate marketing device when Christian Dior itself "vigorously policed the market to prevent persons by fraud and deception [from] obtaining the fruits of another's labors and using them commercially" in its fashion business. *Id.* at 615, 472 N.Y.S.2d at 263 (quoting *Dior v. Milton*, 9 Misc. 2d 425, 155 N.Y.S.2d 443, *aff'd*, 2 A.D.2d 878, 156 N.Y.S.2d 996 (1956)).

291. *See, e.g.,* *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F.2d 711 (9th Cir. 1970) (finding no cause of action where *These Boots are Made for Walking* song style was imitated in a tire commercial, but permission for the use of the song's copyright had been obtained); *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962) (finding no cause of action for the use of a cartoon duck with a voice that imitated Lahr's); *Booth v. Colgate-Palmolive*, 362 F. Supp. 343 (S.D.N.Y. 1973) (denying a television actress the right to recover for imitation of her voice in the defendant's commercial).

persona. This theory's primary rationale is protection of the public from deception.

In *Allen v. National Video, Inc.*,²⁹² the United States District Court for the Southern District of New York refused to find that a photograph of a Woody Allen look-alike, which evoked the appearance of Woody Allen by demeanor, clothing, and props, was a "portrait" under New York State law. After an extensive discussion of the New York law concerning likenesses, and whether a look-alike portrait could ever be a portrait of the celebrity, the court refused to resolve the issue. Instead the court relied on a Lanham Act²⁹³ claim made by Allen, which the court stated would give Allen the same protection as would any claim under New York law. The Lanham Act is the codification of common law trademark infringement rules and its purpose is "the protection of consumers and competitors from a wide variety of misrepresentations of products and services in commerce."²⁹⁴ The Lanham Act protects economic interests analogous to those protected by trademark law, including the interest of the public in being free from harmful deception, by protecting the trademark holder's value in his distinctive mark.²⁹⁵

The court found that a celebrity has a commercial investment in his name and face, and that value depends upon the goodwill of the public. "Infringement of the celebrity's rights also implicates the public's interest in being free from deception when it relies on a public figure's endorsement in an advertisement."²⁹⁶ Actual consumer deception is not required to get injunctive relief under the Lanham Act. Instead, it is sufficient to show a "likelihood of consumer confusion."²⁹⁷ The case law suggests that "the unauthorized use of a person's name or photograph in a manner that creates the false impression that the party has endorsed a product or service in interstate

292. 610 F. Supp. 612 (S.D.N.Y. 1985).

293. Lanham Trademark Act, 15 U.S.C. §§ 1051-1127 (1991).

294. *Allen v. Nat'l Video, Inc.*, 610 F. Supp. at 625 (quoting *CBS, Inc. v. Springboard Int'l Records*, 429 F. Supp. 563, 566 (S.D.N.Y. 1976)).

295. See *Better Business Bureau v. Medical Directors, Inc.*, 681 F.2d 397 (5th Cir. 1982). Central to a finding of false representation in advertising under the Lanham Act is the "determination that the challenged activities create a 'likelihood of confusion' in the consuming public." *Id.* at 400 (quoting *Sun-Fun Products, Inc. v. Suntan Research & Development, Inc.*, 656 F.2d 186, 192 (5th Cir. 1981)).

296. *Allen*, 610 F. Supp. at 626.

297. *Id.* at 627. See also Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1242 (1986).

commerce violates the Lanham Act."²⁹⁸ Rather than reach the question of whether the look-alike's photograph was, as a matter of law, Woody Allen's "portrait or picture" under the New York statute, the court instead examined whether the advertisement created the likelihood of consumer confusion over whether the celebrity had endorsed or was involved with the advertiser's goods and services. The court found that there was a strong similarity between the appearance of Woody Allen and the look-alike, and that there was an intentional evocation of Allen in the use of titles of his movies and characteristic poses in photographs. This resulted in a likelihood of confusion that required protection of the public from false advertising and justified the issuance of an injunction.²⁹⁹ The same analysis and same conclusion was reached three years later when Woody Allen sued a clothing store for using the same look-alike in an advertisement.³⁰⁰ In *Allen v. Men's World Outlet, Inc.*,³⁰¹ the United States District Court stated that the disclaimer in the advertising that identified the look-alike as such was not conspicuous enough to clarify that Woody Allen had nothing to do with the product. From a consumer's point of view, the Lanham Act does not provide a consumer a cause of action, but instead provides only an action for the injured competitor. While any person who believes that he or she is likely to be injured has standing to sue under the Act, most courts have restricted the definition of "any person" to competitors.³⁰² In fact, the Act states that its intent is to protect persons against unfair competition.³⁰³

V. CONCLUSION

As we have seen, the whole purpose of endorsement advertising is to induce purchase decisions by consumers. Endorsements are used by advertisers to enhance the credibility of the advertising message, either by using expert or celebrity opinion or by using "person on the street" real life experiences to influence the consumer's decisions to try a product or service. Advertisers and endorsers, therefore, have obligations to the consumer not to engage in misleading practices. In

298. *Allen*, 610 F. Supp. at 626.

299. *Id.*

300. *See Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360 (S.D.N.Y. 1988).

301. *Id.*

302. K. PLEVAN & M. SIROKY, *supra* note 160, at 22-23.

303. R. Callagy & M. Aieta, *Rights in Persona and Style of Performance*, in *LEGAL AND BUSINESS ASPECTS OF THE ADVERTISING INDUSTRY* 149, 157 (Patents, Copyrights, Trademarks and Literary Property Course Handbook Series No. 271) (1989).

addition, there have been important trends developing in the laws that protect consumers from misleading endorsement advertising. The FTC and Congress have begun to investigate and to try to limit potential abuses in the new long-form commercials or infomercials. There have been important consumer cases under state UDAP and tort rules that have extended the liability of celebrity endorsers when misleading claims are made about products. And celebrities (and, therefore, the public) have been given more protection from misleading misappropriation of their personal attributes to sell products.

The Federal Trade Commission has the regulatory authority necessary to deal with deceptive practices, but in recent years it has not vigorously pursued deception cases. Enforcement actions have often been undertaken only after public outcry and Congressional inquiry, as has been seen with the abuses in the infomercial industry. The emergence of the long-form advertisement or infomercial, with its extensive use of testimonials to sell products, is one result of the deregulation of commercials that occurred in the early 1980's. Products of dubious value are often hyped in formats that are purposely disguised to resemble regular, objective programming. Regulations are in place that make these practices illegal, but the enforcement mechanisms may not be sufficient to regulate the market. Prompt action by the FTC against some of the more egregious abuses will be helpful in reducing the problem, but deception will re-emerge unless the states and federal government are vigilant.

The role of the states in consumer protection is vital, as the FTC Act provides no redress to an individual injured consumer. Instead, the individual must rely on state consumer protection laws and, to a lesser extent, on older tort causes of action. The states are beginning to examine more closely endorsement advertising and deceptive practices, and state courts and states' attorneys general are beginning to protect both consumers and celebrities from deceptive practices. One of the most unusual sources of potential redress for the individual may be the civil RICO action. Although there have been many attempts to scale back the scope of the injuries that RICO can address, redress under the statute might be available if a pattern or practice of deception is present.

As has also been seen, injured plaintiffs are more willing to bring novel causes of action against deep-pocket, nontraditional defendants, who may also have been deceived by the advertiser. This puts responsibility on the endorser to ascertain the truthfulness of statements that are made in the advertising message. The willingness of an

injured plaintiff to assert liability against the endorser and the advertising agency will make both of those parties more careful monitors of their own behavior and will ultimately make them more responsible for eliminating deceptiveness in endorsement advertisements.