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EMPIRICAL RATIONALIZATION OF PRIOR SUBSTANTIATION
DOCTRINE: FEDERAL TRADE COMMISSION V. REEBOK &
SKETCHERS

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ABSTRACT

Companies frequently make efficacy claims in advertisements to introduce new products featuring innovative technology. When such claims are supported by information obtained from scientific research or expert testimonials, they are subject to the doctrine of prior substantiation.³ Under the doctrine, an advertisement claim based on seemingly credible authorities must be substantiated by a reasonable basis before it is released to the general public.⁴ Otherwise, the advertisement will be in violation of Section 5(a) of the Federal Trade Commission Act that prohibits “unfair or deceptive acts affecting commerce.”⁵ This study investigates the rationale of the legal rule in light of consumer behavior theories. While the doctrine has been normatively rationalized, it has not been empirically examined. Given the paucity of relevant research, this study will test consumer attitudes and cognitive reactions toward different types of advertisement messages, such as, one

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³ *Thompson Medical Co., Inc. v. F.T.C.*, 104 F.T.C. 648 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986).

⁴ Randal Shaheen & Amy R. Mudge, *Has the FTC Changed the Game on Advertising Substantiation?*, 25 ANTITRUST 65, 65 (Fall 2010).

⁵ 15 U.S.C. § 45(a) (West 2013).

with establishment claims and the other without such cognitive contents. The study administered real advertising video clips used by Reebok⁶ and Sketchers,⁷ disputed in two settled cases where the Federal Trade Commission alleged that the defendants failed to satisfy the legal standard of the substantiation rule. The findings of this study support the rationale of the rule on the ground that the Reebok advertisement clip delivering expressive establishment claims about its product efficacy would likely have more of an immediate impact on consumers' purchasing intention than Sketchers' ad without such cognitive information. Implications and future research along with limitations are also discussed.

I. INTRODUCTION

Efficacy claims are widely used in advertising, particularly for new products equipped with innovative technology. When a claim is not supported by a reasonable scientific basis, it violates the Federal Trade Commission Act ("FTCA") that prohibits deceptive marketing practices.⁸ Under the statute, the Federal Trade Commission ("FTC") is empowered to enforce the law in federal courts on behalf of the general public against parties releasing deceptive advertising claims.⁹ A claim based on seemingly objective information such as expert testimonials or data from scientific research is legally identified as an establishment claim. Since it is theoretically presumed that an establishment claim would likely persuade consumers more effectively than

⁶ *F.T.C. v. Reebok Int'l Ltd.*, No. 1:11-cv-02046-DCN (N.D. Ohio, Sept. 28, 2011) available at <https://www.youtube.com/watch?v=jcwADqb0wXE>.

⁷ *F.T.C. v. Sketchers U.S.A., Inc.*, No. 1:12-cv-01214 (N.D. Ohio, May 16, 2012) available at <https://www.youtube.com/watch?v=9Dse0Ue8X6s>.

⁸ "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1) (West 2013).

⁹ 15 U.S.C. § 45(a)(2) (West 2013).

other advertisements without such a cognitively appealing component, it is subject to a closer scrutiny under the doctrine of prior substantiation.¹⁰ Under the rule, an efficacy claim is deemed to be deceptive unless it is supported by a reasonable basis prior to its dissemination to the general public.¹¹ For a product efficacy claim relating to health or safety implications, the reasonable basis required under the law is to establish "competent and reliable scientific evidence."¹²

Deception is a behavioral consequence when potential or actual buyers develop false beliefs about a product after being exposed to an advertisement that misleads them or omits some critical information related to the advertised product.¹³ Deceptive practices are harmful on a capitalistic market economy that relies on consumer sovereignty and fair competition.¹⁴ Consumer sovereignty is a state where consumers have unimpaired access to material information about products so that the market dynamics can efficiently respond to consumers' collective consumption decisions.¹⁵ Furthermore, fair competition also necessitates unhindered accessibility to material information related to products and services. If such a crucial information exchange system is interrupted by deceptive marketing practices, the market economy may not function efficiently and the likelihood of market failure would increase.¹⁶ As such, if an ad claim contains misleading information that is highly likely to deceive consumers or

¹⁰ "The [Federal Trade] Commission concludes that the making of an affirmative product claim in advertising is unfair to consumers unless there is a reasonable basis for making that claim." *In re Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

¹¹ Shaheen & Mudge, *supra* note 4.

¹² *Novartis Corp., et al.*, 127 F.T.C. 580, 725 (1999).

¹³ Guang-Xin Xie & David M. Boush, *How Susceptible Are Consumers to Deceptive Advertising Claims? A Retrospective Look at the Experimental Research Literature*, 11 THE MKTG. REV. 293, 294 (2011).

¹⁴ Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REV. 44, 49-50 (1998).

¹⁵ *Id.* at 49.

¹⁶ *Id.* at 50.

fails to disclose critical product information, it is considered deceptive conduct under the law. The law protects the general public's interest as well as the efficiency of the market economy.¹⁷

Corporations are incentivized to use deceptive marketing tactics when the benefits derived from such acts would likely outweigh the costs and/or risks associated with the practice.¹⁸ Hence, some regulatory schemes accompanied by investigatory power are necessary. The Federal Trade Commission Act of 1914¹⁹ and subsequent enactments of consumer protection laws primarily intend to avoid the public harm that arises from unfair and deceptive acts or practices.²⁰ Under the law, three main judicial mechanisms are available to regulate deceptive acts, namely private litigation, industry self-policing, and public regulation.²¹

While it is theoretically possible, private litigation is not a realistic way of regulating advertising since consumer injury is typically too small in deceptive marketing cases to justify legal actions initiated by economically rational individual consumers.²² Moreover, although the advertising industry has implemented self-policing bodies such as the National Advertising Division, the deterrent effects created by such self-regulation is insignificant because it includes no more than

¹⁷ Komal Nagar, *Effect of Deceptive Advertising on Claim Recall: An Experimental Research*, 9 J. OF SERVS. RESEARCH 105, 107 (2009).

¹⁸ *Id.* at 109.

¹⁹ 15 U.S.C. §§ 41-58 (Westlaw 2013).

²⁰ *About the FTC*, FTC (May 8, 2016), <http://www.ftc.gov/ftc/about.shtm>. Initially, the Federal Trade Commission Act was enacted to prevent unfair methods of competition as a part of the legislative battle against various trust activities. In 1938, Congress passed additional statutes giving the FTC a greater authority in order to police unfair and deceptive acts or practices.

²¹ Competitors' actions under Lanham Act 43(a) may be included. Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1, 2 (1985).

²² Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARVARD L. REV. 661, 667 (1977).

cease-and-desist letters without immediate consequences.²³ Thus, public regulation is the only realistic solution in spite of its own shortcomings. Given the need for governmental intervention, the FTC has established lines of jurisprudence that define the regulatory schemes used against deceptive marketing²⁴. One of the quintessential legal theories developed by the federal agency is the doctrine of prior substantiation. Since the rule was articulated in *In the Matter of Thompson Med Co.*,²⁵ the FTC has actively regulated not only advertisements that contain patently misleading information, but also advertisement claims based on seemingly objective grounds but have not been properly substantiated by reasonable scientific grounds.

The substantiation doctrine is crucial for regulating advertisement claims about product qualities that consumers are generally not able to verify. There are three different types of product attributes, namely search attributes, experience attributes, and credence attributes.²⁶ First, search attributes are product features that consumers can evaluate easily, such as color, size, and price.²⁷ Since these are open and obvious qualities, the possibility of deceptive marketing would be relatively low. Second, experience attributes are qualities that can be assessed only after consumers purchase and use the product.²⁸ Because such attributes are usually of disposable commodities with relatively low prices, consumer injury from the deception might not be significant. Since consumers frequently make the purchase of such goods, they can simply avoid any additional harm by not buying items where the seller has not accurately advertised qualities. Thus, the only financial injury is the cost of one-time purchase. Last, credence attributes are product features that ordinary consumers may not be able to verify or evaluate, such

²³ Best, *supra* note 21, at 47.

²⁴ Best, *supra* note 21, at 20.

²⁵ *Thompson Medical Co., Inc. v. F.T.C.*, 104 F.T.C. 648 (1984).

²⁶ Ross D. Petty, *FTC Advertising Regulation: Survivor or Casualty of the Reagan Revolution?* 30 AM. BUS. L. J. 1, 23 (1992).

²⁷ *Id.*

²⁸ *Id.*

as efficacy claims of medicine, nutritional contents of dietary supplements, and effectiveness of fitness equipment.²⁹ Advertising claims for these attributes are most likely to be deceptive because consumers cannot discover the falsity of the given information and are unable to punish the advertiser by refusing to purchase additional products. As a result, the FTC monitors advertising claims of credence attributes more closely and enforces the law more stringently when companies fail to substantiate their credence claims accompanied by seemingly objective information.³⁰

For instance, the FTC charged Reebok³¹ and Sketchers³² with deceptive marketing on the ground that their efficacy claims for toning and shaping sneakers failed to satisfy the legal requirements of the substantiation doctrine. While traditional athletic footwear are designed to provide consumers with more stability, toning and shaping shoes are designed to create slight instability to tone and strengthen lower body muscles.³³ In 2010, the size of this new athletic footwear market had reached one billion dollars.³⁴ While it had not been properly substantiated, Reebok advertised that its Easy-Tone footwear strengthens a consumer's hamstrings and calves up to 11% more, and tones his or her buttocks 28% more, than regular sneakers just by walking.³⁵ In response to these unsubstantiated establishment claims, the FTC investigated the controversial marketing practices under Section 5(a) and Section 12 of the

²⁹ *Id.*

³⁰ *Id.*

³¹ F.T.C. v. Reebok Int'l Ltd., No. 1:11-cv-02046-DCN (N.D. Ohio, Sept. 28, 2011) *available at* <https://www.youtube.com/watch?v=jcwADqb0wXE>.

³² F.T.C. v. Sketchers U.S.A., Inc., No. 1:12-cv-01214 (N.D. Ohio, May 16, 2012) *available at* <https://www.youtube.com/watch?v=9Dse0Ue8X6s>.

³³ See Complaint at 3, F.T.C. v. Reebok Int'l Ltd., No. 1:11-cv-02046-DCN (N.D. Ohio, Sept. 28, 2011) *available at* <https://www.ftc.gov/enforcement/cases-proceedings/102-3070/Reebok-international-ltd>.

³⁴ *Id.*

³⁵ *Id.* at 5.

FTCA. Eventually, the parties reached a settlement.³⁶ Under the settlement decree, Reebok had to establish a \$25 million fund that became available for consumer refunds.³⁷ The company was also permanently enjoined from making any health or fitness-related efficacy claims for its toning shoes unless they are true and empirically supported by reliable scientific evidence.³⁸

In 2011, the FTC filed another lawsuit against Sketchers for similar deceptive marketing practices.³⁹ The FTC indicated in its complaint that Sketchers was also in violation of Section 5(a) and Section 12 when the company advertised efficacy claims for its toning shoes, Shape-Ups, Resistance Runner, and Tone-Ups, without reasonable scientific grounds.⁴⁰ The complaint alleged that Sketchers not only failed to satisfy the prior substantiation rule, but also failed to disclose material information - that the chiropractor hired by the company to support its efficacy claims in its advertisements was in fact a compensated endorser who was also married to a senior vice president of the company.⁴¹ The case was settled for \$40 million.⁴²

As such, efficacy claims highlighting credence attributes of health-related products are mostly subject to the legal scrutiny of the substantiation rule. While this critical notion is supported by public policies,⁴³ it has not been empirically rationalized in light of consumer psychology theories. Given the lack of empirical substance on point, this study examines whether advertisement messages based on establishment claims need to be more closely regulated than others without such

³⁶ *F.T.C. v. Reebok Int'l Ltd.*, No. 1:11-cv-02046-DCN (N.D. Ohio, Sept. 28, 2011).

³⁷ See Complaint at 3, *F.T.C. v. Reebok Int'l Ltd.*, No. 1:11-cv-02046-DCN (N.D. Ohio, Sept. 28, 2011).

³⁸ *Id.* at 5-7.

³⁹ *F.T.C. v. Sketchers U.S.A., Inc.*, No. 1:12-cv-01214 (N.D. Ohio, May 16, 2012).

⁴⁰ *Id.* at 12-17.

⁴¹ *Id.* at 17.

⁴² *F.T.C. v. Sketchers U.S.A., Inc.*, No. 1:12-cv-01214 (N.D. Ohio, May 16, 2012).

⁴³ Charles Shafer, *Developing Rational Standards for an Advertising Substantiation Policy*, 55 U. CIN. L. REV. 1, 43 (1986).

cognitive information. Specifically, it tests whether an advertisement clip with establishment claims affects consumers' purchase intention more than an advertisement clip without such information.

This article consists of four parts. Section II theoretically explores the doctrine of prior substantiation, explains the essential public policy grounds, and discusses the issue of finding an acceptable enforcement level. Section III presents relevant psychology theories and proposes an empirical investigation of the substantiation doctrine. Section IV sets forth the empirical procedure administered to examine the rationale of the doctrine. A quasi-experimental procedure designed for this study is also described, and will report findings based on a set of data analyses. Finally, Section V discusses the implications of this empirical investigation and suggests future studies and discusses the limitations of this empirical investigation.

II. RATIONALIZATION OF SUBSTANTIATION DOCTRINE

The doctrine of prior substantiation is a significant judicial expansion of Section 5 jurisprudence.⁴⁴ In fact, the rationale of the rule is not predicated on the traditional concept of deception.⁴⁵ Rather, the rule is designed to scrutinize the process of information generation and its format of presentation, particularly whether the information has been verified by credible sources and whether it is presented in a way that a reasonable consumer is more likely to believe.⁴⁶ This doctrinal expansion has been firmly supported by public

⁴⁴ In addition, Section 12 specifically prohibits false advertisement claims that are likely to induce the purchase of food, drugs, devices or cosmetics. 15 U.S.C. § 45(a)(1). The FTC brought both Section 5 and 12 claims against Reebok and Sketchers because their toning footwear was recognized as "devices" for the purpose of the alleged violations. 15 U.S.C. § 52 (2010).

⁴⁵ A commentator argues that the substantiation rule does not have any common law ground that directly supports the rule. Shafer, *supra* note 43, at 8.

⁴⁶ *Id.* at 8.

policies to ensure higher accuracy in advertising by regulating those claims that are most likely to be false. For instance, when Reebok's efficacy claims for the toning footwear were not properly substantiated at the time of their dissemination to the public, such practice was implicated with two different types of deception.⁴⁷ First, Reebok's claims were deceptive because they asserted that the company had reliable data acquired from scientific research corroborating the claims even though the company had no such information.⁴⁸ Alternatively, the claims were deceptive as a matter of public policy because they lacked proper substantiation for their establishment claims.⁴⁹ Whether the claims were false⁵⁰ is not the primary inquiry. "Falsity means that the facts conveyed about an item's feature or performance are disconfirmed by examining the item. Lack of substantiation means that the facts are not confirmed, that is, either disconfirmed or neither confirmed nor disconfirmed."⁵¹ In fact, the FTC arguably does not have expertise or necessary resources to monitor the actual trustworthiness of all establishment claims. Thus, the doctrine is crucial for the significant public interests at stake.

Because consumers are more likely to believe a claim supported by seemingly objective data than one without such information, regulatory schemes controlling the practice need to set higher standards. Particularly, establishment claims for credence attributes, such as efficacy claims for toning shoes, must be closely monitored because general consumers are susceptible⁵² to such kind of claims because they lack rele-

⁴⁷ *Id.* at 22.

⁴⁸ *Id.*

⁴⁹ *Id.* at 23.

⁵⁰ See Ivan L. Preston, *The Definition of Deceptiveness in Advertising and Other Commercial Speech*, 39 CATH. U. L. REV. 1035, 1075 (1990).

⁵¹ Shafer, *supra* note 43, at 51.

⁵² Xie, *supra* note 13, at 297. Consumer susceptibility is defined as "the extent to which consumers are more or less likely to acquire false information, form misperceptions, and engage in consumptive behaviours to their detriment."

vant knowledge to assess the truthfulness of advertisements.⁵³ Given this strong policy ground, courts have consistently supported the FTC's broad enforcement power in regulating establishment claims⁵⁴ although the language of the statutes does not expressly endorse such legal doctrine.⁵⁵ In sum, the doctrine was designed to create deterrents for unsubstantiated advertisement claims that are likely to be deceptive and thus harmful to the general public.

After the FTC announced the doctrine in *Pfizer, Inc.*,⁵⁶ one of the most critical issues was how to determine a reasonable basis to satisfy the doctrine of substantiation. In 1984, the agency promulgated a set of factors to determine the level of substantiation required under the rule: (1) the type of claim; (2) the product; (3) the consequence of a false claim; (4) the benefits of a truthful claim; (5) the cost of developing substantiation for the claim; and (6) the amount of substantiation experts in the field believe is reasonable.⁵⁷ In consideration of the enumerated factors, the reasonable basis for health-related efficacy claims was announced

⁵³ Shafer, *supra* note 43, at 43. The doctrine specifically intends to address this lack of scrutinizing capacity. "The harm that the Commission seeks to avoid results from a consumer purchasing a product under some misapprehension. If an advertisement suggests that a product will provide a particular benefit, which in fact it will not, a consumer who believes the advertisement and purchases the product suffers harm."

⁵⁴ *Thompson Medical Co., Inc. v. F.T.C.*, 791 F.2d 189, 195 (D.C. Cir. 1986); *Telebrands Co. v. F.T.C.*, 457 F.3d 354, 360 (4th Cir. 2006). See also Michael D. Bernacchi, *The Expanding Jurisdiction of Deceptive, Misleading and False Advertising by the FTC*, 6 J. OF ADVER. 29, 29 (1977) (accentuating the Commission's broad jurisdiction).

⁵⁵ Preston, *supra* note 50, at 1036.

⁵⁶ While the Commission articulated the requirement of reasonable basis in *Pfizer, Inc.*, the agency refused to apply the new rule into the case at hand. *In re Pfizer, Inc.*, 81 F.T.C. 64 (1972).

⁵⁷ *FTC Policy Statement Regarding Advertising Substantiation*, FTC (May 8, 2016), <https://www.ftc.gov/public-statements/1983/03/ftc-policy-statement-regarding-advertising-substantiation>.

as “competent and reliable scientific evidence.”⁵⁸ Recent cases indicate that a randomized, double-blind, placebo-controlled clinical trial is a necessary empirical basis for making health-related efficacy claims.⁵⁹ The above-mentioned multi-factor test indicates that the agency would have to conduct a cost-benefit analysis to determine whether a reasonable basis exists for the establishment claim. Such case-by-case approach shows that the FTC would refuse to apply an inflexible uniform standard for substantiation cases presumably in order to avoid various problems involved with both over-regulation as well as failure to enforce the rule.

One of the most difficult tasks that the Commission has to deal with in this area of regulation is finding an appropriate enforcement level, particularly because both excessive regulation and lack of enforcement would likely create detrimental effects on the market economy that relies on the dynamic exchange of accurate information for goods and services. While the lack of enforcement of the doctrine may result in inefficiency and even market failure, over-enforcement restrains the efficient flow of product information. This dilemma is akin to problems that arise from type I and II errors in statistics.⁶⁰ A type I error refers to a type of inaccuracy generated from an erroneous rejection of a null hypothesis.⁶¹ Here the null hypothesis should not have been rejected but the researcher mistakenly did so based on some false positive cues.⁶² In the context of advertising regulation, a type I error happens due to an enforcement of inflexible rules that is nitpicking and

⁵⁸ *In re* Novartis Corp., 127 F.T.C. 580, 725 (1999).

⁵⁹ See Stipulated Final Judgment and Order for Permanent Injunction and Other Equitable Relief, *FTC v. Iovate Health Scis. USA, Inc., et al.*, No. 10-cv-587 (W.D.N.Y. July 29, 2010) available at <https://www.ftc.gov/sites/default/files/documents/cases/2010/07/100729iovatestip.pdf>; Agreement Containing Consent Order, *In the Matter of Nestle HealthCare Nutrition, Inc.*, File No. 092 3087 (July 14, 2010) available at <http://www.ftc.gov/os/caselist/0923087/100714nestleorder.pdf>.

⁶⁰ See JERRY R. THOMAS, JACK K. NELSON & STEPHEN J. SILVERMAN, *RESEARCH METHODS IN PHYSICAL ACTIVITY* (6 ed. 2011).

⁶¹ *Id.* at 116.

⁶² *Id.*

unnecessarily harsh. In this case, some useful information may not reach general consumers and the transactional efficiency in the market would be critically impaired.

In contrast, a type II error is the flaw caused by the lack of rigorous standards in a hypothesis testing.⁶³ The error occurs when the researcher fails to reject a false null that should have been rejected, which occurs when the researcher makes a conclusion misguided by false negative information.⁶⁴ In advertising regulation, a type II error is likely when regulatory schemes are too lax. Such under-enforcement is also harmful to the economy because deceptive practices are likely to interrupt the vital flow of reliable information that is necessary to consumers' informed decisions and the market dynamics may not respond to the consumer demand effectively.

There has been a good amount of scholarly discussion over the concern of a type I error in advertisement regulation. Although both proponents and opponents of public regulation acknowledge the vital role of advertising in market economy,⁶⁵ scholars fiercely debate whether some rigorous scrutiny of advertising messages, e.g., the substantiation doctrine, is really necessary or acceptable.⁶⁶ Opponents usually point out that government regulation of advertising practices is not appropriate unless it is efficient in terms of cost-benefit analysis⁶⁷ and stringent public regulation would unnecessarily inhibit the information distribution system in the market.⁶⁸ Specifically, they contend that the

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Studies have demonstrated that although consumers bear costs of advertising in the form of higher prices, advertising is still the best means of information vehicle since any alternatives, e.g., personal selling, would be even less efficient. Michael D. Bernacchi, *The Expanding Jurisdiction of Deceptive, Misleading and False Advertising By the FTC*, 6 J. OF ADVER. 29, 30 (1977).

⁶⁶ Petty, *supra* note 26, at 4.

⁶⁷ Shafer, *supra* note 43, at 43.

⁶⁸ The FTCA seems to consider this issue of over-enforcement. For example, the FTCA has less tough standards on puffery claims

vagueness of the substantiation rule and its punitive remedies would impair the mechanisms of advertising practices as a crucial vehicle of information sharing.⁶⁹

Thus, whereas the over-enforcement issue has been an imperative concern, a type II problem is an equally important issue that needs to be addressed. Inaccurate information about goods and services is likely to impose unjustifiable additional transactional risks and costs on general consumers.⁷⁰ Additionally, since the protection of consumers from deceptive acts promotes the perception of fairness in regard to the economic and political institutions of the society, some degree of over-enforcement might still be acceptable even though it would not be the best practice for the sake of market efficiency.⁷¹ In fact, some studies indicate that more stringent enforcement activities might be called for because current regulatory schemes of the substantiation doctrine have failed to establish noticeable deterrent effects on deceptive conduct in the market.⁷²

Since finding an appropriate enforcement level of any judicial intervention is arguably an issue of public

than Uniform Commercial Code. See Ivan L. Preston, *Regulatory Positions Toward Advertising Puffery of the Uniform Commercial Code and the Federal Trade Commission*, 16 J. OF PUB. POLICY & MKTG. 336, 340 (1997).

⁶⁹ See Thomas J. Holdych, *Standards for Establishing Deceptive Conduct Under State Deceptive Trade Practices Statutes That Impose Punitive Remedies*, 73 OR. L. REV. 235, 235 (1994). ("Commercial information facilitates the choice of appropriate goods, services, or terms in exchange transactions and reduces the costs associated with suboptimal exchanges. Information communicated to buyers increases the probability that items have attributes buyers desire.")

⁷⁰ *Id.*

⁷¹ Shafer, *supra* note 43, at 47.

⁷² Specifically, an empirical analysis of defendant firms' shareholder value indicates that when the FTC issues complaints and settlement agreements simultaneously to enforce the substantiation rule, no significant deterrence effect is likely. Richard S. Higgins & Fred S. McChesney, *Materiality, Settlements and the FTC's Ad Substantiation Program: Why Wonder Bread Lost No Dough*, 32 MGMT. & DECISION ECON. 71 (2011).

policy, an examination of the rationale behind the substantiation doctrine in the context of relevant consumer psychology theories might be instructive. As the concept of consumer protection is mainly predicated on relevant psychological theories, various empirical studies for deceptive practices have been conducted in marketing perspectives.⁷³ Nevertheless, no study has been reported as of this writing in which consumer reactions to deceptive advertising messages are directly examined by using real world advertising messages disputed in deceptive advertisement cases. Given the issue, the present investigation sought to rationalize the doctrine of prior substantiation by testing whether an advertising message supported by establishment claims would affect consumers' attitudes and presumably consumers' buying intention more immediately than messages not containing such cognitive components. This study was expected to support or disprove the rationale of the substantiation rule based on its empirically driven results. The following sections will explain the framework of this investigation mainly based on relevant consumer psychology theories and notions.

III. CONSUMER PSYCHOLOGY THEORIES

The doctrine of prior substantiation is a consumer-based notion.⁷⁴ It is predicated upon a presump-

⁷³ See Jerry C. Olson & Philip A. Dover, *Cognitive Effects of Deceptive Advertising*, 15 J. OF MKTG. RESEARCH 29, 36 (1978) (examined cognitive valences affected by deceptive marketing practices); see also Koki Arai, *Note on the Need for Rules on Misleading Representation Based on Experimental Evidence*, 20 APPLIED ECON. LETTERS, 10 (2013) (found that actual purchasers are not typically vulnerable to deceptive claims); see also Marvin E. Goldberg, *A Quasi-Experiment Assessing the Effectiveness of TV Advertising Directed to Children*, 27 J. OF MKTG. RESEARCH 445 (1990) (examined susceptibility of minors to deceptive advertising); see also Fredric L. Barbour II and David M. Gardner, *Deceptive Advertising: A Practical Approach to Measurement*, 11 J. OF ADVER. 21 (1982) (proposed measurement protocols in deceptive marketing research).

⁷⁴ See *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 387 (1965) (defined consumer deception as "misrepresentation of any fact so

tion that advertisement messages pertinent to establishment claims are likely to significantly influence consumers and would more likely be false without reasonable scientific bases.

A. Attitude and Cognitive Information Processing Theory

Attitude has been one of the most closely examined topics in consumer psychology. The domain of attitude has been conceptualized in different ways.⁷⁵ Attitude research has stemmed from two approaches - unidimensional and tripartite frameworks. According to the first approach, attitude is defined as "a learned predisposition to respond in a consistently favorable manner with respect to a given object."⁷⁶ This approach expounds that attitude reflects a person's feeling toward an object that can be measured on an evaluative continuum ranging from positive to negative.⁷⁷ Thus, attitude can be characterized as a stabilized composite of affective valences.⁷⁸ On the other hand, the tripartite approach indicates that an attitude consists of three components: affect, cognition, and conation.⁷⁹ In spite of the inclusiveness of the approach, the notion has been criticized by scholars for lack of empirical coherence and measurement problems mainly connected to the heterogeneous characteristics of the three distinctive components.⁸⁰

long as it materially induces a purchaser's decision to buy").

⁷⁵ RUSSELL H. FAZIO & RICHARD E. PETTY, *ATTITUDES: THEIR STRUCTURE, FUNCTION, AND CONSEQUENCES* (Russell H. Fazio & Richard E. Petty eds., 1-5th ed. 2008).

⁷⁶ See MARTIN FISHBEIN & ICEK AJZEN, *BELIEF, ATTITUDE, INTENTION, AND BEHAVIOR: AN INTRODUCTION TO THEORY AND RESEARCH* 6 (1975).

⁷⁷ FAZIO & PETTY, *supra* note 75, at 35.

⁷⁸ MARK P. ZANNA & JOHN REMPEL, *ATTITUDES: THEIR STRUCTURE, FUNCTION, AND CONSEQUENCES* 8 (Russell H. Fazio & Richard E. Petty eds., 2008).

⁷⁹ MILTON J. ROSENBERG & CARL I. HOVLAND, *ATTITUDE ORGANIZATION AND CHANGE: AN ANALYSIS OF CONSISTENCY AMONG ATTITUDE COMPONENTS* 1 (Carl I. Hovland & Milton J. Rosenberg, eds., 1960).

⁸⁰ See Scott B. MacKenzie, Richard J. Lutz & George E. Belch, *The*

Since the concept of attitude is a general feeling of favorability toward an object, it presumably engenders from or at least significantly interacts with a person's temporary emotional state.⁸¹ For instance, if a consumer repeatedly encounters a particular type of emotional state associated with a product or brand for a substantially long period of time, he or she eventually develops a pattern of favorability attached to the product or brand, or an attitude towards the object. In contemporary consumer psychology and behavioral science literature, there are two primary notions that deal with the emotional response of consumers toward goods, services, or advertisement messages: (1) emotion can proceed by cognitive processes; or (2) emotion can occur without a cognitive component.⁸² In 1998, a study explored the sphere of emotion based on the first notion.⁸³ The study concluded that a person's emotional state would be viewed as a result of cognitive appraisal on an object. The authors confirmed the finding from previous studies that emotional valences can be formed and activated when "a message, object, or event triggers a cognitive appraisal that results in an evaluation

Role of Attitude Toward the Ad as a Mediator of Advertising Effectiveness: A Test of Competing Explanations, 23 J. OF MKTG. RESEARCH 130 (1986) (finding that the affective process and cognitive process in attitude formation and change occur in two distinct processing modes. The study suggested that it might be discursive for a researcher to capture the heterogeneous psychological valences simultaneously.).

⁸¹ ALICE H. EAGLY & SHELLY CHAIKEN, *THE PSYCHOLOGY OF ATTITUDES* 105 (1993).

⁸² See Jan-Benedict, E. M. Steenkamp & Hans Baumgartner, *Assessing Measurement Invariance in Cross-National Consumer Research*, 25 J. OF CONSUMER RESEARCH 78 (1998); also see Thomas J. Olney, Morris B. Holbrook & Rajeev Batra, *Consumer Responses to Advertising: The Effects of Ad Content, Emotions, and Attitude Toward the Ad on Viewing Time*, 17 J. OF CONSUMER RESEARCH 440 (1991).

⁸³ Jan-Benedict, E. M. Steenkamp & Hans Baumgartner, *Assessing Measurement Invariance in Cross-National Consumer Research*, 25 J. OF CONSUMER RESEARCH 78 (1998).

mediated by beliefs and shaped by personal values."⁸⁴ According to this notion, a consumer's piecemeal cognitive information processing influences the person's emotional response to the perception and judgment on a commodity or advertising message. This perspective indicates that each emotional state including the process of attitude formation would primarily be initiated by the cognitive appraisal of the given stimuli.

In contrast, a group of social psychologists has argued that an emotional state is independent from cognitive information processing.⁸⁵ In 1980, Zajonc proposed a hypothesis that affective judgments may occur without or prior to the activation of cognitive mechanisms.⁸⁶ The author's main claim was that the most immediate reaction to the given environmental stimuli might be the affective emotional responses that are not influenced by the cognitive information processing. Another study showed that an individual's emotional state associated with consumption experiences would be the predominant dynamics to form the attitudes toward the product at issue.⁸⁷ The investigation suggested that the emotional states may form sets of memory structures for subsequent cognitive responses to the consumption experience and memory structures are more easily retrieved if some ancillary affective valences are attached to them.⁸⁸ As such, this perspective is apparently in contradiction to emotion as post-cognitive dynamics. Regardless of the competing notions, psychologists have investigated emotion as an independent domain or

⁸⁴ Morris B. Hobrook & John O'Shaughnessy, *The Role of Emotion in Advertising*, 1 PSYCHOLOGY & MKTG. 45, 51 (1984).

⁸⁵ *Id.* at 50.

⁸⁶ Robert Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151, 151 (1980).

⁸⁷ Joseph Plummer & Rebeca Holman, Presentation at the American Psychological Association Annual Conference: Communicating to the Heart and/or Mind (Aug. 28, 1981) available at <http://uts.cc.utexas.edu/~tecas/syllabi2/adv382jfall2002/readings/plum.pdf>.

⁸⁸ *Id.* at 597.

sphere that is separated yet closely working with the cognitive information processing.⁸⁹

While both emotional valences and cognitive components may influence consumers' brand choice behavior, the cognitive dynamics would likely be the more predominant factors according to Fishbein and Ajzen's theory of reasoned action.⁹⁰ Fishbein and Ajzen theorized that a person's behavioral intention is a function of attitude and subjective norm.⁹¹ Here the attitude is the person's favorability toward a specific choice of behavior based on the person's cognitive assessment of a given situation, while the subjective norm is the person's anticipation of how people around him or her would react to the person's behavior. For instance, when a consumer chooses a product, the act would likely be influenced by the favorability to the product or brand based on the person's utilitarian analysis of the given product features, e.g., price, perceived benefits of the product, the anticipation of how people significant to him or her would perceive such product choice, social meaning and perceived value associated with the product or brand. Thus, the cognitive information delivered by advertisement such as establishment claims for a new product might be a strong catalyst that would likely influence the final consumption decisions.

B. Dual-Mediation Model: Attitude Toward Ads, Brand Attitude, and Purchase Intention

In advertising literature, a significant number of studies have suggested that a person's attitude toward advertising is a significant mediating variable to determine advertising effectiveness, such as attitude toward

⁸⁹ See Thomas J. Olney, Morris B. Holbrook & Rajeev Batra, *Consumer Responses to Advertising: The Effects of Ad Content, Emotions, and Attitude Toward the Ad on Viewing Time*, 17 J. OF CONSUMER RESEARCH 440 (1991).

⁹⁰ See Martin Fishbein & Icek Ajzen, UNDERSTANDING ATTITUDES AND SOCIAL BEHAVIORS (1980).

⁹¹ *Id.*

brand and purchase intention.⁹² In relation to this research stream of the “dual mediation model,” advertising researchers and practitioners have explored two formats of advertisement execution, including emotional and informational advertising.⁹³ Emotional advertising format is referred to as the advertisement execution designed to appeal to consumers’ emotion by using emotion-eliciting stimuli such as drama, mood, or music.⁹⁴ On the other hand, an informational advertising format is designed to solicit rational decision-making based on logic-based arguments and seemingly objective information describing product efficacy and benefits from the consumption experience.⁹⁵ The format of advertisement execution has been considered as an important variable that significantly affects the attitude toward brand and buying behavior.⁹⁶

Early scholarly works discovered that advertising with an emotional advertising format has positive influences on the formation of brand attitude through so-called affect-transfer effects.⁹⁷ A study investigated the impact of favored and disfavored music embedded in an advertisement.⁹⁸ The researcher discovered that the emotional response to the given advertisement with the stimuli would be an important factor to consumers’ product/brand choices.⁹⁹ The study also demonstrated that in an emotion-based advertising context, things such as music can trigger affective reactions to the overall advertisement. The investigation suggested that the attitude toward the music used in the advertisement can be transferred to the attitude toward the advertisement as a whole, which subsequently influences the brand attitude, without significantly involving the

⁹² See MacKenzie, Lutz, & Belch, *supra* note 80.

⁹³ *Id.*

⁹⁴ See Gerald J. Gorn, *The Effects of Music in Advertising on Choice Behavior: A Classical Conditioning Approach*, 46 J. OF MKTG. 94 (1982).

⁹⁵ *Id.*

⁹⁶ MacKenzie, Lutz, & Belch, *supra* note 80, at 131.

⁹⁷ See Gorn, *supra* note 94.

⁹⁸ *Id.* at 95.

⁹⁹ *Id.* at 97.

cognitive evaluation of the given product attributes. Similarly, another study also examined an independent influence model of emotion-transfer in the context of the aforementioned dual mediation model.¹⁰⁰ It found that the effect of attitude-toward-ad on advertising effectiveness is more significant in cases of low-involvement¹⁰¹ and emotion-eliciting advertising.

Although an emotional component in advertisements, such as music, might certainly be a considerable variable to be investigated, consumer psychology research has consistently demonstrated that the cognitive information would have more immediate impacts on consumers' attitudes toward product and brand choice behavior. A study conducted by Yoo and MacInnis proposed a comprehensive attitude formation model in advertising.¹⁰² The proposed model presumed that a consumer initially forms a mixture of feelings, such as affects and judgments, which are known as cognitions. These cognitions are a result of the exposure to advertisements and marketing claims. Such feelings and judgments in turn affect the attitude toward the advertisements and the beliefs about the brand. Consistent with previous studies,¹⁰³ the investigation found the important role of the credibility of advertising claims, a form of cognitive information, is the formation of the brand attitude and buying decision. The

¹⁰⁰ Scott B. MacKenzie & Richard Lutz, *An Empirical Examination of the Structural Antecedents of Attitude Toward the Ad in an Advertising Pretesting Context*, 53 J. OF MKTG. 48 (1989).

¹⁰¹ *Id.* Under a low involvement condition, consumers would likely engage in the heuristic information processing. This is opposed to the piecemeal approach to make a brand choice, since the transactional values and anticipated benefits involved with the situation might not be significant (i.e. buying a cup of coffee). On the other hand, piecemeal approach is likely if the perceived transactional values and anticipated benefits from the situation would be significant (buying a car).

¹⁰² Chargo Yoo & Deborah J. MacInnis, *The Brand Attitude Formation Process of Emotional and Informational Ads*, 58 J. OF BUS. RESEARCH 1397 (2005).

¹⁰³ Deborah J. MacInnis, Ambar G. Rao, & Allen M. Weiss, *Assessing When Increased Media Weight of Real-World Advertisement*, 39 J. OF MKTG. RESEARCH 391, 391 (2002).

study suggested that the strength of cognitive beliefs associated with the advertising claims is a critical component that may determine the consumer behavior in relation to the advertised brands. Given the empirical findings, it has been inferred that cognitive messages such as product efficacy claims would likely have decisive roles in the formation of brand attitude and the choice of product.

C. Substantiation doctrine in the context of consumer behavior theories

In order to communicate with consumers, corporations utilize a variety of marketing channels such as traditional media advertisement, celebrity endorsement, event promotions and sponsorship.¹⁰⁴ The contents of advertising messages disseminated through the marketing channels would predominantly be either emotional or cognitive. For instance, an advertising message may be imbued with some emotional overtone, e.g., consumers' joyful moments with the advertised product, presenting the good with well-coordinated choreography and entertaining music, and a happy family reunion with the products. On the other hand, it would be based on some cognitive contents, e.g., innovative technological features of the product introduced by an expert, and scientific research demonstrating the effectiveness of the product.

The jurisprudence of deceptive marketing law primarily focuses on the claims of cognitive contents for two reasons. First, attitude theories such as Fishbein and Ajzen's theory of reasoned action indicate that cognitive messages would have more immediate impacts on consumers' buying behavior because they tend to persuade consumers directly by influencing their cognitive information processing, which is a key antecedent for attitude formation and purchase intention.¹⁰⁵

¹⁰⁴ See generally Kevin Lane Keller, *Conceptualizing, Measuring, and Managing Customer-Based Brand Equity*, 57 J. OF MKTG. 1 (1993).

¹⁰⁵ See MacKenzie, Lutz, & Belch, *supra* note 80 (while other

The law closely scrutinizes those claims supported by seemingly objective data or credible sources, e.g., scientific data or experts, under the doctrine of prior substantiation. Indeed, an establishment claim might be a quintessential example of cognitive information that may need to be regulated closely. Since an establishment claim would likely be more effective in terms of its immediate impacts on consumers' attitudes and their buying behavior, it tends to be more deceptive without any regulation that specifically controls such practice. An establishment claim without substantiation is either patently or at least likely a false statement. False information would be detrimental to the market economy because it inherently impedes the free flow of useful information in the market that would help consumers maximize the value of their consumption experience. It also forces consumers to take unnecessary and unreasonable risks involved with their product choices.¹⁰⁶ In order to protect the general public from the problem and avoid the likelihood of market failure, deceptive marketing law requires advertising messages with establishment claims to be substantiated by reasonable scientific bases.¹⁰⁷

Secondly, an advertising claim without cognitive content, such as an emotion-based advertisement, is less likely to be deceptive since there is no expressive claim that alleges the utilitarian value or efficacy of the advertised product. Without any cognitive component, consumers may not be easily deceived or mistakenly choose the advertised product. Nevertheless, some emotion-based ads may still deliver strong cognitive inferences that may potentially be deceptive.¹⁰⁸ Thus, the

psychological theories suggest that emotional advertising messages may also affect consumer behavior, their impact is more indirect or mediating compared to the immediate impact of cognitive advertising on such behavior.).

¹⁰⁶ See Shafer, *supra* note 43.

¹⁰⁷ Jerry C. Olson & Philip A. Dover, *Cognitive Effects of Deceptive Advertising*, 15 J. OF MKTG. RESEARCH 29, 36 (1978).

¹⁰⁸ F.T.C. v. Sketchers U.S.A., Inc., No. 1:12-cv-01214 (N.D. Ohio, May 16, 2012) available at <https://www.ftc.gov/enforce->

jurisprudence of deceptive marketing law does not make a simple demarcation between cognitive messages and emotional advertisements for the purpose of the enforcement process. Rather, based on the main stream consumer behavior theories, advertisement with emotional contents is less likely subject to the legal scrutiny because few emotional ads would constitute the level of deception that amounts to a violation of the law. It is also challenging to regulate emotion-based advertisement claims under the current legal standards because the type of deception allegedly created from emotional advertisement claims has not been clearly operationalized in the field of consumer psychology. Lastly, excessive or overbroad regulation of advertising messages would more likely lead to the over-regulation that may result in the aforementioned type I error. This would potentially have chilling effects on the free flow of the product information crucial in the market.

Although consumer behavior theories in general support the rationale of the substantiation rule, there has not been a coherent body of empirical substance that would support this legal notion. Given the lack of relevant empirical basis, this investigation tested whether advertising messages with establishment claims must be more closely scrutinized. Specifically, the current study examined consumer responses to two types of advertisement claims, emotional advertising without any cognitive component and cognitive advertising based on establishment claims based on an individual's attitude toward advertising contents, attitude toward brands, and buying intention.

IV. EMPIRICAL INVESTIGATION

A. Participants, Pretest, and Procedures

Consumer's affective and cognitive responses to two different footwear advertisements were examined at Kutztown University, a medium sized institution in

ment/cases-proceedings/102-3069/sketchers-usa-inc-dba-sketchers.

the United States. Subjects were recruited through classroom announcements which asked for volunteers to participate in a 25 minute long survey and experimental procedures. Each participant received extra course credits for their participation. Given the exploratory nature of this study, the use of a student sample was acceptable.¹⁰⁹ When subjects arrived in a lab, they were greeted by one of the researchers and asked to read a consent form before any further procedure began. After they submitted a written consent form to participate in the study, each subject was randomly assigned to one of two experimental groups. At this point, all participants were asked to complete a short questionnaire, which included a pretest designed to collect demographic information, determine the participant's familiarity with Reebok and Sketchers brands, participant's knowledge of the FTC investigation and lawsuits against the companies, and any preexisting brand attitudes toward the respective brands.

After the introduction and pretest, one of the groups watched a video clip of Reebok's EasyTone advertisement retrieved from the FTC website. The researchers did not inform participants of the fact that the federal agency brought a legal action against Reebok for the violation of the substantiation rule.¹¹⁰ Meanwhile, the other group viewed a clip from a Sketchers'

¹⁰⁹ If this study mainly intends to generalize the rationale of substantiation doctrine from one subject matter to another (e.g., fitness products to over-the-counter medicine) this use of homogeneous sample might have been problematic. However, since the legal doctrine has never been empirically supported like this study before, the current investigation is primarily exploratory. Thus, the use of student sample might not be unacceptable in spite of its clear shortcomings. Using a homogeneous group of subjects is even preferred in an experimental setting for an exploratory study, because it can address threats to statistical conclusion validity and facilitate a coherent theoretical inference from the results of an experiment. Bobby J Calder, Lynn W Phillips, & Alice M Tybout, *Designing Research for Application*, 8 J. OF CONSUMER RESEARCH 189, 197 (1981).

¹¹⁰ The FTC website also published other EasyTone ad materials that are allegedly deceptive under the doctrine of prior substantiation.

advertisement without any descriptions of product attribute or efficacy claim. After the treatments, the researcher instructed both groups to complete a questionnaire to measure their attitudinal and cognitive reactions to the respective ad clips.

B. Advertising Stimuli

This quasi-experimentation¹¹¹ was undertaken after the advertisements had been aired in the United States and the FTC cases were settled. The Reebok advertisement¹¹² contains a series of establishment claims delivered by a toned female fitness instructor wearing a tank top and shorts.¹¹³ It claims that Reebok's Easy-Tone footwear makes hamstrings and calves strengthen up to 11% more and tones his or her buttocks 28% more than regular sneakers, just by walking.¹¹⁴ In contrast, the Sketchers' advertisement did not deliver any cognitive information. In the Sketchers' advertisement, a young female model¹¹⁵ in a scanty outfit with Sketchers Tone-Ups sneakers was dancing around to up-tempo music. There is no description of the advertised product or any efficacy claim in the video clip. The advertisements were quite similar in several aspects, e.g., type of advertised products, body types and images of respective spokespersons, and sensual overtone, except the establishment claims only were provided in the Reebok commercial. This study administered the two video clips as treatments without any further content-related manipulation of such stimuli.

¹¹¹ This study design is quasi-experimental because it was not conducted in a controlled lab environment where the researchers might have been able to control many external factors. See Thomas et al, *supra* note 60, at 344.

¹¹² "Fitness Instructor" Video, *supra* note 6.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ The model was a relatively unknown actress, Breana McDow.

C. Measuring Responses to Ads: Measurement Scale and Constructs

Prior to the main study, participants were asked to complete a short questionnaire designed to collect background information on their experiences with both Reebok and Sketchers brands (e.g., preexisting brand attitude) and demographic information. Attitude toward product (“A_{pro}”) and purchase intention (“PI”) were measured by a questionnaire after the treatments.¹¹⁶ Subjects were asked to rate their overall feelings about the respective brands (Ab), and advertised products (A_{pro}) on a four-item, seven-point semantic differential scale of “Favorable-Unfavorable,” “Positive-Negative,” “Dislike-Like,” and “Good-Bad.”¹¹⁷ The scaling method has been widely used in consumer research literature.¹¹⁸ The reliability of the measurement scheme with respect to the tested variables was estimated by Cronbach’s alpha and was found to be robust (.906 for preexisting brand attitude; .904 for product attitude). PI was measured by a scale developed in a previous study.¹¹⁹ PI was measured in terms of three sub-items with a seven-point Likert scale that ranged from Strongly Disagree (1) to Strongly Agree (7).¹²⁰ For the purpose of the current investigation, individual sub-item scores were summed up to generate a total PI score used for the subsequent data analysis. The measurement reliability for

¹¹⁶ This measurement platform is widely used in marketing communication research. See MacKenzie, Lutz, & Belch, *supra* note 80.

¹¹⁷ *Id.*

¹¹⁸ Robert A. Peterson, William R. Wilson & Steven P. Brown, *Effect of Advertised Customer Satisfaction Claims on Consumer Attitudes and Purchase Intention*, 32 J. OF ADVER. RESEARCH 34 (1992); see also Yong Zhang & George M. Zinkhan, *Response to Humorous Ads: Does Audience Involvement Matter?*, 35 J. OF ADVER. 113 (2006).

¹¹⁹ The study investigated the strength of attitude-behavior relationship. It indicated that the scale with the tested variables has high internal consistency. Kuang-peng Hung, Annie H. Chen, Norman Peng, Chris Hackley, Rungpaka A. Tiwsakul, & Chun-lun Chou, *Antecedents of Luxury Brand Purchase Intention*, 20 J. OF PRODUCT & BRAND MGMT. 457 (2011).

¹²⁰ *Id.*

PI was checked by Cronbach's alpha, which was robust (alpha = .916).¹²¹

A cognitive advertisement-evaluation¹²² was used to find more in-depth information for the treatment's manipulation check. After watching either Reebok or Sketchers commercials, subjects were given three minutes to write their thoughts on the given commercials.¹²³ Once collected, the semantic contents of the cognitive responses (i.e., listed thoughts) were coded into advertisement or brand-related thought categories by two unbiased judges who had no knowledge about the current research project.¹²⁴ The final tally showed that the researchers and judges generally agreed upon the categorization of the individual subjects' thoughts at 95 percent.¹²⁵ The responses for which the judges showed disagreements were excluded from the data set.¹²⁶ Next, the total cognitive response values were calculated by subtracting the number of negative statements from the total number of positive statements in each advertisement/product related thoughts category (see Table 4).

Responses from the subjects familiar with any of the administered advertisement clips or the FTC cases were excluded from the study to reduce the potential bias from such preexisting knowledge.¹²⁷

D. Data Analysis

A set of reliability assessments was undertaken by using Cronbach's alpha correlation coefficients.¹²⁸

¹²¹ *Id.*

¹²² See MacKenzie, Lutz, & Belch, *supra* note 80; see also Peter L. Wright, *The cognitive processes mediating acceptance of advertising*, 10 J. OF MKGT. RESEARCH 53 (1973).

¹²³ *Id.*

¹²⁴ See *infra*, Table 3.

¹²⁵ See *infra*, Table 3.

¹²⁶ See *infra*, Table 3.

¹²⁷ See Oksana Loginova, *Exposure Order Effects and Advertising Competition*, 71 J. OF ECON. BEHAVIOR AND ORG. 528 (2009).

¹²⁸ An alpha level of .70 recommended by Nunnally and Bernstein was used as the minimum acceptable level of reliability in

To compare differences in the treatment groups' responses to the Reebok and Sketchers commercials, a one-way between-groups analysis of covariance (ANCOVA) was performed.¹²⁹ In addition, a standard multiple regression analysis was performed to determine how much cognitive responses to the advertisements explain the variance of the attitude toward the advertised products. This regression analysis was undertaken for the manipulation check of the given treatment, including whether the Reebok and Sketchers commercials were different in terms of the degree of the cognitive/emotional overtone perceived by the subject groups. Lastly, frequencies and descriptive statistics describe the demographic backgrounds of the participants. SPSS 18.0 for Windows was utilized to perform the data analyses. For this process, a composite mean score for each research construct was computed and used.

E. Result

A convenience sample of 95 subjects was recruited for the study (46 participants from the Sketchers advertisement and 49 participants from the Reebok advertisement). Of the 95 participants, 60.0% (n = 57) were male and 37.9% (n = 36) were female with two incomplete respondents. The age of respondents ranged from 18 to 25 years old with 20.8 year old being the average age. Each group was composed of the following ethnicities: Caucasian represented 74 participants (77.9%), and African-Americans with 9 participants (9.5%). More than half of the participants (67.3%) were sophomore students (30.5%) and junior students (36.8%) (Table 1).

terms of internal consistency. See Jum C. Nunnally & Ira H. Bernstein, *PSYCHOMETRIC THEORY* (1994).

¹²⁹ The ANCOVA was conducted because subjects' attitude toward Reebok and Sketchers commercials, their brand attitude, and the purchase intentions might have been affected by their preexisting brand attitude (i.e., how favorable Reebok or Sketchers were to the subjects before they participated in the current investigation).

Table 1. Demographics Characteristics

	Total (%)
N	93
Missing	(97.9)
	2 (2.1)
Sex	
Female	36 (37.9)
Male	57 (60.0)
Age	
18- 20	47 (33.7)
21-22	35 (36.8)
23-25	11 (27.4)
Ethnicity	
Black/African American	9 (9.5)
White/Cauca- sian	74 (77.9)
Asian or Pacific Islander	2 (2.1)
Other	6 (6.3)

Note: Percentages may not add to 100 % due to rounding.

A one-way between-group ANCOVA was undertaken to examine the effects of two different advertisements on attitudes toward the advertised product. Here the independent variable was the two advertisement conditions (Reebok and Sketchers advertisements), and the dependent variable was the attitude scores. The preexisting brand attitudes (toward Reebok or Sketchers) of subjects were used as a covariate in this analysis.

The covariate, including the preexisting brand attitude, was significantly related to the advertised product attitude scores.¹³⁰ After controlling for the effects of the preexisting brand attitude, there was a significant group difference ($p < .05$) in attitudes toward the advertised products after the treatment.¹³¹ The result demonstrated that the Reebok group showed a significantly lower attitude score ($M = 3.93$, $SE = .11$) than the Sketchers group ($M = 4.24$, $SE = .11$). 56.4 percent of the total variance in product attitude scores was accounted for by the two different advertisements controlling the effect of the preexisting brand attitude scores. The adjusted means of the product attitude scores are presented in Table 2.

Table 2. Means (M), Standard Deviations (SD), Standard Error (SE), and Adjusted Means for Attitude and Purchase Intention

Treatment Group	Preexisting Brand Attitude	Attitude Toward Product		Purchase Intention	
	M (SD)	M (SD)	M_{adj} (SE)	M (SD)	M_{adj} (SE)
REEBOK Ad	4.30 (1.12)	4.12 (1.25)	3.93 (.11)	3.54 (1.80)	3.27 (.17)
SKETCHERS Ad	3.75 (1.16)	4.03 (.95)	4.24 (.11)	2.17 (1.26)	2.46 (.18)

¹³⁰ $F(1, 92) = 123.38$, $p = .001$.

¹³¹ $F(1, 92) = 4.245$, $p = .042$, partial eta squared=.044.

Another ANCOVA was conducted to determine a statistically significant difference between Reebok and Sketchers advertisements on individual's intention to buy the advertised products, controlling for the preexisting brand attitudes. While the independent variable was the different advertisement type (Reebok as cognitive advertisements and Sketchers as affective advertisements), the dependent variable was the "Purchase Intention" scores. Similar to the previous ANCOVA, the preexisting brand attitude score was set as a covariate. After controlling for the effect of the covariate, there was a statistically significant effect of the different advertisement type on the purchase intention, $F(1, 90) = 10.26$, $p < .002$, partial eta squared = .10.

As shown in Table 2, purchase intention is significantly higher in the Reebok group ($M = 3.27$, $SE = .17$) than the Sketchers group ($M = 2.46$, $SE = .18$). The coefficient of effect size indicated that 10 percent of the variance in purchase intention scores was explained by the experiment condition.

As illustrated in Tables 3 and 4, subjects revealed positive and negative responses to the advertisement clips. While 6.9% of the participants in the Sketchers group expressed trust in or support for the product and the spokesperson in the advertisement, 12.2 percent of cognitive responses in the Reebok group expressed a specific desirable attribute of the product, a favorable reason for using the product in the Reebok advertisement, and trusted the spokesperson (see Table 3). In addition, 10.7 percent of responses in the Reebok treatment group favorably reacted to the advertisement execution, whereas only 26.2 percent for the Sketchers. A standard multiple regression analysis was employed to examine the effects of these cognitive responses (CRs) on the attitude toward the advertised product. Table 4 suggests that the CRs significantly explained the variance of the product attitude for the Reebok group,¹³² but not for the Sketchers group.¹³³ Table 4 indicates that Product CRs (Beta = .365, $p = .014$) as a cognitive component were found to be effective explanatory variables

¹³² $R^2 = .186$, $F(3, 42) = 3.204$ ($p = .033$).

¹³³ $R^2 = .153$, $F(3, 45) = 2.71$ ($p = .056$).

for the Reebok product attitudes. On the other hand, Repetition CRs and Execution CRs (emotional components) were the significant variables for the Sketchers product attitudes. Such results indicate that individuals exposed to the Reebok advertisement clips are more likely to cognitively respond to the advertised product, whereas individuals exposed to the Sketchers commercial are more likely to emotionally respond to the product. Thus the cognitive response evaluation and ensuing regression analysis suggest that the intended manipulation of the treatment was successful.

Table 3. Cognitive Response Categories and Frequencies

Category	REEBOK		SKETCHERS	
	No.	%	No.	%
Cognitions				
Counterargument ^a	34	16.0	24	15.2
Supportargument ^b	16	12.2	11	6.9
Repetition-related positive ^c	0	0	0	0
Repetition-related negative ^c	2	1.5	3	1.9
Positive ad execution ^d	14	10.7	42	26.2
Negative ad execution ^d	32	24.4	30	20.0
Irrelevant	13	9.9	13	8.2
All others ^e	20	15.3	35	22.2
Total	131	100	158	100

^a Statements which are directed against the idea of or the use of the products in the advertising communication.

^b Statements which are directed in favor of the idea or use of the product in the advertising message.

^c Statements noting that the ad had been seen or heard more than once, and incorporating a favorable/unfavorable reaction.

^d Statements directed at the execution of the ad rather than the message and expressing a favorable/unfavorable reaction to the ad.

^e Statements included curiosity, affirmation/disaffirmation, and neutral evaluation statements.

Table 4. Effects of Cognitive Responses (CRs) to Ad on Attitudes toward the Advertised Product

	Ad Cognitive Response	Unstandardized Coefficient (Standardized)	Standard Error	P value
Reebok Ad				
$R^2 = .186$	Product CRs	.422 (.365)	.165	.014
	Repetition CRs	1.765 (.238)	1.047	.099
	Execution CRs	.051 (.033)	.225	.820
Sketcher Ad				
$R^2 = .153$	Product CRs	-.225 (-.156)	.204	.276
	Repetition CRs	-1.827 (-.297)	.884	.045
	Execution CRs	-.292 (-.304)	.134	.035

Note: Product CRs = Supportargument - Counterargument; Repetition CRs = Repetition-related positive - Repetition-related negative; Ad execution CRs = Positive ad execution - Negative ad execution

V. DISCUSSION

A. Implication: Empirical Support to Substantiation Doctrine

This empirical investigation generally supports the rationale of the substantiation rule that requires higher standards for the advertisements with establishment claims. The result indicates that an advertisement with establishment claims would more effectively persuade potential buyers than the one without such cognitive components. Table 2 demonstrates that the subjects in the Reebok group showed more willingness to purchase Reebok sneakers than Sketchers in the Sketchers group. This finding is consistent with what consumer psychology theories in general would suggest, such advertisements with cognitive information would likely elicit purchase intention more effectively than purely affective ads without such information.¹³⁴

¹³⁴ See Zanna, *supra* note 78.

It is true that affective advertisements without any description of product features or efficacy claims may also have notable impacts on consumer behavior by touching their attitudinal constellations connected to the advertised brand or product.¹³⁵ Nevertheless, while such emotionally charged advertisement would presumably appeal to the attitude toward brand or product, it might not immediately trigger purchase intention. Theoretically, attitude is a latent dynamic that would influence a person's behavior in a long term rather than a short term.¹³⁶ Thus, the cognitive information delivered by an advertisement such as the Reebok's advertisement in this study must be subject to a closer scrutiny than affective advertisements. Given the findings that support the direct impacts of the establishment claims on consumers' consumption behavior, the lack of close scrutiny would be a more critical concern than any problems due to the over-regulation of the law. Thus, the rationale of the substantiation rule imposing the higher legal standards on the ad messages with establishment claims is justifiable in terms of public policy.

Regarding the impact of advertisements on attitude toward the advertised product, participants in the Sketchers group expressed more favorable attitudes toward the product in the advertisement than those in the Reebok group. However, it is imperative to review more in-depth information related to subjects' cognitive reactions to the ad and its message in determining the acceptance of advertising messages. As shown in Table 3, subjects exposed to the Reebok advertisement were more likely to process the cognitive components of the advertising messages rather than the overall execution of the advertisement, whereas subjects exposed to the Sketchers advertisement were more likely to respond emotionally to the execution of the advertisement. It is noteworthy that subjects in the Reebok group tend to analyze the advertising messages in response to the advertisement's claim and to express trust in or support

¹³⁵ *Id.*

¹³⁶ *Id.*

for the advertisement and the designated spokesperson. Although the Reebok advertisement clip had impacts on the subjects' negative responses to the product probably due to the excessively suggestive overtone or the incredible ad claims executed in the ad, it was effective in terms of eliciting the cognitive responses that might be crucial to the formation of ultimate buying behavior.

The fact that the Reebok group still revealed a higher purchase intention score than the Sketchers group (Table 2) in spite of the lower brand attitude score that resulted from the advertisement might be due to the Gestalt nature of the brand knowledge structure. That is, it might be possible that Reebok's overall brand knowledge is extraordinarily strong within the subject group in terms of brand awareness. According to consumer psychology theories, brand attitude is merely one element of brand knowledge that would compositely constitute so-called consumer-based brand equity.¹³⁷ Even though the preexisting brand attitude was controlled in the ANCOVA, there could be other elements of the brand knowledge structure such as brand awareness that may still dominate the subjects' brand choice behavior. In other words, Reebok's exceptionally strong brand awareness might have a high level of schematic tolerance that would be powerful enough to withstand the negative emotional state generated by the disfavored Reebok advertisement. This inference suggests that the substantiation rule might be even more critical in regulating unsubstantiated claims made by a powerful brand like Reebok. Due

¹³⁷ Brand knowledge is consisted of two subdomains (i.e. brand image and brand awareness). Brand attitude belongs to the domain of brand image. Brand image is essentially a sphere of various schematic properties associated with a brand such as typical user image, product or non-product-related attributes, etc. On the other hand, the domain of brand awareness includes two separate subdomains, i.e., brand recall and recognition. Brand recall is the extent to which consumers can remember a brand name related to its typical products or services. In contrast, brand recognition is the degree to which potential buyers can distinguish a particular brand from a set of competing brands. Keller, *supra* note 83, at 7.

to the inherent trustworthiness associated with the famous brand, consumers might presumably be even more vulnerable to the well-established brand's unsubstantiated establishment claims.¹³⁸

Since private litigation¹³⁹ or the advertising industry's self-policing might not effectively protect the general public,¹⁴⁰ the FTC's policing power against deceptive marketing practices is a key regulatory mechanism. The current study supports the rationale of one of the most important legal notions that would legitimize the federal agency's aggressive enforcement activities - the doctrine of prior substantiation. In light of the current investigation, efficacy claims for health or fitness products based on seemingly objective scientific research data must be substantiated by "competent and reliable scientific evidence"¹⁴¹ because ordinary consumers

¹³⁸ An article argues that a higher substantiation standard would need to be applied to a famous brand's efficacy claims because of this concern. See Heather M. Mandelkehr, *When Toning Shoes Strengthen Nothing More Than Likelihood of Lawsuit: Why the Federal Trade Commission Needs Guidelines Regarding Proper Substantiation of Fitness Advertisements*, 20 JEFFREY S. MOORAD SPORTS LAW J. 297, 337 (2013) (criticizing the FTC settlement with Reebok that requires only one clinical study for future establishment claims compared to previous health and fitness product cases where two clinical studies were required for any future claims).

¹³⁹ In addition to the fact that the individual consumer harm in deceptive marketing cases might be too small to justify private lawsuits, courts have been against piggyback class actions following the FTC's enforcement actions. See *Fraker v. Bayer Corp.*, No. CV F 08-1564 AWI GSA, 2009 WL 5865687, at *7 (E.D. Cal. Oct. 6, 2009) (the FTC Act provides the exclusive regulatory power to the Federal Trade Commission to curb deceptive marketing practices, not to private citizens).

¹⁴⁰ Prior to the FTC's lawsuit against Reebok for the deceptive marketing practices involved with its toning footwear, the National Advertising Division of the Better Business Bureau recommended the company to discontinue the advertisements with establishment claims for want of substantiation but Reebok disagreed. Mandelkehr, *supra* note 138, at 305.

¹⁴¹ "Competent and reliable scientific evidence shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified

might not be able to discover the falsity of the given information and may be easily persuaded by such claims.¹⁴²

B. Future Study and Limitations

This study suggests several lines of future research in the area of deceptive marketing and consumer protection. First, the effectiveness of advertisement disclaimer required under deceptive marketing law might be examined by using an empirical framework similar to the current project. While a variety of advertisement disclaimers have been mandated by law, genuine impacts of such legal requirements on consumers' cognitive information processing have not been thoroughly investigated. A quasi-experimental design similar to the current study may reveal more insightful data that would address current issues in the regulatory scheme.¹⁴³ Second, the levels of reasonable substantiation for different product categories and attributes

to do so, using procedures generally accepted in the profession to yield accurate and reliable results." *Novartis Corp., et al.*, 127 F.T.C. 580, 725 (1999).

¹⁴² See Marla Pleyte, *Online Undercover Marketing: A Reminder of the FTC's Unique Position to Combat Deceptive Practices*, 6 U.C. DAVIS BUS. LAW J. 55, 71 (2006) (explained why general public would not be expected to make informed buying decisions and why the FTC must be vigilant to police deceptive marketing practices); see Dana Rosenfeld & Daniel Blynn, *The Prior Substantiation Doctrine: An Important Check on the Piggyback Class Action*, 26 A.B.A. ANTITRUST 68, 68 (2011) (consumers would receive no substantial economic gains from class actions against sellers for making unsubstantiated claims); see also Mandelkehr, *supra* note 138, at 322.

¹⁴³ Kenneth C. Herbst, Eli J. Finkel, David Allan & Grainne M. Fitzsimons, *On the Dangers of Pulling a Fast One: Advertisement Disclaimer Speed, Brand Trust, and Purchase Intention*, 38 J. OF CONSUMER RESEARCH 909, 917 (2012) (end-of-advertisement disclaimers may undermine consumers' buying intention depending on different levels of brand trust); Kesten C. Green & J. Scott Armstrong, *Evidence on the Effects of Mandatory Disclaimers in Advertising*, 31 J. OF PUB. POLICY & MKTG. 293, 302 (2012) (no evidence to claim that

might be explored based on a meta-analysis of relevant literature. The risk of consumer harm might be the highest when an efficacy claim is related to a credence product attribute since the general public may not be able to examine the truthfulness of the claim. A meta-analysis would explore risk management and product liability literature to formulate a set of systematically rationalized different substantiation levels that may be required for different product categories and attributes.¹⁴⁴ Third, more in-depth research needs to be done on the deterrence effects of the FTC's current enforcement system. Studies have shown discursive findings with respect to the deterrence effects of the FTC's usual regulatory scheme in deceptive marketing cases, such as filing a complaint immediately followed by the settlement.¹⁴⁵ A series of qualitative inquiries based on semi-structured focus group interviews with a group of policy makers and industry experts may produce useful information to identify critical issues in the public regulation of deceptive marketing and hopefully suggest more comprehensive policy directions.

general public would have benefit from government-mandated disclaimers); *see also* Mary Ann Stutts & Garland G. Hunnicutt, *Can Young Children Understand Disclaimers in Television Commercials?*, 16 J. OF ADVER. 41, 45 (1987) (children would not likely understand precise meanings of disclaimers).

¹⁴⁴ A meta-analysis analyzes existing body of research quantitatively or qualitatively in order to generate more streamlined and systematic macro-level viewpoints for given scientific inquiries. *See* Terri D. Pigott, *ADVANCES IN META-ANALYSIS* (2012).

¹⁴⁵ Jaeseok Jeong & Chan Yun Yoo, *Deceptive Advertising and Abnormal Stock Returns*, 30 INT'L J. OF ADVER. 509 (2011) (FTC rulings on deceptive advertising have negative effects on shareholder wealth of defendant corporations); Martha Myslingski Tipton, Sundar G. Bharadwaj & Diana C. Robertson, *Regulatory Exposure of Deceptive Marketing and Its Impact on Firm Value*, 73 J. OF MKTG. 227 (2009) (event study demonstrated significantly negative abnormal stock returns in case of deceptive advertising charges); *see also* Higgins & McChesney, *supra* note 72 (found no substantial effects).

The current investigation has several inherent limitations. This study is based on a student sample and focused on a narrow product category - performance-based athletic footwear mainly targeting female consumers. The findings might not be generalized beyond such a limited scope. Although the researchers attempted to control the bias from the prior knowledge by eliminating the data collected from the subjects who were previously exposed to the commercials or aware of the FTC investigations, there would be other sources of bias that were not controlled in this study, e.g., individual favorability to respective spokespersons in the commercials, favorability to advertisement executions, and sociocultural connotations of the commercials perceived by individual subjects. Such factors might be threats to the internal validity of the study.