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JURY TRIAL IN PENALTY ACTION FOR DECEPTIVE ADVERTISING

United States v. J. B. Williams Co.

To prevent the dissemination of false advertising, the Federal Trade Commission (FTC) has been empowered to issue cease and desist orders where appropriate.[1] Upon the petition of the respondent, such orders are reviewable by a court of appeals,[2] and, to the extent the orders are affirmed, the reviewing court shall issue a parallel enforcing order.[3] Where an order has been affirmed, the FTC may redress subsequent violations thereof either by seeking an adjudication of contempt before the affirming court of appeals,[4] or by bringing an action in a district court for the recovery of civil penalties and the imposition of equitable relief.[5] In *United States v. J. B. Williams Co.*,[6] the Second Circuit held that where the FTC chose to seek a civil penalty in the district court, the defendant was entitled to a jury trial of disputed factual issues regarding the alleged violation of the order.[7]

After several years of administrative proceedings, the FTC, having determined that the advertising of the product Geritol by the J. B. Williams Company was violative of the Federal Trade Commission Act (the Act), issued a cease and desist order.[8] Upon Williams' petition for review of the order, the Court of Appeals for the Sixth Circuit affirmed.[9] After a public hearing on compliance and the receipt of

1 Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1970), *as amended*, 15 U.S.C. §§ 45, 53, 56 (Supp. III, 1973). Section 55(a) broadly defines "false advertising" as "an advertisement, other than labeling, which is misleading in a material respect . . . ." *Id.* § 55(a).

2 15 U.S.C. § 45(c) (1970). The scope of such review is limited to the "substantial evidence" rule. *Id. See* FTC v. Morton Salt Co., 334 U.S. 37 (1948). Under this flexible standard, de novo judicial review of administrative action is confined to questions of law. Review of factual questions is restricted to a search of the entire record for "substantial evidence" reasonably supporting the administrative agency's determination. *See* 5 U.S.C. § 706 (1970); 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01-02 (1958).

3 15 U.S.C. § 45(c) (1970). An order may also become final by the failure of a respondent to petition for review within 60 days of service of the order. *Id.* § 45(c),(g).

4 18 U.S.C. § 401 (1970). *See* United States v. J.B. Williams Co., 354 F. Supp. 521, 530-31 (S.D.N.Y. 1973).

5 15 U.S.C. § 45(*l*),(m) (Supp. III, 1973). Criminal proceedings, in certain instances, may also be brought by the Attorney General upon certification of facts by the FTC. 15 U.S.C. § 54 (1970); 15 U.S.C. § 56 (Supp. III, 1973).

If an FTC order has become finalized by expiration of the 60-day appeal period, *see* note 3 *supra*, the FTC would be limited to a § 45(*l*) penalty action.

6 498 F.2d 414 (2d Cir. 1974). Judge Friendly authored the court's opinion, in which Judge Feinberg joined. Judge Oakes dissented.

7 *Id.* at 430.

8 The order directed Williams and its wholly-owned advertising agency, Parkson Advertising Agency, Inc., to cease representing "directly or by implication" that Geritol provided relief of tiredness unless the advertisements affirmatively disclosed the product's limited efficacy. *Id.* at 418 & n.2.

9 J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967). The order was enforced with slight modification. The Sixth Circuit refused to enforce a provision which, in effect, would have made Geritol a prescription drug. *Id.* at 891.

three compliance reports[10] from Williams, the FTC concluded that the advertisements, although modified, continued to make representations forbidden by the cease and desist order.[11] Consequently, the FTC, recommending a civil penalty action, submitted a draft complaint to the Attorney General,[12] who thereupon filed the formal complaint against Williams.[13] Over Williams' demand for a jury trial, the district court granted the Government's motion for summary judgment,[14] holding that no right to a jury trial inhered in a civil penalty action[15] and that no issue of material fact as to the violation of the order existed in the present instance.[16]

Although the order was reviewed by the Sixth Circuit, the Attorney General was free to institute a civil penalty action in the Southern District of New York since § 45(*l*) does not restrict such actions to the circuit wherein the order is reviewed under § 45(c). *See* 15 U.S.C. § 45(c) (1970); 15 U.S.C. § 45(*l*) (Supp. III, 1973).

[10] The submission of a compliance report within 60 days after service of the Commission's order is required pursuant to 16 C.F.R. § 3.61 (1974). This section also provides for submission of such further reports as the Commission requires. This 60-day time limitation corresponds with that provided in 15 U.S.C. § 45(c) (1970) for a petition to review the FTC's order. *See* note 3 *supra*. A respondent is thus obligated either to outline concrete proposals for compliance or to seek review of the order within 60 days of receipt of service.

[11] 498 F.2d at 419-20. After the formal rejections of the first two compliance reports, the FTC advised Williams and Parkson as to the modifications of the advertisements which would be required to bring them into compliance with the order and thus avoid further enforcement proceedings. *Id.*

[12] At the time of these proceedings, §§ 45(*l*) and 56 had not as yet been amended to allow the FTC to bring a civil penalty action directly when the Attorney General failed to take such action. Formerly, only the Attorney General was authorized to bring such a proceeding upon a certification of facts by the FTC. However, the Attorney General, at his own discretion, could refuse to institute a civil penalty action "when, in reliance on his own legal expertise, he consider[ed] the evidence insufficient to warrant prosecution." United States v. St. Regis Paper Co., 355 F.2d 688, 694 (2d Cir. 1966). Pursuant to the new amendments, when the Attorney General fails to take action within 10 days of the FTC's proposal, the Commission may bring a civil penalty proceeding in its own behalf. 15 U.S.C. §§ 45(*l*)-(m), 56 (Supp. III, 1973).

[13] Although the FTC's draft complaint recommended an action to recover a total judgment of $500,000, the government's complaint demanded $500,000 from both Williams and Parkson, its advertising subsidiary. 498 F.2d at 418. The Second Circuit unanimously decided that the penalty recommended by the FTC limited the Attorney General's *ad damnum* in the civil penalty proceeding. *Id.* at 437, 462. The court divided, however, as to whether penalties could be levied against both Williams and Parkson. Judge Friendly, reasoning that "in practicality, [Parkson] is Williams' advertising division," concluded that Parkson should not be treated as a separate entity for the purpose of the civil penalty. *Id.* at 436.

[14] United States v. J.B. Williams Co., 354 F. Supp. 521 (S.D.N.Y. 1973).

[15] The lower court found neither the sixth nor seventh amendment right to a jury trial applicable. The sixth amendment was inapplicable, the court reasoned, because proceedings to recover a civil penalty under § 45(*l*) are not criminal in nature. 354 F. Supp. at 529. Nor did the seventh amendment entitle the defendants to a trial by jury, the court concluded, since a civil penalty action is similar to a civil contempt proceeding where a right to jury trial does not obtain. *Id.* at 533 n.6.

[16] The district court's holding "that there is no genuine issue as to any material fact and that the advertisements here challenged violate the order," *id.* at 534, was crucial to its summary disposition of the proceedings. Even absent a right to jury trial,

In reversing, the Second Circuit agreed with the district court that since an action to recover a civil penalty is not criminal in nature, the sixth amendment[17] right to trial by jury was not applicable. In rejecting the sixth amendment claim, the court of appeals relied upon the uniquely monetary sanction of the penalty provision and upon the congressional characterization of the remedy as civil.[18] Addressing itself to Williams' argument that a right to jury trial inhered under the seventh amendment,[19] the court was unable to obtain guidance from either the Federal Trade Commission Act or the sparse judicial precedent available.[20] Nevertheless, Judge Friendly, writing for the majority, resolved that inasmuch as Congress had delegated plenary power to the district courts to adjudicate civil penalty actions for violations of FTC orders,[21] and since Congress had expressed no intent to extinguish the right to a jury trial traditionally affixed to a civil penalty remedy,[22] the seventh amendment entitled the defendant to jury resolution of factual issues concerning the alleged order violation.[23]

In a dissenting opinion, Judge Oakes found the seventh amendment wholly inapplicable, arguing that the determination as to whether an FTC order has been violated rests within the province of the FTC itself and is not appropriate for trial by judge or jury.[24] The dissent forcefully asserted that "great deference" should be accorded the agency's conclusions[25] and criticized the majority opinion as an unten-

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the existence of a genuine issue as to the fact of violation would require a bench trial for resolution. *See* 6 J. MOORE, FEDERAL PRACTICE ¶ 56.02[7] (2d ed. 1974).

17 "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. CONST. amend. VI.

18 498 F.2d at 421; *see* 15 U.S.C. § 45(*l*) (Supp. III, 1973); note 39 *infra*.

19 "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

20 498 F.2d at 422, 428, 440. *See* notes 36, 44-46 and accompanying text *infra*.

21 498 F.2d at 422, 424.

22 *Id.* at 426.

23 *Id.* at 424, 430.

As noted by Judge Friendly at the outset of the majority opinion, the seventh amendment right to a jury trial "would, of course, be academic if . . . there were no triable issues of fact." *Id.* at 421. However, he discerned a disputed issue of fact in the instant case, *viz.*, "whether the commercials in question violated the cease and desist order." *Id.* at 430-32. Analysis of this issue would involve the two-pronged approach of "determining what the order means" and "deciding whether the accused commercials . . . come within the order as so construed." *Id.* at 430-31. Judge Friendly believed that the order was to be interpreted by the court as a matter of law. Whether the advertisements fell within the order's proscription, however, was thought to be a factual question which, if genuinely disputed by the parties, required jury resolution. *Id.* at 431-34.

24 *Id.* at 453.

25 *Id.* at 454. Judge Oakes acknowledged that not even the district court had accorded any weight to the FTC's determination, having independently decided that the modified Geritol commercials violated the order. *Id.* at 460; 354 F. Supp. at 535, 537 n.12.

able "substitution of judicial judgment" for the expertise of the FTC.[26] Judge Oakes reasoned that the civil penalty provision must be interpreted in the context of the entire statutory scheme,[27] under which the "principal function" of the Commission is to determine what advertising violates the Act.[28] In his opinion, proper administration of the deceptive advertising provisions of the Act requires the FTC's expertise both in the formulation of cease and desist orders and in the crucial final stage of penalizing order violations. By failing to respect the need for the FTC's expertise at the critical penalty stage, the majority opinion, in Judge Oakes' view, frustrates the "entire regulatory scheme."[29] Under the dissent's alternative approach, an FTC finding that a violation has occurred would be subject to review by the district court only on a limited "arbitrary or capricious" standard.[30]

Despite the urgings of the dissent, substantial support for the majority opinion can be derived from the Supreme Court's position in *FTC v. Morton Salt Co.*,[31] wherein it was stated:

> The enforcement responsibility of the courts, once a Commission order has become final . . . is *to adjudicate questions concerning the order's violation,* not questions of fact supporting that valid order.[32]

While acknowledging that the underlying order is not subject to attack in a civil penalty suit,[33] Judge Friendly reasoned that the district court's responsibility under the Act is to make an independent determination of whether the order was violated.[34] Moreover, the FTC's duties terminate once it has certified to the Attorney General those facts which gave the Commission "reason to believe" that its order had

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26 498 F.2d at 443.

27 *Id.* at 439-40.

28 *Id.* at 445.

29 *Id.* at 460.

30 *Id.* at 458. *See* note 42 *infra.*

31 334 U.S. 37 (1948).

32 *Id.* at 54 (emphasis added). Inasmuch as *Morton Salt* was a proceeding to review an FTC order to cease and desist from price discrimination deemed unlawful under 15 U.S.C. § 13 (1970), the Supreme Court's statement, relied upon in *Williams,* may be regarded as dictum. However, it appears that the Supreme Court did distinguish the role of the courts in adjudicating the violation of an order from that of the FTC in formulating the order. *See* 334 U.S. at 54.

33 498 F.2d at 429-30 n.17. Since 15 U.S.C. § 45(c) (1970) provides for initial review of an FTC order by a court of appeals, the order may not be collaterally examined in a subsequent civil penalty proceeding. *See* United States v. Piuma, 40 F. Supp. 119 (S.D. Cal. 1941), *aff'd,* 126 F.2d 601 (9th Cir.), *cert. denied,* 317 U.S. 637 (1942). *See also* Farmington Dowell Prods. Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1969) (private antitrust suit under 15 U.S.C. § 15 (1970)).

34 498 F.2d at 422, 430.

been violated.[35] Thus, Judge Friendly found no difficulty in applying the general proposition that "there is a right of jury trial when the United States sues . . . to collect a penalty, even though the statute is silent on the right of jury trial."[36]

Judge Friendly's conclusion that the Act vests full adjudicatory power in the district courts appears manifestly sound as a matter of statutory construction. The FTC is authorized to determine which acts or practices constitute "false advertising" within the meaning of the Act. However, the issuance of a cease and desist order was the sole means delegated by Congress to the FTC to prevent such advertising.[37] The Act contains no provision authorizing the FTC to levy penalties upon disobedient parties. In the event the FTC "has reason to believe" that its order has been violated,[38] it must, in order to remedy the violation by civil penalty, bring an action in the district court.[39]

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[35] *Id.* at 429. The language of the Act requiring certification of facts by the FTC to the Attorney General is particularly relevant:

> Whenever the Federal Trade Commission has *reason to believe* that any person, partnership, or corporation is liable to a penalty . . . it shall . . . certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought . . . .

15 U.S.C. § 56 (Supp. III, 1973) (emphasis added). It would seem that had Congress intended the Commission's determination to carry conclusive weight, it not only would have so specified in the Act, but also would have employed somewhat stronger language than that utilized in § 56.

[36] 498 F.2d at 422-23, *quoting* 5 J. MOORE, FEDERAL PRACTICE ¶ 38.31[1], at 232-33 (2d ed. 1971).

The only other court passing directly on the jury trial issue reached a decision in accord with that of the majority in *Williams*. In United States v. Hindman, 179 F. Supp. 926 (D.N.J. 1960), despite an FTC order that the defendant cease labeling his garments "custom-made," the defendant continued to label his garments "custom-tailored." In a civil penalty action for the alleged violation of the order, the district court denied cross motions for summary judgment, holding that the defendant was entitled to a jury trial "on the limited issue as to whether or not the label term 'custom-tailored' . . . means to [defendant's] purchasers that they are 'custom-made'" as prohibited by the order. *Id.* at 938. Nonetheless, in footnote dictum, the Third Circuit later criticized *Hindman* as erroneous. United States v. Vulcanized Rubber & Plastics Co., 288 F.2d 257, 258 n.2 (3d Cir.), *cert. denied*, 368 U.S. 821 (1961). *See* notes 44-46 and accompanying text *infra*. In reaching his decision in *Williams*, Judge Friendly noted that the available authority was "scarcely dispositive" of the jury trial issue, and considered the question as one of first impression. 498 F.2d at 422.

[37] *See* 15 U.S.C. § 45(b) (1970). The powers of the FTC are derived from congressional legislation, but the Act nowhere confers authority on the FTC to adjudicate violations of its orders. *See* FTC v. National Lead Co., 352 U.S. 419, 428 (1957); Community Blood Bank, Inc. v. FTC, 405 F.2d 1011, 1015 (8th Cir. 1969); American Cyanamid Co. v. FTC, 363 F.2d 757, 768 (6th Cir. 1966).

[38] 15 U.S.C. § 56 (Supp. III, 1973). *See* note 35 *supra*.

[39] 15 U.S.C. § 45(*l*) (Supp. III, 1973) provides:

> Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action . . . .

Judge Oakes' remark that "one feature of § 45(*l*) is to avoid the expense and delay

Judge Oakes' argument for "administrative expertise"[40] seems misdirected. It is undeniable that FTC expertise is critically important in the formulation of cease and desist orders. Equally important, however, is the congressional designation of the district court, not the FTC, as the forum for adjudication of alleged order violations.[41] By judicial fiat, the dissent would designate the FTC as the adjudicator of such violations, subject to an extremely limited judicial review.[42] With so restricted a role, the district court might well become a mere "rubber stamp" for the FTC.

The dissent feared that by permitting a jury to pass upon the meaning of the advertisements, the FTC "would be stripped of its major function . . . in the regulatory scheme — deciding what is and what is not deceptive advertising."[43] Judge Oakes noted[44] that in *United States v. Vulcanized Rubber & Plastics Co.*,[45] a similar concern was voiced by the Third Circuit in dictum.[46] However, under the

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of further *formal* proceedings after a cease and desist order ha[s] become final," 498 F.2d at 454 (emphasis in original), conflicts with the plain language of § 45(*l*), which provides for recovery of a civil penalty "in a civil action."

40 498 F.2d at 460.

41 15 U.S.C. § 45(*l*) (Supp. III, 1973). *See* note 39 *supra.*

42 Judge Oakes relied on Camp v. Pitts, 411 U.S. 138 (1973) (per curiam), for judicial review based on an "arbitrary or capricious" standard. 498 F.2d at 454-55. This reliance appears misplaced. *Camp* held that where a statute directs certain administrative action, but is silent on the right of judicial review, review may be had under the Administrative Procedure Act, 5 U.S.C. § 701 (1970). 411 U.S. at 140. In *Camp,* the standard of review to be applied under the Administrative Procedure Act was "whether the Comptroller's adjudication was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .'" *Id.* at 142, *quoting* 5 U.S.C. § 701(2)(A) (1970).

The Federal Trade Commission Act, 15 U.S.C. § 45(*l*) (Supp. III, 1973), however, directs the district court, not the FTC, to determine whether an order has been violated. Therefore, since there was no administrative action regarding an alleged order violation to be reviewed in *Williams,* the *Camp* rule is inapplicable. Notably, where Congress did direct FTC action, *i.e.*, issuance of a cease and desist order, it displayed no difficulty in providing for judicial review. *See id.* § 45(c) ("substantial evidence" test for review of FTC orders). It would seem that if Congress had intended the FTC to determine order violations, it also would have provided a specific standard of judicial review of such determinations. The Federal Trade Commission Act, however, is silent as to both matters. *See* 15 U.S.C. §§ 41-58 (1970), *as amended,* 15 U.S.C. §§ 45, 53, 56 (Supp. III, 1973).

43 498 F.2d at 440-41 n.2.

44 *Id.* at 450-51.

45 288 F.2d 257 (3d Cir.), *cert. denied,* 368 U.S. 821 (1961). *Vulcanized Rubber* affirmed a lower court's summary disposition of a § 45(*l*) civil penalty proceeding where "there was no issue of fact presented . . . ." 288 F.2d at 258 n.2.

Even under *Williams,* there would exist no need for a jury trial in the absence of a genuine dispute over the fact of violation. 498 F.2d at 421, 430. *See* United States v. Beatrice Food Co., 344 F. Supp. 104 (D. Minn. 1972), *aff'd,* 493 F.2d 1259 (8th Cir. 1974) (no material factual issue as to the violation of an FTC order present requiring a jury trial in a civil penalty action); United States v. Piuma, 40 F. Supp. 119, 123 (S.D. Cal. 1941), *aff'd,* 126 F.2d 601 (9th Cir.), *cert. denied,* 317 U.S. 637 (1942) (summary judgment proper in a civil penalty action where "no substantial issue of fact in dispute").

46 The Third Circuit criticized United States v. Hindman, 179 F. Supp. 926 (D.N.J. 1960), stating:

Williams majority opinion, the jury is to make no independent determination of whether the advertising is deceptive, but is merely to resolve disputed factual issues as to whether the advertisements make representations prohibited by the FTC order.[47] It is thus difficult to perceive how a jury would "strip" the FTC of its major function of determining what constitutes deceptive advertising.

Having concluded that the Act entrusted the courts with adjudicatory power over order violations in civil penalty actions, Judge Friendly examined the numerous precedents for applying the seventh amendment right of jury trial to actions to recover civil penalties.[48] Most recently, the Supreme Court, in *Curtis v. Loether*[49] and *Pernell v. Southall Realty*,[50] held that the seventh amendment requires a jury trial in civil actions to enforce statutory rights. The Court in *Curtis* held that where the statutory scheme provided for a civil action for the recovery of actual and punitive damages, "the traditional form of relief offered in the courts of law,"[51] the parties were entitled to a jury trial under the "clear command of the Seventh Amendment."[52] In *Pernell*, the Court again found the seventh amendment applicable

> The holding [in *Hindman*] was erroneous, since the sole issue before the court was whether or not the labeling practice was within the proscription of the order and not whether the labeling practice was deceptive. . . . Moreover, creating an issue of fact as the court did in Hindman, would usurp the function exclusively vested by Congress in the Federal Trade Commission to determine the issue of whether a labeling practice is misleading or deceptive to the public.

288 F.2d at 258-59 n.2 (citation omitted).

While the Third Circuit succinctly framed the *Hindman* issue, it seems to have misinterpreted the holding therein. *Hindman* did not authorize the jury to make any independent determination as to whether the defendant's labels were deceptive, but reserved to the jury only the question of whether the defendant's labels were prohibited by the FTC order. *See* note 36 *supra*. If the jury found that the labels were proscribed by the order, the FTC's determination that such labels were deceptive would warrant the imposition of civil penalties. The Third Circuit's concern with "usurping" the FTC's function is thus difficult to justify. The *Vulcanized Rubber* footnote dictum is criticized in L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 319 n.237 (1965).

[47] 498 F.2d at 430-32. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 393 (1965): "It has long been assumed that in an action for violating an administrative order, only the fact of violation of the order is to be tried by the jury." *See generally* 5 J. MOORE, FEDERAL PRACTICE ¶ 38.11[7] (2d ed. 1974). *See also* Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

[48] 498 F.2d at 422-24.

[49] 415 U.S. 189 (1974). In *Curtis*, after noting that the legislative history was "sparse" and "ambiguous" on the question, the Supreme Court held that "the Seventh Amendment entitles either party to demand a jury trial in an action for damages in the federal courts under [the Civil Rights Act of 1968, §§ 804(a), 812, 42 U.S.C. §§ 3604(a), 3612 (1970)]." 415 U.S. at 192 (footnote omitted).

[50] 416 U.S. 363 (1974). *Pernell* was an eviction proceeding under D.C. CODE ANN. § 16-1501 (1973). The Supreme Court found that the seventh amendment required a trial by jury, although the statute was silent as to such right. 416 U.S. at 376.

[51] 415 U.S. at 196 (footnote omitted).

[52] *Id.* at 198 (footnote omitted).

to a statutory civil action for eviction.[53] *NLRB v. Jones & Laughlin Steel Corp.*[54] and *Block v. Hirsch*,[55] which denied the right to jury trial, were respectively distinguished in *Curtis*[56] and *Pernell*[57] on the basis that, in both cases, Congress had vested administrative agencies, not courts, with the power to adjudicate the rights of the parties.

Judge Oakes refused to accept as precedent the cases relied upon by the majority, arguing that none of these decisions granted the right of jury trial in an action to recover civil penalties for the violation of an administrative order.[58] However, this appears to be a fruitless distinction. As previously indicated, Congress granted the authority to

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53 416 U.S. at 376.

54 301 U.S. 1 (1937). *Jones & Laughlin* was a proceeding to review an NLRB order to pay back wages of reinstated employees. The Board was empowered under § 10(c) of the National Labor Relations Act to issue cease and desist orders and to take "affirmative action, including reinstatement of employees with or without back pay . . . ." Under § 10(e), the Board's actions "if supported by evidence," were to be final. Act of July 5, 1935, ch. 372, § 10(c),(e), 49 Stat. 449. The Court, in rejecting the defendant-employer's objections based on the seventh amendment, stated:

> [The seventh amendment] preserves the right which existed under the common law when the amendment was adopted. . . .
>
> The instant case is not a suit at common law or in the nature of such a suit. *The proceeding is one unknown to the common law. It is a statutory proceeding.* . . . The contention under the Seventh Amendment is without merit.

301 U.S. at 48-49 (emphasis added) (citations omitted). *But see* Pernell v. Southall Realty, 416 U.S. 363, 375 (1974), wherein the Court noted that the seventh amendment "requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law . . . ."

55 256 U.S. 135 (1921). In *Block*, the Court dealt with the Rent Commission of the District of Columbia, created by Congress to regulate rents and to determine a tenant's right to remain in possession after his lease had expired. Act of Oct. 22, 1919, ch. 80, tit. II, §§ 102, 109, 41 Stat. 298. The Court therein held:

> If the *power of the Commission established by the statute to regulate the relation* is established, as we think it is, . . . this objection [by the landlord that the parties were deprived of a seventh amendment right of jury trial] amounts to little.

256 U.S. at 158 (emphasis added). Unlike the statute construed in *Block*, the language of 15 U.S.C. § 45(*l*) (Supp. III, 1973), providing for a judicial civil action, would appear to place the power in question, *viz.*, adjudication of FTC order violations, beyond the scope of the agency. *See* note 39 *supra*.

56 In *Curtis*, the Court stated:

> *Jones & Laughlin* merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of *administrative adjudications* and would substantially interfere with the NLRB's role in the statutory scheme.

415 U.S. at 194 (emphasis added) (footnote omitted). The adjudicative role of the NLRB within the statutory scheme of the National Labor Relations Act, *see* note 54 *supra*, is in sharp contrast to the district court's adjudicative role under the Federal Trade Commission Act, *see* text accompanying notes 37-42 *supra*.

57 The *Pernell* Court distinguished *Block* on the basis that, in *Block*, the Rent Commission's power to "regulate the relation" was established, and thus any seventh amendment claims were inappropriate because they were "incompatible with the whole concept of *administrative adjudication*." 416 U.S. at 383, *citing* Curtis v. Loether, 415 U.S. at 194 (emphasis added).

58 498 F.2d at 451.

determine whether an FTC order has been violated to the district court, not the FTC.[59] Moreover, the legislative history of the Act indicates no congressional intent to eliminate the right to trial by jury traditionally available in actions to recover civil penalties for statutory violations.[60] Accordingly, it would appear reasonable to conclude that this right properly obtains in an action to recover the civil penalties imposed by the Federal Trade Commission Act[61] for violation of an FTC order.

The dissent further maintained that the "practical abilities and limitations of juries"[62] militated strongly against granting a jury trial in *Williams*.[63] Relying upon several references in the legislative history of the Act to "the American gullible public,"[64] Judge Oakes concluded that Congress could not have intended a jury to pass upon the question of what constitutes deceptive advertising.[65] However, the majority placed no reliance on a jury's ability to discern whether an advertisement is deceptive. On the contrary, the Second Circuit's decision in *Williams* respects the function of the FTC by having a jury resolve only factual issues as to whether challenged advertisements contain representations which have been prohibited by the FTC in a cease and desist order.[66] Thus, both the FTC function to prevent deceptive advertising under the Act and the seventh amendment right to jury trial are preserved.

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59 *See* notes 37-42 and accompanying text *supra*.

60 *See* 498 F.2d at 426-27.

In Meeker v. Lehigh Valley R.R., 236 U.S. 412 (1915), the Supreme Court held that the defendant's right to a jury trial remained inviolate in an action to recover civil damages for a statutory violation, even where Congress had gone so far as to render an ICC reparation order prima facie evidence of a violation. The *Meeker* Court stated:

> This provision [rendering the ICC's order prima facie evidence in a civil damage suit] . . . cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. . . . It does not abridge the right of trial by jury or take away any of its incidents.

Id. at 430.

61 15 U.S.C. § 45(*l*) (Supp. III, 1973).

62 Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970). *See* 498 F.2d at 452. *Ross* held the seventh amendment right to jury trial applicable to a stockholders' derivative suit. The Supreme Court stated that the seventh amendment "embrace[s] all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." 396 U.S. at 533 (citation omitted). Judge Oakes' reference in *Williams* is to one of three factors considered by the *Ross* Court in determining whether an issue is "legal" in nature, in which case a right to jury trial inheres. The three factors were: "the pre-merger [of law and equity] custom," "the remedy sought," and "the practical abilities and limitations of juries." *Id.* at 538 n.10.

63 498 F.2d at 452-53.

64 *Id.* at 447, *citing* 83 CONG. REC. 394, 416 (1938) (remarks of Representatives Sirovich and Coffee).

65 498 F.2d at 447, 452-53.

66 *See* text accompanying note 47 *supra*.

Perhaps, as acknowledged by Judge Friendly, "it would be wiser for Congress to allow the FTC to impose penalties for violations of its orders, subject to limited judicial review,"[67] but Congress has not yet seen fit to do so. Where Congress has designated the district court as the forum for adjudicating violations of FTC orders and for imposing the consequent civil penalties, "it must preserve to the parties their right to jury trial."[68] Thus, Judge Friendly's majority opinion in *Williams* strikes a proper accord between the seventh amendment and the Federal Trade Commission Act as currently written.

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FDA Dietary Supplement Regulations

National Nutritional Foods Association v. FDA

Section 401[1] of the Food, Drug, and Cosmetic Act[2] empowers the Food and Drug Administration (FDA) to promulgate a "reasonable definition and standard of identity" for any food under its "common or usual name" when such action "will promote honesty and fair dealing in the interest of consumers."[3] When first proposed, the section was viewed as a tool to protect consumers against cheapened products.[4] Identity standards for particular foods, such as a requirement that peanut butter consist of 90 percent peanuts, have been utilized to guarantee the sale of products conforming to an established minimum standard of quality.[5] The Second Circuit, in *National Nutritional*

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[67] 498 F.2d at 430.

[68] Pernell v. Southall Realty, 416 U.S. 363, 383 (1974) (citation omitted).

As was probably realized by Judge Oakes, *see* 498 F.2d at 441 n.8, the majority holding places the vindication of the Sixth Circuit's parallel enforcing order in the hands of a jury. *See* text accompanying note 3 *supra*. Such a result is, however, a necessary corollary to a statutory scheme which provides for the alternative remedy of a civil penalty to be adjudicated in district court. Indeed, a jury clearly would be required to vindicate a circuit court's parallel enforcing order in the event a criminal proceeding is brought under 15 U.S.C. § 54 (1970), *see* note 5 *supra*, where the sixth amendment right to trial by jury would be applicable.

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[1] 21 U.S.C. § 341 (1970).

[2] *Id.* § 301 *et seq.*

[3] *Id.* § 341.

[4] 27 C. Dunn, Federal Food, Drug, and Cosmetic Act 1073 (1938) [hereinafter cited as Dunn]. During legislative hearings, illustrations of cheapened foods included: (1) butter to which water was added to reduce fat content, *id.* at 218; (2) oysters to which water was added, *id.* at 161; (3) jams and preserves in which a higher percentage of sugar than fruit was used, *id.* at 819.

[5] *See, e.g.*, Corn Prods. Co. v. HEW, 427 F.2d 511 (3d Cir.), *cert. denied*, 400 U.S. 957 (1970) (sustaining a peanut butter standard of identity requiring a minimum of 90% peanut content); Columbia Cheese Co. v. McNutt, 137 F.2d 576 (2d Cir. 1943), *cert. denied*, 321 U.S. 777 (1944) (upholding a cream cheese standard of at least 33% milk fat).

For an explanation of the purpose of § 401 as a means of setting a minimum standard