Alternative Approaches to the Distinction between Commercial and Noncommercial Speech: Fargo Women's Health Organization v. Larson

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ALTERNATIVE APPROACHES TO THE DISTINCTION BETWEEN COMMERCIAL AND NONCOMMERCIAL SPEECH: FARGO WOMEN'S HEALTH ORGANIZATION v. LARSON

INTRODUCTION

The distinction between commercial and noncommercial speech is elusive and the criteria used to differentiate the two manifold. Differentiating criteria include motive,\(^1\) context,\(^2\) interests protected,\(^3\) and common

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3. A state's interest in protecting its citizens from fraud, deception, and annoyances, or promoting their health or economic welfare, has been considered in defining speech as commercial. See Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (state's interest in protecting safety of fair patrons justifies restrictions on literature distribution); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (commercial billboards banned to promote safety and aesthetics); Central Hudson Gas v. Public Serv. Comm'n, 447 U.S. 557 (1980) (state interest in conserving energy can be satisfied by less restrictive means than banning promotional inserts); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (useful information derived from billing inserts on controversial public issues); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (state can regulate attorney solicitation under circumstances likely to pose danger to consumer); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (state's claim that contraceptive advertising is offensive and embarrassing insufficient to justify suppression); National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977), cert.

583
sense, and the nature of and extent to which public issues are involved. Unfortunately, the distinction is critical. With certain narrow exceptions, non-commercial speech enjoys full first amendment protection and is not subject to government regulation, while commercial speech is not entitled to the same degree of constitutional protection and may be regulated by the government.


4. A few courts have noted that common sense is the best indicator of whether speech is commercial or noncommercial. See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1984) (commercial speech doctrine rests heavily on commonsense distinction); Penthouse Int'l v. Koch, 599 F. Supp. 1338, 1344 (S.D.N.Y. 1984) (common sense distinction must be drawn between political and commercial speech). See also Moore, Justice Blackmun's Contributions on the Court: The Commercial Speech and State Taxation Examples, 8 Hamline L. Rev. 29, 41 (1985) ("common sense" differences between commercial and other types of speech justified greater willingness to tolerate regulations aimed at deceptive commercial speech).


6. Four categories of speech have been excluded from first amendment protection because they are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). These four categories include: fighting words, id.; obscenity, Roth v. United States, 354 U.S. 476 (1957); defamatory falsehoods, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); and speech carrying a clear and present danger of incitement to violence, Brandenburg v. Ohio, 395 U.S. 444 (1969). See also Spiritual Psychic Science Church v. Azusa, 39 Cal. 3d 501, 703 P.2d 1119, 217 Cal. Rptr. 225 (1985) (four categories of speech held not entitled to first amendment protection); Note, A New Twist in the Abortion Funding Controversy: Planned Parenthood v. Arizona, 33 DePaul L. Rev. 835, 845 nn.66-67 (1984) (four categories of unprotected speech).

7. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1984). See generally Note, We Can Share the Women, We Can Share the Wine: The Regulation of Alcohol Advertising on Television, 58 S. Cal. L. Rev. 1107, 1114 (1985) [hereinafter Note, We Can Share the Women] (Supreme Court repeatedly asserted commercial speech protected differently under first amendment than other types of speech); Thompson, Antitrust, the First Amendment and the Communication of Price Information, 56 Temp. L.Q. 939, 960 (1983) (distinction between commercial and political speech rests on belief that commercial speech is not as worthy of constitutional protection as political speech). Cf. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 391, 635 (1982) (different treatment of commercial and noncommercial speech cannot be justified on premise that "some forms of speech are more valuable than others");
In *Fargo Women's Health Organization v. Larson,* the North Dakota Supreme Court refused to extend full first amendment protection to advertising by a "pro-life" clinic. The plaintiff, an abortion clinic, filed an action for damages and injunctive relief, charging that the defendant used false and deceptive advertising with the intent of misleading women into believing that the defendant performed abortions in order to lure them to the Help Clinic to discuss anti-abortion alternatives. The defendant argued that its advertising was not commercial speech but instead, noncommercial advocacy advertising which merited full first amendment protection. The trial court held that the advertising was commercial speech because it appeared in a commercial context and it did not meet the standards for noncommercial speech. Finding that the advertising led pregnant women seeking abortions to believe that they were calling and visiting an abortion clinic, the trial court judged the advertising deceptive and issued a preliminary injunction enjoining it. The state supreme court agreed with the trial court's characterization of the speech as commercial, but modified the preliminary injunction to permit the clinic to use the word "abortion" in future advertising.

In concluding that the lower standard of review for commercial speech be applied in *Fargo,* the courts were able to reach an end result that was just. The pro-life clinic's advertisement was clearly deceptive because it misled the public about the clinic's anti-abortion philosophy in order to attract women who wanted abortions or birth control counsel. Even the pro-life clinic's name, the "Women's Help Clinic of Fargo," seemed calculated to cause deliberate confusion with the abortion clinic, the "Fargo Women's Health Organization." But, in order to attack this fraudulent conduct, the court first had to categorize the advertising as commercial speech.

The potential for shielding deceptive speech from regulation by couching it in a noncommercial context clearly exists, however, this opportunity is foreclosed to advertisers like the Women's Help Clinic of Fargo if deceptive speech is subject to regulation without regard to its categorization as commercial or noncommercial. This Note suggests alternative approaches to the regulation of clearly deceptive speech in cases where such categorization is difficult or should be ignored entirely.

I. BACKGROUND

The government may ban commercial speech if it is false or proposes an illegal transaction. In addition, truthful commercial speech concerning a

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9. *Id.* at 181.

10. *Id.* at 182.

11. *Id.* at 179.


lawful activity can be regulated if there is a substantial government interest and the regulation directly advances that interest.15

Once speech is characterized as commercial, a claim that it is false, deceptive, or misleading will trigger government review. Speech can be suppressed only if there is no way to communicate the message nondeceptively.16 Typically, the deceptive advertising is enjoined, and corrected nondeceptive advertising is permitted to run in its place.17 Currently, requiring the inclusion of disclosures is the preferred method of remedying deceptive advertising,18 although this may not always be the most effective method.19 The Federal Trade Commission (FTC) standard of deception is “likelihood to deceive” such that the reasonable consumer will act to his detriment.20 It is not necessary to prove actual deception.21 In applying this standard, courts have established various criteria to use in their analysis. Courts examine the context in which the communication appears,22 the vulnerability of the target market to the particular message,23 the consideration of the advertising in its entirety,24 and the advertiser’s intent.25

The art of defining deception in commercial speech is somewhat more precise than is the classification of speech as commercial or noncommercial. This classification, however, is the threshold issue in every deception case.26

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15. Central Hudson, 447 U.S. at 566.
19. Brown and Williamson, 778 F.2d at 44-45. See Litton Indus., Inc. v. FTC, 676 F.2d 364 (9th Cir. 1982) (fine print disclosures inadequate for remedying important deceptive information but reasonable for qualifying information of only limited relevance); Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977) (pro forma disclaimers may not cure deceptive messages). See also Letter from FTC Chairman James C. Miller III to Hon. John D. Dingell 11-13 (Oct. 14, 1983) (discussing FTC Deception Policy Enforcement Statement which recognizes consumers may not always read disclosures so disclosures must be clear and conspicuous). Cf. Virginia Pharmacy, 425 U.S. at 764-66 (appropriate remedy is to require corrective information to appear in whatever form necessary to remedy deception).
20. Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1435 (9th Cir. 1986).
23. Ohralik, 436 U.S. at 454; Avis Rent A Car System, 782 F.2d at 386.
26. See supra note 6 for exceptions.
A. Commercial or Noncommercial Speech?

The importance of the distinction between commercial and noncommercial speech began in 1942 with Valentine v. Chrestensen. The Supreme Court established the "commercial speech doctrine," holding that speech of a purely commercial nature was not entitled to first amendment protection. The issue in Valentine was the public distribution of handbills in violation of a local sanitary code. The Court, recognizing that government may not restrict the dissemination of opinion or the communication of political or social information, held that the same restrictions did not apply to "purely commercial" speech which existed merely to serve the economic interests of the speaker.

The Valentine commercial speech doctrine survived for thirty years until, in 1975, it was reexamined in the context of abortion advertising in Bigelow v. Virginia. In Bigelow, a newspaper published advertising which was paid for by a New York agency that assisted women in arranging for low-cost abortions in New York hospitals and clinics. The agency charged a fee for the service. The state prosecuted the newspaper's editor for violating a state statute that prohibited publication of material that encouraged abortion. The Court reversed the conviction and held that it was an error to assume

27. 316 U.S. 52 (1942).
28. Id. at 54. The commercial speech doctrine was based on the rationale that speech which existed only to serve the economic interests of the speaker deserved no first amendment protection and thus was subject to regulation, while speech concerning opinion, politics, or social information was fully protected and could not be restricted by the government. See J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 923-43 (2d ed. 1983) (Chrestensen generally interpreted as excluding all commercial speech from first amendment protection); Note, Developments in the Law: Deceptive Advertising, 80 HARV. L. REV. 1005, 1027 (1967) ("[S]ince Chrestensen, the notion that commercial advertising is not protected by the first amendment has been enshrined among the commonplaces of constitutional law.").
29. 316 U.S. at 53. The sanitary code provided that "no person shall ... distribute ... any handbills ... or other advertising matter ... in ... any ... public place ..." Id. at 53 n.1.
30. Id. at 54.
33. The advertisement read in part: "Abortion is now legal in New York. There are no residency requirements. For immediate placement ... contact Women's Pavilion ... We will make all arrangements for you and help you with information and counseling." 421 U.S. at 812.
34. Id. at 812-13. The statute that was violated read in part "If any person, by publication ... advertisement ... or in any other manner, encourages ... the procuring of an abortion ... he shall be guilty of a misdemeanor." VA. CODE ANN. § 18.1-63 (1960).
that advertising was not entitled to first amendment protection simply because it was commercial in nature.\textsuperscript{35} The Court declined, however, to determine to what extent commercial speech was protected.\textsuperscript{36} The Court instead employed a balancing test that weighed the first amendment issue against the particular public interest involved.\textsuperscript{37} Because the advertisement contained information about abortion, the scales tipped in favor of granting some first amendment protection since the advertisement involved a particularly strong constitutionally protected public interest, one far more important than simply the commercial nature of the advertising.\textsuperscript{38}

During the next term, in \textit{Virginia State Board of Pharmacy v. Virginia Citizens Counsel},\textsuperscript{39} the Court strengthened the protection given to commercial speech by holding that the rights of consumers to receive information, and of advertisers to disseminate it,\textsuperscript{40} were interests which deserved protection.\textsuperscript{41} Thus, speech which did "no more than propose a commercial transaction" would be protected under the first amendment.\textsuperscript{42} The commercial transaction in \textit{Virginia Pharmacy} involved advertised prescription drug prices by licensed pharmacists, a practice characterized as unprofessional conduct by a Virginia statute.\textsuperscript{43} The state apparently feared that price advertising would lead consumers to put disproportionate emphasis on price over quality. Rejecting the state's paternalistic approach, the Court found that the public's interest in

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\item 35. 421 U.S. at 825. Relying on its prior decisions, the Court held that the commercial form of speech does not deprive it of first amendment protection. \textit{Id.} at 818 (citing \textit{Pittsburgh Press}, 413 U.S. at 384; \textit{New York Times}, 376 U.S. at 266).
\item 36. 421 U.S. at 825.
\item 37. \textit{Id.} at 826. The Court struck down the Virginia statute because it regulated speech that was not deceptive, fraudulent, in furtherance of a criminal act, or an invasion of privacy. \textit{Id.} at 828.
\item 38. The Court specifically noted that the public had an interest in obtaining information about abortion services in New York, and that the right to an abortion was constitutionally protected. \textit{Id.} at 822. \textit{See generally} Scott v. Association for Childbirth at Home, 85 Ill. App. 3d 311, 407 N.E.2d 71 (1980) (commercial advertising on home childbirth involves constitutional right that deserves as much protection as abortion advertising in \textit{Bigelow}); \textit{Note, Lawyer Advertising, supra} note 31, at 859 (status of abortion as constitutionally protected right heavily influenced the Court's decision); Moore, \textit{supra} note 4, at 32 (nature of the \textit{Bigelow} speech, which was viewed as more than commercial speech, compelled its protection; \textit{Bigelow} did not abrogate \textit{Chrestensen}, or establish a broad principle of commercial speech protection); \textit{Note, Constitutional Law—First Amendment—Commercial Speech—Lawyer Advertising Protected by the First Amendment, 11 CREIGHTON L. REV. 577, 584-85 (1977)} (\textit{Bigelow} presented public interest other than commercial nature of advertising).
\item 39. 425 U.S. 748 (1976).
\item 40. \textit{Id.} at 762-63.
\item 41. \textit{Id.} at 757.
\item 42. \textit{Id.} at 762. \textit{See generally} L. TRIBE, \textit{AMERICAN CONSTITUTIONAL LAW} 654 (1978) (Justice Blackmun's opinion in \textit{Virginia Pharmacy} was "powerful," and the result was a "landmark holding"); Thompson, \textit{supra} note 7, at 968 (\textit{Virginia Pharmacy} was single most important commercial speech decision).
\item 43. The statute stated: "Any pharmacist shall be . . . guilty of unprofessional conduct who . . . advertises . . . price . . . for any drugs . . . dispensed only by prescription." 425 U.S. at 750 n.2 (quoting VA. CODE ANN. § 54-524.35 (1974)).
\end{itemize}
the free flow of commercial information outweighed the state’s asserted interest in maintaining high standards of professionalism among pharmacists. The Court held that the state may not completely suppress the dissemination of truthful information about a lawful activity based solely upon fear of the effect of the information upon either the disseminators or recipients.44

The *Virginia Pharmacy* Court articulated two reasons for distinguishing between commercial speech and other types of speech for purposes of first amendment protection. First, the disseminator of commercial speech can easily establish its truth or correctness. Second, since communication is a key element of selling, there is little risk that it will be suppressed completely by appropriate regulation in a free market system. These two characteristics of commercial speech justified its regulation to prevent deception.45

The *Virginia Pharmacy* Court’s consumer benefit rationale for the constitutional protection of commercial speech formed the basis of several later decisions. In 1977, the Court in *Bates v. State Bar Association of Arizona* held that truthful advertising regarding the availability and terms of routine legal services could not be restrained, and recognized the right of consumers to be informed about the activities of the legal profession. Arizona’s ban on lawyer advertising was struck down and the Court rebutted every justi-

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44. 425 U.S. at 770. The Court concluded that Virginia’s close regulation of pharmacists ensured high professional standards without the advertising ban, and that the ban had no direct effect on professional standards. *Id.* at 768-69. See generally Note, *Fair Use*, supra note 31, at 837 (*Virginia Pharmacy* established new category of first amendment protection based on public interest: commercial free speech).

45. 425 U.S. at 773. The Court found that in addition to serving the interests of “speaker and listener,” this type of speech served society’s interests by promoting the welfare of those who are most dependent on prescription medicine. It noted that for certain types of consumers, prescription drug price information “could mean the alleviation of physical pain or the enjoyment of basic necessities.” *Id.* at 763-64. See also Thompson, *supra* note 7, at 968 (price advertising served disabled and elderly who are most dependent on prescription medicine). Issues were left unresolved that dealt with restrictions or commercial advertising related to illegal activity, and on advertising by other professions, such as lawyers or physicians. 425 U.S. at 771-73.


48. *Id.* at 384.

ification that the Arizona Bar Association offered in support of the ban.50 As with commercial or noncommercial speech, the advertising was subject to reasonable time, place, and manner regulations that properly advanced legitimate state interests.51

In 1980, a specific framework emerged for measuring the constitutionality of commercial speech restrictions. In *Central Hudson Gas and Electric v. Public Service Commission*,52 a regulation, enacted during the energy crisis and banning utility companies from encouraging the use of energy through promotional advertising, was held unconstitutional. The Court found that since the first amendment’s concern for commercial speech was based on the informational function of advertising,53 the consumer’s need for information which might aid in purchasing decisions was worthy of protection.54 Instead of using *Virginia Pharmacy’s* definition of commercial speech as

50. 433 U.S. at 368-79. To the ABA’s primary assertion that advertising would adversely affect the dignity of the legal profession, the Court responded that there was not a sufficient connection between advertising and “the erosion of true professionalism,” especially since the public was already aware that attorneys are motivated by a profit interest. The ABA’s second justification for banning attorney advertising was that it is inherently misleading due to the lack of a standardized product. Acknowledging that legal advertising could not provide totally complete information to the reader, the Court nevertheless concluded that some information was better than none.

The Court dismissed as irrelevant the ABA’s third contention that advertising would stir up litigation, adding that the American Bar Association’s Model Code of Professional Responsibility placed an affirmative duty on attorneys to make legal services available to the public. The Court found “unlikely” the Bar Association’s assertion that the increased costs of advertising would result in higher fees to the client. Finally, the ABA argued that the potential for deceptive advertising mandated the creation of a regulatory agency, posing an undue burden on the profession. The Court countered by crediting the majority of attorneys with honesty in their methods of dealing with the public, and expressed confidence that the advertising standards would be self-enforced. *Id.*

51. 433 U.S. at 384. Reasonable regulations on time, place, or manner of speech are upheld if the regulations are content-neutral and do not entirely eliminate the opportunity for speech. For example, in *Ohralik*, the Supreme Court upheld a restriction on in-person solicitation by attorneys as a valid regulation on the manner of commercial speech based on ethical considerations. 436 U.S. at 466-67. See also *Consolidated Edison*, 447 U.S. at 535 (suppression of billing inserts discussing public policy issues unconstitutional because regulation foreclosed an adequate alternative communication channel); United States v. O’Brien, 391 U.S. 367, 377 (1977) (first amendment is not violated by conviction for draft card burning); Police Dep’t v. Mosley, 408 U.S. 92 (1972) (regulations regarding picketing near public schools unacceptable when defined in terms of subject matter). Additionally, time, place, or manner restrictions must pass the “least restrictive alternative” test. See *Village of Schaumburg*, 444 U.S. at 637 (door-to-door solicitation regulations acceptable); Linmark Ass’n v. Willingboro, 431 U.S. 85, 93 (1977) (prohibition on use of “for sale” signs unacceptable because seller had no alternative channel of communication). See also *Virginia Pharmacy*, 425 U.S. at 771 (Court expressly upheld validity of regulations regarding time, place, and manner of advertising as long as they are justified without reference to the content of the speech, they serve a “significant” government interest, and alternative communication channels remain open).

52. 447 U.S. 557 (1980).
53. *Id.* at 563.
54. *Id.* at 567.
that which "merely proposes a commercial transaction," the Court defined commercial speech as that relating solely to the economic interests of speaker and audience. The Court then formulated a four-part test for evaluating restrictions on commercial speech. Under the first prong of the test, as long as the communication is not false, misleading, or deceptive, it is constitutionally protected. Thereafter, only narrowly drawn restrictions that directly advance a substantial state interest are allowed.

The Court applied the Central Hudson test to strike down a postal regulation which prohibited the unsolicited mailing of contraceptive advertising in Bolger v. Young Drug Products Corporation. The defendant, a contraceptives manufacturer, promoted his products to wholesalers through direct mail. Despite the fact that at least one of the mailings was primarily an informational pamphlet on the prevention of venereal disease, with only one small reference to Young's products, the Court found that most of the mailings fell "within the core notion of commercial speech" as defined by Virginia Pharmacy. The Court concluded that the three mailings involved all varieties of commercial speech. Under the Central Hudson test, the Court found the postal regulation to be more extensive than necessary to serve the state's interest in shielding recipients from mail that they were likely to find offensive.

In concluding that the mailings were commercial speech, the Court addressed the fact that the mailings were not all merely proposals for commercial transactions. Taken individually, the references to specific products,
the defendant's economic motive, and the form of the mailings as advertisements were not enough to classify the mailings as commercial speech.\textsuperscript{67} Even though the material included a discussion of venereal disease and birth control that was not specifically related to selling the product,\textsuperscript{68} the cumulative effect of these factors was sufficient to justify a commercial speech characterization.\textsuperscript{69}

The Court reached a similar result in \textit{Zauderer v. Office of Disciplinary Counsel}.\textsuperscript{70} The Court ruled that even though advertising by the attorney contained information of public interest regarding the legal rights of persons injured by an intrauterine device, it was commercial speech.\textsuperscript{71} The advertisement, featuring a picture of the Dalkon Shield, asked "Did you use this I.U.D.?" and invited readers to call the attorney if they had.\textsuperscript{72} The Court noted that all advertising was implicitly a plea for patronage,\textsuperscript{73} and that the commercial speech doctrine rests heavily on the "common sense" distinction between speech which proposes a commercial transaction and other varieties of speech.\textsuperscript{74} After defining the advertising as commercial, the Court applied the \textit{Central Hudson} test and held that Ohio could not prohibit its attorneys from using truthful advertising.\textsuperscript{75}

While the \textit{Central Hudson} test for evaluation of the constitutionality of regulations on speech appears to be on firm ground,\textsuperscript{76} the current law on the distinction between commercial and noncommercial speech continues to present a quandary. Clarifying the distinction has proven fruitless and inconclusive.\textsuperscript{77} Singularly decisive characteristics of commercial speech have

\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.} at 68. \textit{See also} Note, \textit{First Amendment Protection, supra} note 46, at 695 (Court missed an opportunity to clarify distinction between commercial and noncommercial speech by focusing on distinctions among several mailings); Shiffrin, \textit{supra} note 7, at 1258 (combination of product reference and economic motive supports conclusion that information pamphlets were commercial speech).
\textsuperscript{69} 463 U.S. at 67.
\textsuperscript{70} 471 U.S. 626 (1984).
\textsuperscript{71} \textit{Id.} at 638.
\textsuperscript{73} 471 U.S. at 639.
\textsuperscript{74} \textit{Id.} at 637.
\textsuperscript{75} \textit{Id.} at 646-47.
\textsuperscript{76} Most recently, the \textit{Central Hudson} analysis has been applied to hold that states may sometimes ban nondeceptive advertising for legal products and services. \textit{See Posadas de Puerto Rico Ass'n v. Tourism Co. of Puerto Rico, 106 S. Ct.} 2968 (1987) (state may prohibit advertising by gambling casinos directed at residents of the state).
\textsuperscript{77} The ambiguity surrounding the term "commercial speech" has troubled scholars and commentators for years. Farber, \textit{supra} note 46, at 386-90; Redish, \textit{The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression, 39 Geo. Wash. L. Rev.} 429, 430-31 (1971); Rotunda, \textit{The Commercial Speech Doctrine in the Supreme Court, U. Ill. L.F.} 1080, 1088-90 (1976). Demonstrating the problem in applying the various commercial speech definitions to a particular type of speech, one commentator cites several examples of speech that do not propose a commercial transaction under \textit{Virginia Pharmacy}, but could
included speech for "private profit."

In contrast, the Bigelow Court explicitly held that the speaker's economic motive did not make speech commercial. Virginia Pharmacy broadly characterized commercial speech as that which "does no more than propose a commercial transaction." The Central Hudson Court altered this definition by classifying commercial speech as relating "solely to the economic interests" of the speaker and the audience. This definition was echoed in Bolger, which added that reference to specific products, and speech which took the form of an advertisement, were not sufficient, on their own, to justify classifying speech as commercial.

According to Zauderer, "common sense" tells us that all advertising is commercial because all advertising is implicitly a plea for patronage. However, those who recognize the potential for commercial speech to simultaneously communicate economic and political or social messages would balk at Zauderer's oversimplified and highly generalized "common sense" approach.

The Court's consistent failure to establish clear, workable guidelines to determine what makes speech commercial is not surprising given the intangible and multi-faceted nature of communication. As demonstrated by the plethora of standards already available, a single rule that has application beyond the immediate fact situation is simply too difficult to fashion. As a

relate solely to the economic interests of the speaker and audience under Central Hudson. These include corporations speaking to the press about their corporate future, to their shareholders about their interests in the company, to their employees subject to labor laws, and to government officials regarding lobbying efforts. Shiffrin, supra note 7, at 1214-15. Shiffrin notes that the commercial speech cases are unclear on whether the focus should be on the message, the motives of the speaker and the audience, or something else. Id. at 1222. Even the Supreme Court has cited examples of commercial speech that may be of general or public interest, such as when an artificial fur manufacturer promotes its product as an alternative to the extinction of fur bearing animals, or a domestic producer advertises its product as an alternative to imports. Virginia Pharmacy, 425 U.S. at 764. See also Note, Fair Use, supra note 31, at 838 (Supreme Court decisions fail to establish guidelines that lower courts can use to determine when social value of commercial speech will entitle it to full protection); Note, First Amendment Protection, supra note 46, at 685 (major problem with development of commercial speech doctrine is that Court never defined commercial speech). But see Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 1 (1979) (commercial speech should not be protected at all because it is "business advertising which does no more than solicit a business transaction or state information relevant thereto"); Baker, supra note 49, at 13-25 (first amendment only protects speech resulting from voluntary decision making, not forced decisions coerced by profit motive).

79. 421 U.S. at 818.
80. 425 U.S. at 762.
81. 447 U.S. at 561.
82. 463 U.S. at 66.
83. 471 U.S. at 639.
84. See Shiffrin, supra note 7, at 1255 (nature of speech, with its various and complex interaction of important values, justifies alternatives that treat it in concrete contexts—general abstractions do not work).
result, the effective and efficient regulation of deceptive speech is sometimes hampered.

B. Deception

Under common law, limited protection against false and deceptive advertising is available in the form of a claim which includes fraud and warranty actions. In cases involving interstate commerce, a cause of action arises under either section 43(a) of the Lanham Act or section 5(a)(1) of the Federal Trade Commission Act. Both sections attack advertising that has the capacity or tendency to deceive the consumer. Generally, the Lanham Act is a private remedial scheme for the benefit of competitors, while the FTC Act more specifically serves the public interest. In addition to these federal statutes, most states have enacted similar laws to prevent false, deceptive, or misleading advertising. These state statutes generally defer to FTC and federal court interpretations of section 5(a) of the FTC Act for definitions of deceptive conduct.

In 1983, the FTC issued a policy enforcement statement defining deception as a "representation, omission, or other practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." In *In re Cliffdale Associates, Inc.*, the FTC used this new definition to find that advertising for an automotive air-bleed device, designed to save

85. Thompson, *supra* note 7, at 973 n.193. Common law actions for fraud, deceit, and warranty were limited to providing relief on a case-by-case basis. Injunctions were not available to prevent further dissemination of the advertising. E. KINTER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES: A GUIDE FOR THE BUSINESSMAN 7-8 (1971).
86. 15 U.S.C. § 1125(a) (1982) states in part:
Any person who shall . . . use in connection with any goods . . . any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods . . . to enter into commerce, . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.
87. 15 U.S.C. § 45(a)(1) (1982) ("unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful").
89. Id.
90. Thompson, *supra* note 7, at 968. For example, the Illinois Consumer Fraud and Deceptive Practices Act provides the statutory basis for advertising within the state of Illinois. ILL. REV. STAT. ch. 121-1/2, paras. 261-317 (1983).
92. Letter from Chairman James C. Miller III to Hon. John D. Dingell at 4 (Oct. 14, 1983) [hereinafter Letter, Deception Policy Statement] (discussing FTC Deception Policy Enforcement Statement). The FTC defines misrepresentation as "an express or implied statement contrary to fact." A misleading omission occurs when the "qualifying information necessary to prevent a practice, claim, representation, or reasonable belief from being misleading is not disclosed." In determining whether an omission is deceptive, the overall impression created by the representation, practice, or claim is examined. *Id.* at 2 n.4.
fuel, was deceptive because it claimed that "every car needs one" when in fact cars manufactured after 1974 could not benefit from the product. Furthermore, claims of enhanced fuel efficiency were overstated. Applying this standard in *Southwest Sunsites, Inc. v. FTC*, the court found that brochures promoting land investment were deceptive because they failed to disclose material information regarding both the suitability of the property for various uses and the financial risk involved.

Proof of actual consumer deception is not necessary to enjoin advertising. Rather, the FTC and state agencies may properly regulate speech that presents a likelihood of deception. According to the court in *Thompson Medical Company, Inc. v. FTC*, whether or not a particular advertisement is likely to deceive is "determined by the net impression it is likely to make upon the viewing public." Thus, advertising that conveys a false or misleading impression about a product or service is improper even if each individual statement in the ad, considered separately, is literally and technically true.

Additionally, advertising that may be "reasonably" interpreted in a misleading way is unlawful even though other nonmisleading interpretations are possible.

For example, in *Thompson Medical Co.*, the company manufactured Aspercreme, a nonaspirin product developed to relieve arthritic pain. A

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94. *Id.* at 167.
95. 785 F.2d 1431 (9th Cir. 1986).
96. *Id.* at 1435. *See also supra* notes 70-75 and accompanying text. The use of a "technical term" in *Zauderer* was enough to prompt the Court to find "self-evident" deception. The technical term was the word "fees" as contrasted with "costs." In the context of attorney advertising, the former was a word of art, according to the Court. The deception resulted from the reference in the advertising to the availability of contingent fee arrangements without disclosing that the client was liable for costs associated with the litigation.
97. *Friedman*, 440 U.S. at 15; *American Home Prods. Corp. v. FTC*, 695 F.2d 681, 687 (3d Cir. 1982); *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979). *See also Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976) (likelihood of deception is criterion by which advertising is measured); *Letter, Deception Policy Statement, supra* note 92, at 4 (issue is whether act or practice is likely to mislead, rather than if it causes actual deception).
98. 791 F.2d 189, 197 (D.C. Cir. 1986). *See also American Home Prods.*, 695 F.2d at 685 (important consideration is net impression conveyed to the public); *Warner Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977) (close proximity of statements in advertisement deceptively conveyed that killing germs meant curing colds); *FTC v. Sterling Drugs*, 317 F.2d 669, 674 (2nd Cir. 1963) (in reviewing advertising, Commission will examine "the entire mosaic, rather than each tile separately").
99. *Thompson Medical Co.*, 791 F.2d at 197; *Carter Prods., Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963). *See also Letter, Deception Policy Statement supra* note 92 (entire advertisement transaction, or cause of dealing will be considered).
100. 791 F.2d at 197; *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 161 n.4 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Jay Norris Corp. v. FTC*, 570 F.2d 157 (7th Cir. 1977); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1962). *See also Sears, Roebuck & Co. v. FTC*, 676 F.2d 385 (9th Cir. 1982) (secondary deceptive message is actionable even though primary message accurate); *Letter, Deception Policy Statement supra* note 92, at 8 (when representation conveys even one meaning to reasonable consumers which is false, seller is liable).
television advertisement featured an announcer who held two aspirin tablets and stated, "Aspercreme starts concentrating all the temporary relief of two aspirin directly at the point of minor arthritic pain . . . ." As she spoke, the aspirin tablets she held were replaced by a tube of Aspercreme. On review, the appellate court affirmed the FTC's finding that Thompson's advertising falsely represented that its nonaspirin product contained aspirin, and that this was a material misrepresentation likely to mislead customers. The FTC enjoined the advertising, even though none of the advertising at issue explicitly stated that Aspercreme contained aspirin, because the overall net impression was that it did.

A 1982 Lanham Act case, Better Business Bureau v. Medical Directors, suggested that the context of an ad might deceive consumers even though the advertisement was entirely true on its face. The defendant, a weight clinic, ran advertising that referred to customers who had provided generally favorable reports on the clinic to the Better Business Bureau as Better Business Bureau "investigators." The court enjoined the advertising and held that, when it was considered in the context of the Bureau's traditional role in "encouraging honesty and exposing deception," this advertising deceptively inferred that the defendant had the Bureau's endorsement, even though the advertisement was technically accurate.

A recent example of the difference between deception "on its face" and deception "in effect" is the Ninth Circuit's holding that the expenditure of "substantial funds" on the publication of false claims created a rebuttable presumption of actual deception and reliance. In U-Haul International v. Jartran, Inc., the defendant engaged in an eighteen-month national advertising campaign which compared its capabilities to those of its primary competitor, U-Haul. Observing the difficulty of establishing consumer deception through direct evidence, the court held that Jartran's substantial spending, in an effort to deceptively influence consumers' purchasing decisions, justified the existence of a presumption that consumers were deceived. Although the issue raised on this particular appeal was a $40
million damage award and not the initial finding of deceptiveness, the holding demonstrates the willingness of the courts and the FTC to consider a varied range of factors when evaluating the likelihood that advertising will deceive or mislead consumers.

In reviewing advertising, the FTC may rely on its own expertise and judgment without the aid of consumer surveys, testimony, or other evidence of actual deception.\(^{110}\) The court in FTC v. Brown and Williamson Tobacco Corp.,\(^{111}\) emphasizing that the "public's impression is the only true measure of deceptiveness,"\(^{112}\) noted that having some empirical evidence of public impression would generally be desirable, but not necessary to support a finding of tendency to deceive.\(^{113}\)

Somewhat offsetting the seemingly broad standards employed to measure deceptiveness and the flexibility the courts and the commission enjoy in applying them, is the requirement that advertising be interpreted in its entirety and in terms of the audience it speaks to. The Second Circuit in Avis Rent A Car System, Inc. v. Hertz Corp.,\(^{114}\) quoted Judge Learned Hand's warning that "[t]here is no surer way to misread any document than to read it literally."\(^{115}\) In March 1984, Hertz ran an advertisement with the headline "Hertz has more new cars than Avis has cars."\(^{116}\) Avis sued in U.S. district court under section 43(a) of the Lanham Act claiming that the statement was absolutely false.\(^{117}\) Avis argued that because the advertisement was not

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110. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391-92 (1965); Thompson Medical Co., 791 F.2d at 197; Brown and Williamson, 778 F.2d at 40; Bristol-Meyers Co. v. FTC, 738 F.2d 554, 563 (1984). See also American Home Prods., 695 F.2d at 687-88 n.10 (consumer testimony, although helpful, not essential); Resort Car Rental Sys., Inc. v. FTC, 518 F.2d 962, 964 (9th Cir. 1975), cert. denied sub nom. MacKenzie v. United States, 423 U.S. 827 (1975) (commission could have reached conclusions regarding deceptive nature of ads without consumer witnesses); J.B. Williams Co. v. FTC, 381 F.2d 884, 890 (6th Cir. 1967) (commission need not take random sample to determine meaning and impact of ads); Carter Prods., Inc. v. FTC, 323 F.2d 523, 528 (5th Cir. 1963) (FTC may draw its own inferences and need not rely on testimony or exhibits); Exposition Press, Inc. v. FTC, 295 F.2d 869, 872 (2d Cir. 1961), cert. denied, 370 U.S. 917 (1962) (commission needs no consumer testimony to support inference of deceptiveness); Zenith Radio Corp. v. FTC, 143 F.2d 29, 31 (7th Cir. 1944) (commission not required to sample public opinion). But see Leonard Porter Co. v. FTC, 88 F.T.C. 546, 626 n.5 (1976) (in some cases may require extrinsic evidence to prove likelihood of deception).

111. 778 F.2d 35 (D.C. Cir. 1985).
112. Id. at 39-40.
113. Id. at 40. See also supra note 21 and accompanying text. Evaluating advertising's tendency to deceive is not always easy. See Kramer, Marconian Problems, Gutenbergian Remedies: Evaluating the Multiple-Sensory Experience Ad on the Double-Spaced, Typewritten Page, 36 Fed. Comm. L. Serv. 35, 36 (1977) (serious problems arise when regulators evaluate possible falsity or deception without considering ad in same context it sought to instill); Gellhorn, Proof of Consumer Deception Before the FTC, 17 U. KAN. L. REV. 559, 563-67 (1969) (FTC does not have sufficient expertise to know how consumers interpret ads; ads are often ambiguous, and workable measure of consumer understanding is elusive).

114. 782 F.2d 381 (2d Cir. 1986).
115. Id. at 385 (quoting Guiseppi v. Walling, 144 F.2d 608, 624 (2d Cir. 1944)).
116. 782 F.2d at 383.
117. Id. at 381.
specifically limited to rental cars, it was false since Avis owned more cars than Hertz at the time the claim was made. Hertz defended on the ground that the advertising, properly construed, referred only to the cars available for rental by the two companies, not to the total number of cars owned. 118 The trial court rejected Hertz's argument that consumers would interpret the advertisement as a comparison of rental fleets as opposed to all cars owned. 119 The appellate court overturned the holding and reasoned that in determining its meaning, an advertisement must be considered in its entirety. The court determined that isolated statements could not be interpreted out of context. The court stated that the advertisement must be read in the context of the target consumer's actual concerns and interests. 120 Because Hertz addressed the advertisement to the "renting public," it successfully argued that the advertisement was not deceptive since consumers of rental cars would understand that the advertisements referred only to cars for rent. 121 Thus, an advertiser is not liable for every possible interpretation or action by a consumer. Instead, the test is whether the consumer's interpretation or reaction to the communication as a whole is reasonable. 122 When advertising is targeted to a specific audience, it is evaluated in terms of its effect on a reasonable or ordinary member of the targeted group. 123

Once it is determined that a representation, omission, or practice is likely to mislead consumers, it must be "material" to be judged deceptive. 124 Materiality does not depend on a showing of actual injury, 125 but instead,

118. Id. at 383.
119. Id. at 382-83.
120. Id. at 385.
121. Id. at 386. The Court added that Avis failed to introduce any evidence regarding the message received by the audience to whom the advertising was directed. Context and entirety can not be ignored as emphasized in earlier cases. See Vidal Sassoon, Inc. v. Bristol Meyers Co., 661 F.2d 272, 276 (2d Cir. 1981) (court cannot engage in "disputatious dissection"); Sterling Drug, 317 F.2d at 674 (principles of interpretation include analysis of communication in its entirety).
122. Cliffdale Assocs., Inc., 103 F.T.C. at 165; National Dynamics v. FTC, 492 F.2d 1333 (2d Cir. 1974). See also Warner Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977) (claim evaluated from perspective of "average listener"); Letter, Deception Policy Statement supra note 92, at 8-9 (practice must be considered from perspective of reasonable consumer).
123. Hertz, 782 F.2d at 385; Porter v. Dietsche, 605 F.2d 294 (7th Cir. 1979); Horizon Corp. v. FTC, 97 F.T.C. 464, 464, 810 n.13 (1981). See also Bates, 433 U.S. at 383 n.37 (consideration of legal sophistication of audience necessary in determination of whether attorney advertising is misleading); Travel King, Inc. v. FTC, 86 F.T.C. 715, 757, 759-60 (1975) (seriously ill consumers particularly vulnerable to exaggerated medical claims); Ideal Toy Co. v. FTC, 64 F.T.C. 297, 310 (1964) (children as consumer group not equipped to evaluate possibility that claims aimed at them may be untrue); Westen, Remarks of Deputy Director, FTC Bureau of Consumer Protection, "New Directions in the Regulation of Advertising: Protecting Children in the Marketplace of Ideas," (Mar. 1978) (television advertising has tremendous impact on children, yet they lack ability of adults to comprehend it).
124. See supra note 92 and accompanying text.
125. Colgate-Palmolive Co., 380 U.S. at 391-92; Simeon Management Corp. v. FTC, 579 F.2d 1137, 1168 (9th Cir. 1978). See also Resort Car Rental System, 518 F.2d at 964 (actual damage need not be shown).
is based on the influence the representation has on consumer behavior. A claim or representation is material if it is likely to affect a consumer's product choice, or his conduct regarding a product.\textsuperscript{126} Under this standard, "injury exists if consumers would have chosen differently but for the deception."\textsuperscript{127} Further, representations or omissions that significantly involve subject matter with which the reasonable consumer would be concerned, such as health, safety, or cost, are also considered material.\textsuperscript{128}

In sum, "deception" is a subjective standard that protects both the advertiser and the consumer. The advertiser's protection comes from the assurance that its advertising will be evaluated, not in isolation or piece by piece, but as a total communication. The advertisement is interpreted, therefore, as its intended target audience would interpret it. Similarly, the consumer is protected by application of a standard that considers the unique experience, knowledge, and circumstances that the targeted market draws upon when responding to advertising, along with the net impression likely from a particular advertisement. Each advertisement should be judged in terms of the influence such information has on a prospective consumer's choice of product or service. Thus, the advertising must be viewed from the perspective of the audience, an audience which acts "reasonably under the circumstances."\textsuperscript{129}

II. \textit{Fargo Women's Health Organization v. Larson}

The plaintiff, Fargo Women's Health Organization, was a medical clinic that performed abortions. The defendant, The Women's Help Clinic, provided pregnancy tests and anti-abortion counseling services, but did not perform abortions. The Women's Health Organization filed an action for damages and injunctive relief charging that the Help Clinic used false and deceptive advertising to mislead women into believing that they performed

\textsuperscript{126} Colgate-Palmolive Co., 380 U.S. at 386; Cliffdale Assocs., 103 F.T.C. at 112; American Home Prods., 695 F.2d at 690. See also Basis of Statement and Purpose of the Cigarette Rule, 29 Fed. Reg. 8325, 8386-87 (1964) (deception material if it is likely to affect average consumer in deciding whether to buy advertised product); \textit{Restatement (Second) of Torts} § 538(2) (1977) (material misrepresentation or omission is one which reasonable person would regard important in knowing how to act).

\textsuperscript{127} Letter, Deception Policy Statement supra note 92. But see Cliffdale Assocs., 103 F.T.C. 110, 196 (Commissioner Patricia P. Bailey concurring in part and dissenting in part) ("Opinion and Policy Statement conclusions that injury and materiality are synonymous, that causation and reliance must be shown or even that the likelihood of consumer detriment must be demonstrated in every case do not square with these accepted standards of materiality.").

\textsuperscript{128} Letter, Deception Policy Statement supra note 92. See Cliffdale Assocs., 103 F.T.C. at 116 (scientific support for product performance claims is material); Firestone Tire & Rubber Co. v. FTC, 481 F.2d 246, 249 (6th Cir. 1973) (misrepresentation as to safety involves issue of great significance to consumers); \textit{J.B. Williams Co.}, 381 F.2d 884 (6th Cir. 1967) (information that product works in only small number of cases where symptoms are due to iron deficiency is material).

\textsuperscript{129} Cliffdale Assocs., 103 F.T.C. at 165.
abortions in order to lure them to the Help Clinic to discuss anti-abortion alternatives. The Women's Health Organization also charged that the defendant intentionally named itself the "Help Clinic" to cause confusion, and lead women who wanted to contact the Women's Health Organization into unknowingly contacting the Help Clinic.\textsuperscript{130}

The Help Clinic advertised in newspapers and the telephone book. The advertisements featured the word "abortion" in large, bold type followed by a listing of services. The list included "financial assistance," "advisory services," "free pregnancy tests," "services performed by licensed physicians," "confidential," and in one of the two advertisements, "indecision counseling—Pro-Life."\textsuperscript{131}

The trial court entered a preliminary injunction following a hearing. Prior to granting the injunction, the court found that the plaintiff Health Clinic had made a prima facie showing that the Help Clinic's advertising was false and deceptive and would injure the plaintiff if allowed to continue during litigation.\textsuperscript{132} The court enjoined the Help Clinic from using its name or a similar one, deceptively advertising the availability of elective abortions, deluding women into believing they were seeking assistance from the Women's Health Clinic when in fact they were not, and using the word "abortion" in its advertising unless it explicitly stated that it did not perform abortions.\textsuperscript{133}

The Help Clinic appealed, asserting that the preliminary injunction infringed on its first amendment rights.\textsuperscript{134} Before reviewing the injunction, the North Dakota Supreme Court briefly summarized the current law regarding prior restraint of speech, and cited \textit{Zauderer} and \textit{Central Hudson} for the proposition that commercial speech does not receive the full panoply of first amendment protection.\textsuperscript{135} Relying on \textit{Virginia Pharmacy}, it added that prior restraint of commercial speech was allowed, although to what extent remained unclear.\textsuperscript{136} The court then framed the issue as "whether the Help Clinic's communication constituted commercial or noncommercial speech."\textsuperscript{137}

The court first determined that commercial speech was involved in this case.\textsuperscript{138} It began its analysis of the issue by quoting the \textit{Zauderer} Court's

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\item Approximately 2,000 pro-life centers have opened since the 1973 Roe v. Wade decision. These centers have made it their goal to combat abortion clinics by deflecting potential clinic customers to the centers. \textit{See Law, Pro-Life Clinics Suffer Legal Attack}, \textit{Insight}, Oct. 27, 1986, at 52-54.
\item \textit{Fargo Women's Health Org., Inc. v. Larson}, 381 N.W.2d 176, 178 n.1 (N.D. 1986).
\item \textit{Id.} at 179.
\item \textit{Id.}
\item \textit{Id.} at 180. The Help Clinic also questioned whether the state's false advertising laws applied to this case, and whether the Women's Health Organization had a valid cause of action for trademark infringement. \textit{Id.} at 177-78. Because it was reviewing only the propriety of the preliminary injunction, the supreme court refused to rule on these two issues, as they involved the merits of the case. \textit{Id.} at 183.
\item \textit{Id.} at 180.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 182.
\end{enumerate}
\end{tcolorbox}
characterization of the commercial speech doctrine as based on the "common sense distinction between speech proposing a commercial transaction . . . and other varieties of speech . . . ."

The court then arrived at its determination that the Help Clinic's advertising was commercial speech, as opposed to noncommercial advocacy advertising, based on three factors: (1) the availability of financial assistance from the Help Clinic and its acceptance of credit cards; (2) the commercial context of the advertising and its promotion of services rather than ideas; and (3) the absence of any substantial reference to, or comment upon, public issue matters. The court rejected the defendant's argument that, because no monetary charges were assessed for services rendered to patients, the communication was really advocacy advertising in support of the pro-life position and not commercial speech.

It then applied Central Hudson's four-part test to reach the conclusion that the injunctive relief granted did not unconstitutionally infringe on the Help Clinic's first amendment rights. According to the court, the order was narrowly drawn to proscribe only the deceptive and misleading advertising, and did not prohibit the Help Clinic from rendering or advertising services as long as they were not deceptive. The court found a portion of the injunction, which ordered the Help Clinic to explicitly state that it did not perform abortions if it used the word "abortion" in future advertising, unduly broad and redundant. In light of the other provisions of the injunction, the court agreed that this restriction was unnecessary to prevent false and misleading advertising.

III. Analysis and Criticism

The Fargo decision may have had a very different result if the court had used a different definition of commercial speech. For example, if the court found profit motive determinative of commercial speech, as did the Court in Virginia Pharmacy, the Help Clinic might have prevailed by arguing that its advertising was not aimed at making money, but instead at turning abortion seekers into advocates of the Help Clinic's anti-abortion philosophy. Because the potential exists for advertisers like the Help Clinic to escape judicial or governmental scrutiny by advertising under the guise of a "public issue" communication, alternatives are needed to the typical or cursory

139. Id. at 180 (quoting Zauderer, 471 U.S. at 637).
140. 381 N.W.2d at 180-81.
141. Id. at 180.
142. Id. at 182.
143. Id.
144. Id. at 179.
145. Fargo defines the nature of the speech by the nature of its context. 381 N.W.2d at 181.
147. See, e.g., Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (upholds portion of ordinance totally banning commercial billboards to preserve aesthetics and traffic safety, but striking down general ban on noncommercial billboards as impermissible restriction on speech).
commercial speech analysis performed in *Fargo* and similar cases.

The *Fargo* court applied three factors to its definition of commercial speech, which is speech proposing a commercial transaction. After briefly discussing the first factor, financial assistance and credit card acceptance, the court dismissed as nondispositive the issue of whether "any monies are received by the Help Clinic from its clients" in deciding if the speech was commercial. The extension of financial assistance and credit, however, could be strong evidence of the pecuniary motive present in any commercial transaction. Aside from the observation that one patron was charged for services received from the Help Clinic, there was no discussion of fees, profit or economic motive, or any other commercial considerations. Indeed, the court specifically stated that it did not matter whether any money was exchanged for services.

It was important, however, that the advertising appeared in a "commercial context" which focused on the medical, advisory, and financial services available in an attempt to solicit patronage for the clinic. The court called this a "classic example" of commercial speech. But the clinic was not in the business of selling medical or advisory services. The clinic admitted that it had no profit motive and testified that fees were not charged for services. The objective underlying the solicitation was not pecuniary gain, but instead the promotion of the Clinic's pro-life philosophy.

In applying a "commercial context" standard to distinguish commercial from noncommercial speech, the *Fargo* court never defined "commercial context." Was it dependent on the form of the communication, the media it appeared in, or the language it employed? In the 1964 libel case *New York Times v. Sullivan*, the fact that the speech at issue was cast in the form of a paid political advertisement did not transform it into commercial speech. Instead, the content of the advertisement, not the context, was the crucial factor in determining what degree of constitutional protection the

148. 381 N.W.2d at 180.
149. Id.
150. Id.
151. Id. at 181.
152. The Help Clinic might have argued that its advertising was simply a communication of its willingness to "serve" the community, much like the direct mail solicitation upheld by the Court as fully protected noncommercial speech in *In re Primus*, 436 U.S. 412 (1978). In that case, the solicitation was from an ACLU attorney. The letter advised the recipient, who had been sterilized as a condition for receiving Medicaid, to sue the doctor who performed the procedure, and that the ACLU would represent her at no cost. The Court pointed out that the motive underlying the solicitation was not pecuniary gain, but the advancement of "political and ideological goals" through associational activity protected by the first amendment. Id. at 416. Therefore, *Primus* held that a lawyer informing an individual of a willingness to advise was considered not-for-profit "informational" advertising. Id. at 427.
153. 381 N.W.2d at 181.
155. Id. at 266.
1987] FARGO WOMEN'S HEALTH ORGANIZATION 603

speech deserved. The Fargo court made no attempt to reconcile its application of a "commercial context" standard with the New York Times holding, nor did it try to fit it into the framework of prior commercial speech standards.

The court relied on Zauderer, Bolger, and Bigelow to refute the Help Clinic's argument that the first amendment fully protected the advertising as a form of advocacy advertising. The Court stated that merely tying a communication to a public issue will not transform commercial into noncommercial speech. Yet it neglected to reconcile its conclusions with several cases that suggest the opposite conclusion might be reached. As one court stated, "[T]he capacity of commercial speech to communicate simultaneously political and social messages can be discerned by anyone who gives second thought to . . . an advertisement for commercial abortion services at a family planning clinic." Conversely, noncommercial speech has the same propensity to "communicate simultaneously" economic and commercial messages.

In Glover v. Cole, involving a state university's ban on soliciting sales for a Socialist Worker's Party newspaper, the university president argued that the sales activity did not enjoy full first amendment protection because the activity was a purely commercial transaction. Cautioning that there was "no certain refuge in platitudes from the commercial speech cases," the court stated that the fallacy in applying the commercial speech approach was the "plastic distinction" between pure speech and commercial activity. It argued that fund raising may be an integral part of political advocacy.

The Supreme Court stated in Citizens for a Better Environment v. Village of Schaumburg that some kinds of solicitation do more than affect private economic decisions, most notably charitable contribution solicitations such as the door-to-door canvassing undertaken by the Citizens for a Better Environment. Because this type of solicitation included the dissemination of

156. Id. The Court stated that the speech was not commercial in the Chrestensen "private profit" sense because it "communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose objectives are matters of the highest public interest and concern. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold." Id. See generally Thompson, supra note 7, at 967 (New York Times stands for proposition that "public speech," even if commercial in nature, is fully protected); Moore, supra note 4, at 30 (Court viewed New York Times as establishing that advertising concerning opinions and matters of public concern is entitled to full constitutional protection).

157. See supra notes 70-75 and accompanying text.
158. See supra notes 60-69 and accompanying text.
159. See supra notes 32-46 and accompanying text.
162. Id. at 1200.
163. Id. at 1200-01.
views and ideas as opposed to merely providing information on the characteristics and costs of goods and services, it was categorized as fully protected, noncommercial speech.\footnote{165}

Quoting from the majority opinion in \textit{Bolger}, the \textit{Fargo} court stated that the rationale for the Supreme Court's holding was clear: "'[A]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.'\footnote{166} It added that the Help Clinic could advocate a social or political issue outside of a "commercial context" if it wished to take advantage of the full first amendment protection. The court's own motive and analysis became apparent when it included the \textit{Bolger} quote in its opinion. The court knew that the Help Clinic's advertising was misleading, yet recognized that it could not regulate it without first categorizing it as commercial speech. Aware that support for the argument that the advertising was commercial speech was weak, the court posited its argument in the negative, reasoning that the speech was not noncommercial after a cursory application of case law to the facts. It easily distinguished \textit{Bigelow} by pointing out that there was no restriction on factual material of public interest as in the Virginia statute which prohibited publication of pro-abortion information. \textit{Fargo} merely involved the commercial solicitation of clientele.\footnote{167} The court's approach, however, ignores the obvious. The advertising at issue here was not aimed at gaining new business in the commercial sense, but in the ideological sense.

Nevertheless, the court's only alternative was to label the advertisement as commercial in order to uphold the injunction. Had the misleading effects of the advertising not been so blatant, or had the court been more sympathetic to the pro-life argument, it could have found that the speech was noncommercial given the lack of an economic motive and the simple advisory or informational nature of the advertisement's content. Instead, the court could have applied the \textit{In re Primus} holding that solicitation, with the objective of furthering the ideological goals of a nonprofit organization, is fully protected, noncommercial speech.\footnote{168} Either alternative would preclude judicial scrutiny of the advertising.

An argument similar to that endorsed in \textit{Fargo} failed in a 1985 California case. In \textit{Spiritual Psychic Science Church of Truth, Inc. v. Azusa},\footnote{169} a church and its minister sued to enjoin enforcement of a city ordinance that prohibited fortune-telling for consideration. The city argued that the type of fortune-telling the ordinance addressed was commercial speech because it was engaged

\footnotesize{\begin{itemize}
\item\footnote{165. \textit{Id.} at 632. See also Pennsylvania Pub. Interest v. York Township, 569 F. Supp. 1398 (M.D. Penn. 1983) (charitable appeals for funds enjoy preferred first amendment status over commercial solicitation).}
\item\footnote{166. \textit{Fargo}, 381 N.W.2d at 181 (quoting \textit{Bolger}, 463 U.S. at 68).}
\item\footnote{167. \textit{Id.} at 182.}
\item\footnote{168. See \textit{supra} note 152 and accompanying text.}
\item\footnote{169. 39 Cal. 3d 501, 703 P.2d 1119, 217 Cal. Rptr. 225 (Cal. 1985).}
\end{itemize}}
in for profit and did not concern or affect the political process. Thus, it should not be entitled to full constitutional protection. Essentially, the city's argument mirrored the Fargo court's rationale. The California Supreme Court rejected it, finding that fortune-telling for consideration was noncommercial speech. Applying the Virginia Pharmacy and Central Hudson definitions of commercial speech, the court found that fortune-telling went beyond the mere proposal of a commercial transaction and involved the passing of information and ideas. The court reasoned that this exchange was completely unrelated to any fees the client paid to receive the communication. Refuting the city's contention that the speech should not be considered political, the court reasoned that it was impossible to conclude that fortune-tellers never impart political messages because such communication "conceivably could contain the spark of a political flame." Thus, the possibility that fortune-telling might "fire the imagination and stimulate discussion of the future" also weighed against the city's argument.

It is tempting to try to distinguish Spiritual Psychic Church by arguing that Fargo deals with the advertising of the "act" while Spiritual Psychic Church deals with the "act" itself. The California Supreme Court, however, explicitly stated that its analysis applied to all of the related and unrelated activities covered by the city ban on fortune-telling, including advertising. Thus, when the weakness of the economic motive argument is combined with the possibility that the information the Help Clinic imparted could be characterized as in the public interest or a political issue, applying Spiritual Psychic Church would yield a different finding in Fargo.

IV. ALTERNATIVES

The Fargo decision illustrates that arbitrary classification of speech as commercial or noncommercial, at least in cases where it is not obviously one or the other, creates a roadblock to the regulation of deceptive advertising.

In situations where speech is not clearly commercial or noncommercial, three alternative approaches to the traditional classification schemes are suggested. The first approach is to eliminate the requirement that the speech at issue initially be labeled commercial or noncommercial, often an artificial designation, and permit the reviewing court to immediately apply the Central Hudson test to determine whether, and how, the speech should be regu-

170. Id. at 508-11, 703 P.2d at 1122-23, 217 Cal. Rptr. at 228-30.
171. Id. at 510-11, 703 P.2d at 1123, 217 Cal. Rptr. at 229-30.
172. Id. at 512, 703 P.2d at 1124, 217 Cal. Rptr. at 231.
173. Id.
174. Id. at 506 n.1, 703 P.2d at 1120 n.1, 217 Cal. Rptr. at 227 n.1.
175. Recognizing that speech often contains commercial and noncommercial elements, Justice Stevens stated in Bolger that "it may be more fruitful to focus on the nature of the challenged regulation rather than the proper label for the communication." 463 U.S. at 82-83 (Stevens, J., concurring).
lated.176 The second approach consists of an assessment of the risks involved in the particular communication to determine whether or not it should be regulated. The last alternative would be the establishment of a separate standard of review for medical, personal, or professional services advertising.

Under the first alternative, the court would apply the Central Hudson test when speech is not clearly commercial or noncommercial. If the court finds the communication to be fraudulent or misleading under the current “likely to deceive” standard of review,177 it can be regulated to the extent necessary to serve a substantial state interest. This approach permits direct attack on deceptive speech without the judicial gymnastics currently undertaken to first classify it as commercial. In Fargo, the search for a rationale upon which to base a finding that the advertising was commercial would be avoided, and the risk that another court could easily reach the opposite result in subsequent litigation would be minimized. This approach increases certainty by putting advertisers on notice that if their communication is likely to deceive the targeted audience, it will be regulated. Thus, the Help Clinic would be less likely to take a chance on running deceptive advertising in the hope that it could prevail on the advocacy advertising argument and thereby escape regulation. The chief disadvantage of this approach is the potential for an overly broad application to speech that truly is noncommercial and entitled to full first amendment protection. Under this approach, there is still the need for judicial discretion to first determine that the speech cannot be characterized as either commercial or noncommercial before the court could proceed directly to the Central Hudson test. The risk exists that some noncommercial speech could be subject to possible unconstitutional regulation. However, the resulting “damage” would amount to no more than a proscription on the deceptive aspects of the speech coupled with the opportunity to correct the problem and continue with the revised communication.

This alternative approach includes no built-in safeguard to protect the less than “reasonable under the circumstances” plaintiff. It only ensures that regulation of the deceptive speech will not be foreclosed because it cannot be categorized as commercial. This is the least desirable alternative in terms of effective application of the deception standard because an “unreasonable” reaction on the part of a plaintiff acting in reliance on the advertising could preclude regulation, since the advertising must meet the “likely to deceive” standard to trigger its regulation.

The second alternative involves assessing the risks of the communication. Where a strong potential for fraud, overreaching, or undue influence exists as a result of the communication, it would be subject to regulation. The advantage of this approach is that it considers the targeted listener’s unique set of circumstances. In Fargo, where the listener is especially vulnerable to manipulative or intentionally vague communication, stricter standards would be justified.

176. See supra note 57.
177. See supra note 92 and accompanying text.
This approach follows the Supreme Court’s rationale in *Ohio State Bar Association* v. *Ohio State Bar Association*, where an attorney’s in-person solicitation of a prospective client was prohibited because of the attendant risks inherent in circumstances where high-pressure sales tactics might be used. In *Ohio State Bar Association*, the state’s interest in protecting the public from the harmful aspects of solicitation was strong enough to support the ban on in-person solicitation. A seemingly important factor in the Court’s analysis was the vulnerability of the audience involved; in this case the target was an accident victim whom the Court said was unable to properly evaluate her need for legal expertise.

As Justice O’Connor pointed out in her dissent in *Zauderer*, the printed word is only one step removed from in-person solicitation and it is impossible to judge its validity without first consulting the advertiser. Unwitting respondents who have been deliberately misled into calling the Help Clinic, under the false impression that it is an abortion clinic, risk exposure to the same kind of intimidation and undue influence that the *Ohio State Bar Association* Court denounced. The result of the solicitation, whether in person or in print, is the same. The state’s interest in protecting its citizens from this result should not depend on whether the speech can be characterized as commercial or noncommercial. Courts should be free to evaluate the conduct in terms of the results, not just the tactics. The *Ohio State Bar Association* Court endorsed the solicitation ban as a “prophylactic measure” designed to prevent harm before it could

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179. The Supreme Court upheld a prohibition of in-person solicitation by attorneys. An important part of the rationale for the Court’s holding was the potential for overreaching and undue influence inherent in personal solicitation of a prospective client by a lawyer. *Id.* at 461-62. Attorney Ohralik, upon learning that an acquaintance had been hurt in an accident, visited her in the hospital with the hope of representing her in any later lawsuit. The Court found that the direct pressure and one-sidedness of this type of selling, under these circumstances, went beyond the constitutional protection granted in *Bates v. State Bar*. See supra notes 47-51 and accompanying text. The *Ohio State Bar Association* Court noted that *Virginia Pharmacy* did not entitle commercial speech to the same level of protection as noncommercial speech, emphasizing that it takes a “subordinate position” in the “scale of first amendment values.” 436 U.S. at 455-56. Commercial speech could be regulated in furtherance of an important state interest. The interests upheld were the protection of the public from the harmful effects of personal solicitation and the advancement of high professional standards for the legal profession. *Id.* at 461. The argument upheld in *Ohio State Bar Association* that the solicitation ban serve a substantial state interest in maintaining high standards among licensed professionals was rejected by the *Bates* Court when offered to support the ban on lawyer advertising. However, the Arizona Bar Association’s argument in *Bates* was that advertising damaged the dignity of the profession. In contrast, the *Ohio State Bar Association* respondent’s rationale was protection of the public. See supra note 50 and accompanying text.
180. 436 U.S. at 461.
181. *Id.* at 449. Justice Marshall suggested in his concurring opinion that there might be a different result where “honest, unpressured commercial solicitation is involved.” *Id.* at 476 (Marshall, J., concurring). The absence of a naive, vulnerable audience may weaken the state’s public protection interest in prohibiting solicitation. *Id.*
182. 471 U.S. at 678 (O’Connor, J., dissenting).
183. 436 U.S. at 461-62.
Where, as in *Fargo*, harm in the form of undue intimidation, coercion, or fraudulent misrepresentation is likely to occur as a result of the speech at issue, regulating it should be justified regardless of the form it takes.

The third alternative approach is the establishment of a separate standard of review for medical, personal, or professional services advertising. Communications of this nature are particularly prone to deception, both intentional and innocent. The *Virginia Pharmacy* Court recognized this, and noted that the increased likelihood of deception inherent in advertising for these services might necessitate different standards for evaluating the acceptability of time, place, and manner restrictions. The *Bates* Court strongly suggested that advertising regarding the quality of legal services could be misleading and thus should not be allowed. In fact, three Justices filed dissenting opinions asserting that the first amendment did not bar regulation of legal service advertising. They cited the increased potential for deception and the difficulty of effective regulation in the public interest as warranting the prohibition of price advertising for legal services.

Professional and medical services are complex and diverse. The average lay person lacks the knowledge and experience necessary to gauge the veracity of the information or the quality of the service offered. An uninformed decision based on one's interpretation of a misleading advertisement could lead to seriously detrimental results. This qualitative difference between commercial advertising for commodity products and professional services advertising warrants different regulatory standards.

Generally, content-based restrictions are upheld only for speech categorized as having little or no speech value, such as obscenity and "fighting words." Otherwise, the state must have a compelling interest in regulating the speech if the speech is noncommercial, or a substantial interest if the speech is commercial. Under this third alternative, regulation of medical, professional, or personal services advertising would give rise to a rebuttable presumption of a valid state interest. The state has an interest in alleviating the dangers that can result from innocent misrepresentation or intentional fraud.

184. *Id.* at 464.
185. 425 U.S. at 773 n.25. See *supra* note 51 and accompanying text.
187. *Id.* at 386 (Burger, C.J., concurring in part and dissenting in part); *Id.* at 390-91 (Powell, J., Stewart, J., concurring in part and dissenting in part).
188. *Id.* at 391 (Powell, J., concurring in part and dissenting in part). Chief Justice Burger noted that the nonstandardized aspect of legal services made advertising difficult to regulate. *Id.* at 386-87 (Burger, C.J., concurring in part and dissenting in part).
189. See generally *Note, We Can Share the Women*, *supra* note 7, at 1116 (arguing that harms associated with alcohol consumption justify regulations on advertising that might be unacceptable if applied to less hazardous products).
191. See *Central Hudson*, 447 U.S. at 566 (substantial state interest is just one of four criteria for regulating commercial speech).
These dangers are inherent in advertising for special services, because of the nature of the harm that can befall consumers who act in reliance on this advertising. Physical as well as mental health may be at risk.

Regulation of cigarette advertising has been upheld in the interest of promoting public health. Even though limiting the ways that manufacturers could promote cigarettes infringed on their first amendment rights, courts have upheld the Congressional regulations as permissible under the first amendment. Similarly, regulations on medical, personal, or professional services advertising can be justified on the grounds of protecting public health. The burden would be on the advertiser to prove that the public health interest was not implicated under the particular facts of the case. In Fargo, for example, the Help Clinic would have the burden of showing that the mental or physical well-being of its unsuspecting customers was not detrimentally affected as a result of visiting the Clinic in reliance on its advertising.

The second alternative approach, which permits regulation where there is greater risk of overreaching and undue influence, best facilitates effective application of the deception standard to cases like Fargo. The "likely to deceive" test protects consumers who act reasonably under the circumstances. The unwitting Help Clinic patrons may be incapable of reasonable behavior precisely because of the circumstances. The extremely personal, emotional, and often troublesome nature of the abortion issue produces a highly charged situation that makes the reasonable person deception standard difficult to apply. A Help Clinic victim, however, may be left unprotected because the response resulting from her confrontation with the Help Clinic is not demonstrably reasonable. The second alternative incorporates the higher probability of "unreasonableness" into its analysis; the more vulnerable and easily manipulated the target audience, the greater the potential for overreaching and undue influence, and the stronger the case for regulation. Once it is established that the situation demands regulation, the degree of reasonableness necessarily becomes less of a concern in determining whether the conduct is likely to deceive.

The third alternative, which suggests a different standard of review for medical, personal, and professional services advertising, also mitigates against the dangers of the reasonable person deception standard in special situations like Fargo. Since the two part rationale for this alternative includes the seriousness of the harm that could result and the average lay person's lack

192. See generally Note, We Can Share the Women, supra note 7 (asserting that harms associated with alcohol abuse are so extensive they establish a compelling state interest in regulating speech).

of knowledge or experience about these services, an unreasonable response resulting from naivety and the character of the services offered already is taken into account.

CONCLUSION

Vague and unworkable standards, existent in the regulation of commercial speech, undermine the consumer benefit rationale advanced as a justification for limited first amendment protection of commercial speech. At the heart of the problem is the insistence upon the classification of all speech as either commercial or noncommercial. In a marketplace of goods and services, all advertising plays both informational and transaction-motivating roles. The objective is the same—to encourage the reader to take action, be it in the political, ideological, or commercial sense. The line between informing and selling is usually unclear, whether one is dealing in abortion as a commodity service, or abortion alternatives as a value choice. Likewise, it is an oversimplification to state that the existence of the commercial speaker's profit motive precludes any chance that his advertising will provide noncommercial information of value to the public, or conversely, that the noncommercial speaker's advocacy of a cause will not result in economic action on the part of the listener. As Justice Blackmun stated in Bigelow, "[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.

Commercial and noncommercial elements are present in many types of communication. An adept advertiser may be able to add enough noncommercial characteristics to an advertisement with a purely commercial motive and gain the benefit of full first amendment protection. The reluctance to adopt regulatory standards for communication that falls into a gray area should be overcome in order to meet the first amendment objective of providing a free flow of information and ultimately benefit the consumer, be it a consumer of products or ideas. Deception should be attacked regardless of the nature of the speech.

Terry Kirk

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194. See generally Shiffrin, supra note 7, at 1278 n.364 (asking people to share values versus seeking to influence private economic decisions does not clearly divide commercial from noncommercial speech).

195. See Redish, supra note 77, at 443-48 (people have difficulty distinguishing between commercial and noncommercial speech in their decision-making).

196. 421 U.S. at 826.