

(except television or radio advertisements of 15 seconds or less in duration) for "one year and until the respondents have expended on Doan's advertising a sum equal to the average amount spent annually during the eight years of the challenged campaign." The prescribed corrective statement is: "Although Doan's is an effective pain reliever, there is no evidence that Doan's is more effective than other pain relievers for back pain."

A. Legal Standard

Corrective advertising is a type of fencing-in relief for which the court in *Warner-Lambert* adopted a higher standard than the "reasonably related" standard applicable to traditional forms of fencing-in relief. *Warner-*

more reason to impose a corrective advertising remedy than there is for a doctor to prescribe a remedy for a patient who has already recovered. Specifically, the false superior efficacy belief must exist at the time that the Commission's order becomes final -- that is, the date on which the

advertising making a false superior efficacy claim about Anacin ceased, the false belief created would linger among non-users for "approximately one year" and among users for more than one year. 98 F.T.C. at 283-84.

Some quantitative assessment is needed in this case if expert testimony is going to support the imposition of corrective advertising. After all, because the deceptive advertising here ceased three years ago, corrective advertising cannot be ordered as a matter of law if the false superior efficacy belief is likely to linger for three years or less, while it could be ordered if the belief is likely to linger for approximately four years or more. Expert testimony that the false superior efficacy belief is likely to linger for some indeterminate period of time is of little probative value when the Commission's order is based on the expert testimony. 98 F.T.C. at 283-84.

"clearly and consistently." Consumers may have taken away the implied claim immediately after seeing the deceptive advertisements, but only a minimal proportion (between 1% and 8%) of test participants recalled the claim 24 hours or 72 hours after viewing the advertisements along with programming and other advertisements.⁽¹⁶⁾ Similarly, only a minimal proportion (0% top-of-the-mind and 2% total unaided) of consumers recalled any advertising for Doan's, including the

Similarly, in *Bristol-Myers*, the respondent had made, expressly and by clear implication, false

analysis is not the careful calculation of the costs and benefits associated with alternatives that *Central Hudson* requires.

First, the majority does not analyze whether there are any narrower alternatives to imposing corrective advertising, including considering whether traditional cease-and-desist order provisions (such as those contained in Parts I and II of the Order, or triggered disclosure requirements) could be adequate to address future deception.⁽²⁵⁾ Second, assuming that some corrective advertising provision is warranted, the majority does not address in any detail whether

The corrective advertising requirement here is in no way limited to media that are likely to target Doan's users and aware non-users. One narrower alternative that would more accurately target Doan's users and aware non-users is to require the corrective statement only on product labeling and in packaging. Product labeling and packaging are sources of critical safety and efficacy information for users and potential users of Doan's, such as indications for use, directions, warnings, drug interactions, active ingredients, and inactive ingredients. *See Mazis Tr.* at 1607-08 (product package can affect beliefs; consumers look at the product package immediately at the point of purchase). Another narrower alternative is brochures with corrective information that would be made available to Doan's users and aware non-users through prominent displays on the drug store shelves and other locations at which Doan's and other OTC analgesics are sold. Indeed, the Commission has used similar media to target a particular group of consumers who have false beliefs to be corrected.⁽²⁷⁾ Although dissemination of a corrective statement through product packaging and point-of-sale displays, either separately or combined, is a less restrictive alternative that may well be adequate to correct the false belief among Doan's users and aware non-users, the majority does not consider the imposition of such alternatives - - much less

6. I am assuming for the sake

