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Book Review: The Aspirin Wars: Money, Medicine, and 100 Years of Rampant Competition

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Book Review

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The Aspirin Wars: Money, Medicine, and 100 Years of Rampant Competition, by Charles C. Mann and Mark Plummer. Published by Alfred A. Knopf, Inc. (201 E. 50th St., New York, N.Y. 10022) (1991). 420 pages. $25.00.

I. INTRODUCTION

The recent identification of a possible link between the long-term use of aspirin and a reduced incidence of colon and rectal cancer has directed renewed attention to a familiar household medication whose origins reach back to antiquity.2

Competition from other painkillers had begun to cut deeply into the market once dominated by aspirin-based products when studies indicated the possibilities, first that the regular consumption of aspirin might prevent second heart attacks, and later that it might lower the risk of heart attacks in healthy individuals. If these two discoveries, as well as the new finding about colon and rectal cancers, hold up under further scientific scrutiny and gain acceptance within the medical and regulatory communities, the growth potential for the sale of medicines made from acetylsalicylic acid (the chemical name for aspirin) would be virtually unlimited.

This, therefore, is an auspicious moment for the publication of The Aspirin Wars, billed as an up-close look at the encounter between the world’s best-known home remedy and the free-enterprise system.6 Science writer Charles C. Mann and economist Mark Plummer have pooled their

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2. The Greeks and the Romans used willow bark to relieve pain and fever. See A. FREESE, ASPIRIN AND YOUR HEALTH 18-19 (1974). Aspirin is a synthesized version of the potion made from willow bark.


6. "The Aspirin Wars penetrates the wilder shores of capitalism to reveal the essence of competition at its canniest, craziest, most unbridled, and most brilliant." ASPIRIN WARS, supra note 3, Book Jacket.
talents in an ambitious effort to record the saga of the discovery of aspirin and its uses, as well as the no-holds-barred conflicts over the production and marketing of the popular painkiller and the medicines that might substitute for it. The story they tell turns out to be epic in scope. It spans three continents, involves a formidable mass of detail, and parades before the reader an array of characters who seem to outnumber the combined casts of Gone With the Wind and The Ten Commandments.  

The Aspirin Wars is unusual in that it contains three books in one, and each has particular appeal for a different audience. The first presents a corporate history suitable for study in business schools. The second deals with legal issues and will be of special interest to attorneys, government regulators, and law students. The third is a fascinating chapter in the history of medicine. The three segments do not blend well into a coherent whole, which is one of the shortcomings of the book. This review will consider each of the three sections of the book separately. It will devote critical attention to some of the legal and public policy issues suggested in parts two and three.

II. Foreign Wars

In their opening section, the authors describe the growth of the Bayer Company, the German chemical-dye manufacturer that first produced acetylsalicylic acid and promoted it to physicians under the trade name Aspirin. Bayer introduced Aspirin in 1899, and marketed it as an ethical drug. The product was an instant success as an internal analgesic effective in reducing inflammation and headaches.

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7. Even Eva Peron makes a cameo appearance, although the anecdote about her is undoubtedly apocryphal. According to the authors, relying on anecdotal evidence, the export division of Sterling Drug "gave an unknown chanteuse named Maria Eva Duarte her first professional singing job. Duarte was fired when she got sick and didn't show up at the station." The government shut down the radio station and threatened to do the same to Sterling's subsidiary, until the latter's representatives realized "who she was" and implored Evita's forgiveness. She finally relented. "With Evita singing the jingles,... Argentina became the biggest per capita consumer of aspirin in the world." ASPIRIN WARS, supra note 3, at 153-54.

Eva Duarte, however, was never a "chanteuse." She was a stage actress and a model who first became famous as a performer on popular radio dramas (sponsored, appropriately enough, by a soap company) in 1939. See generally J. BARNES, EVITA, FIRST LADY: A BIOGRAPHY OF EVA PERON (1978); O. BORRONI & R. VACCA, LA VIDA DE EVA PERON: TOMO 1, TESTIMONIOS PARA SU HISTORIA (1970); N. FRASER & M. NAVARRO, EVA PERON (1980); M. NAVARRO, EVITA (1981). In addition, once she acquired a certain amount of influence because of her association with Colonel Juan D. Peron, no right-thinking radio station would have fired her, nor would she ever have stooped to singing commercials (although she might have appeared as a featured actress on radio programs sponsored by companies selling aspirin products).

Thus, Mann and Plummer have added yet another undeserved blemish to the reputation of Eva Peron. See J. PAGE, PERON, UNA BIOGRAFIA (PRIMERA PARTE, 1895-1952) 230-31 (1984) (debunking Aristotle Onassis' claim that he had had an affair with Eva Peron); Page, The True Life and Strange Cult of the Long-Running Legend, WASH. POST, Sept. 20, 1981, at K1 (explaining how rock opera Evita misrepresents the historical Eva Peron).

8. Ethical drugs were drugs promoted only to physicians and sold only by pharmacies, which in turn sold them only when prescribed. Proprietary medicines, on the other hand, were marketed directly to the public. They were also called patent medicines, not because they were actually patented,
Bayer pushed the overseas sales of its painkiller, as well as other pharmaceutical products, and set up a factory in upstate New York to produce them. The German corporation took advantage of American law to obtain both a patent on its analgesic and a trademark for the word Aspirin. But during World War I, the United States Congress passed the Trading with the Enemy Act which enabled the government to seize and auction off not only Bayer’s physical property in the United States, but also the name Bayer and its symbol, the Bayer cross. The highest bidder was Sterling Products, a West Virginia firm that had previously specialized in the sale of heavily advertised nostrums such as laxatives and cures for impotence.

When the U.S. patent on Aspirin expired in 1915, another firm began to market an identical product under the name “Aspirin.” Sterling subsequently brought suit for trademark infringement. Judge Learned Hand ruled that the American public had come to treat “aspirin” as a name for all acetylsalicylic acid painkillers. Thus, Sterling lost the trademark for Aspirin, which became a generic term that any company could use for any medicine made from acetylsalicylic acid.

Sterling still owned the trade name Bayer and its familiar symbol. The company continued to market Bayer Aspirin in the United States, but it also decided to sell the product internationally. This put Sterling in direct competition with the German Bayer Company, which had emerged intact from World War I. The two firms eventually entered into agreements covering the world-wide marketing of aspirin and other Bayer products. When I.G. Farben absorbed the Bayer Company in 1925, Sterling maintained contractual ties with the giant conglomerate.

I.G. Farben became closely associated with the Nazi regime that took power in Germany in 1933. When hostilities broke out in Europe, Sterling’s involvement with the company, especially in South America, provoked accusations that the American corporation was trying to preserve the South American market for the Nazis. The U.S. Treasury Department froze the firm’s assets, the Senate investigated, and in 1941 the Justice Department obtained a consent decree abrogating Sterling’s contracts with I.G. Farben and removing its president, who narrowly escaped criminal prosecution thanks to the legal (and extra-legal) maneuvering of the controversial Washington attorney Thomas G. Corcoran.

But because their ingredients were secret. See P. Temin, Taking Your Medicine: Drug Regulation in the United States 3 (1980). The equivalent terms today would be prescription and non-prescription or over-the-counter (OTC) drugs.

9. German law patented only new processes, and did not protect new products. See Aspirin Wars, supra note 3, at 28.


13. A book on Washington law firms, in a chapter entitled Tommy the Cork Corcoran: The Lawyer as Acrobat, quotes the assistant attorney general at the time as noting that the settlement of
The tortuous history of the successes and failures of Bayer and Sterling provides a panorama of cut-throat international competition significantly influenced by larger political events. The protagonists do not emerge as motivated by any noble concerns for the advancement of science or the public health. They were struggling to monopolize a brand name, Bayer, and to control markets for a simple medicine that cost little to produce yet brought in handsome returns. The tale has no real heroes, nor does it convey any lesson other than to demonstrate the extremes to which individuals and corporations will go in pursuit of profit. This message becomes even more obvious as the authors turn their attention to the struggles waged by the pain-reliever industry over the wallets and purses of American consumers.

III. Domestic Strife

The book's second segment shifts the spotlight from the battles over Bayer Aspirin to the fierce home-front campaigns waged by market-share competitors against Bayer and against one another. It describes how aspirin-maker squared off against aspirin-maker, and how aspirin-makers fought the makers of non-aspirin painkillers. At the same time federal regulatory agencies intervened, for the most part ineffectually, on behalf of a public targeted by a bewildering bombardment of labeling and advertising claims that were allegedly false, dubious, or unsubstantiated.

A. At War with the FTC

Mann and Plummer must first go over some familiar ground, as they trace the events leading up to the enactment of the original Pure Food and Drugs Act, the problems with its definition of mislabeling, the early unsuccessful efforts of the Federal Trade Commission (FTC) to combat the case against Sterling "without the submission of all the evidence to a grand jury marks the lowest point in the history of the Department of Justice since the Harding Administration." J. GouLDEN, THE SUPERLAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS 158 (1971). Corcoran's brother was the manager of a company owned by Sterling. ASPIRIN WARS, supra note 3, at 104.


15. The 1906 Act defined misbranding as "any statement, design, or device regarding [a drug or article of food], or the ingredients or substances contained therein, which shall be false or misleading in any particular . . . ." Pure Food and Drugs Act, § 8, 34 Stat. at 768. In an early decision, the Supreme Court held that these words applied only to false statements relating to the identity of the article in question, or possibly to its strength, quality, or purity. United States v. Johnson, 221 U.S. 488 (1911).

Congress responded to this cramped reading by amending the Act to provide that misbranding would occur if the package or label of a food or drug bore "any statement, design, or device regarding the therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent." Sherley Amendment of 1912, Pub. L. No. 62-301, 37 Stat. 416 (1912). The Supreme Court interpreted this new definition of misbranding to require proof by the government that a defendant had an actual intent to deceive. Seven Cases of Eckman's Alternative v. United States, 239 U.S. 510 (1916).
false advertising, the "turf war" between the FTC and the Food and Drug Administration (FDA) over authority to regulate the advertising of drugs, and the eventual passage of a new, much strengthened Federal Food, Drug, and Cosmetic Act.

These political and regulatory developments responded in part to the continuing success enjoyed by the nonprescription drug industry. Over the years that industry found a receptive market for home remedies that were often ineffective and occasionally dangerous to the health of consumers, and promoted these products with relentless, imaginative advertising that had only a passing acquaintance with scientific truth. The sellers of pain-relievers were consistently in the front ranks of these promoters of self-medication, no doubt because pain is a constant and most disagreeable aspect of the human condition.

The advent of radio opened up vast, new possibilities for influencing consumers, and the manufacturers of painkillers took full advantage of the new medium. By 1936 Sterling had become the fourth-biggest of the nation's radio advertisers, and the company was spending about $500,000 annually for Bayer Aspirin commercials. One reason for these expenditures was the presence of serious competition. In 1930 American Home

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17. The 1906 Act gave the FDA authority to take enforcement action against food or drug that was "misbranded," a term specifically stated to apply to the "package or label." Pure Food and Drugs Act, § 8, 34 Stat. at 768.


Congress also broadened the FDA's reach somewhat by giving the agency authority over "labeling," which was defined as "all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article." Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, § 201(m), 52 Stat. 1040, 1041 (1938), as amended 21 U.S.C. § 321(m) (1988).


19. The most authoritative studies of this phenomenon are J. Young, The Toadstool Millionaires: A Social History of Patent Medicines in America Before Federal Regulation (1961) and J. Young, supra note 16. See also A. Kallet & F. Schlink, 100,000,000 Guinea Pigs: Dangers in Everyday Foods, Drugs, and Cosmetics ch. VII (1933) (dangerous patent medicines still on market); R. Lamb, American Chamber of Horrors: The Truth About Food and Drugs (1936).

20. The first effort by the government to enforce the Pure Food and Drugs Act of 1906 was the criminal prosecution of the seller of an analgesic ingeniously dubbed Curforhedake Brane Fude. The defendant was charged with using a poisonous ingredient in the product and claiming falsely that it would cure headaches. The jury found him guilty. The judge imposed a fine of only $700, despite the fact that he had sold some 2 million bottles of the drug over the course of twenty years. See Aspirin Wars, supra note 3, at 123-34; J. Young, supra note 16, ch. 1.

Products (AHP), a modest-sized manufacturer of brand-name drug and household products, acquired a small company that produced a painkiller called Anacin. Five years later, AHP resolved to go after a much larger share of the internal analgesic market, a decision that put Anacin on a collision course with Bayer.\textsuperscript{22}

Invented in 1915, Anacin was originally a mixture of aspirin, acetanilid, caffeine, and quinine sulfate, and it was sold to dentists as a cure for the pain and inflammation associated with tooth extraction. Promotional statements asserted it was more effective than plain aspirin, not because of any scientific evidence, but on the basis of the nonscientific conviction that more ingredients had to be better.\textsuperscript{23} This was the beginning of a long history, well-documented by Mann and Plummer, of questionable advertising that would become as much a part of the product as its trademark.\textsuperscript{24}

When Anacin went \textit{mano a mano} with Bayer, it utilized the slogan “Like a doctor’s prescription—not one but a combination of ingredients.” The fact that the same claim might have been made for a cake seems to have passed unnoticed. Moreover, AHP advertising never revealed what these ingredients actually were. After various reformulations, the company settled on aspirin and caffeine. Yet its promotional campaigns over the years created the impression that the product’s formula remained unchanged. When the age of television dawned, a clever advertising executive designed the so-called “Pounding Hammers” commercial, which claimed that Anacin “Stops headache! Relieves tension! Calms jittery nerves! . . . For fast, fast, FAST relief, take Anacin.”\textsuperscript{25} As Mann and Plummer point out,

Anacin’s pounding hammers became symbols of everything false and irritating about Madison Avenue; critics savaged them as if they were the end of Western Civilization . . . . [A] group of advertising experts rated “Pounding Hammers” as one of the worst ads in recent years. [It was] also one of the most successful . . . . [I]t made more money for the producers of Anacin in seven years than \textit{Gone With}

\textsuperscript{22} AHP and Sterling were actually sister companies, in the sense that one of the co-founders of Sterling also created AHP. \textit{Id.} at 155.

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} See also M. Kinsley, \textit{Headaches}, \textit{HARPER’s}, Dec. 1982, at 20, 21 (calling AHP the “long-time industry champ in marketing malarkey”).


\textsuperscript{25} The visual part of the advertisement featured a cartoon of the human head with its brain divided into three parts, with a pounding hammer in the first segment, a coiled spring in the second, and a jagged lightning bolt in the third. \textit{ASPIRIN WARS}, supra note 3, at 159. The commercial did not, of course, disclose the possible extent to which the presence of caffeine in Anacin might add to the consumer’s tension and jittery nerves. See Altman, \textit{The Perils of Caffeine}, N.Y. TIMES, Mar. 15, 1975, at 12 (caffeine as “long recognized factor in the diagnosis of anxiety”).
the Wind did for David O. Selznick and MGM in a quarter of a century. 26

Meanwhile, there was a third entry in the headache sweepstakes. In 1949 Bristol-Myers weighed in with Bufferin, which contained aspirin and two antacids. Having discovered that the antacids served to accelerate the process by which aspirin reached the bloodstream, the company launched an advertising campaign based on the claim that Bufferin “[a]cts twice as fast as aspirin.” The advertisements did not, in the beginning, disclose the fact that Bufferin contained aspirin.

Sterling was slow to react to the aggressive promotion by its competitors, and by the end of the 1950s the millions of dollars AHP and Bristol-Myers were spending on advertising had taken their toll; the sales of Anacin and Bufferin were even with those of Bayer.

It is worth noting that the pain-relievers being promoted by these companies all used an identical ingredient—aspirin—in approximately the same dosage to produce an analgesic effect. It is reasonable to assume, therefore, that the drugs in fact produced identical effects upon consumers. Indeed, the aspirin-makers offered no data to suggest that people who used their remedies were actually recovering more quickly or more completely from headaches than they would have if they had used a competing remedy. Yet they were spending vast sums to make those assertions, which amounted to the only way companies could differentiate their products from those of their competitors. The companies were passing on to the consumer, in the form of higher prices, the costs of conveying what were in essence unsubstantiated factual claims.

Inevitably, the FTC thrust itself into the “aspirin wars.” The Federal Trade Commission Act bestowed upon the agency statutory authority to police “unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce.” 27 The FTC also had specific authority to combat the false advertising of foods, drugs, medical devices, and cosmetics. 28 Its staff could exercise broad investigatory powers and could initiate complaints seeking so-called “cease-and-desist” orders, enjoining further violations of the Act. 29

Modern advertising, however, presented the FTC with a formidable

26. Aspirin Wars, supra note 3, at 159-60.
28. Id. § 52.
29. See generally, Developments in the Law—Deceptive Advertising, 80 Harv. L. Rev. 1005, 1063-67 (1967). If the targets of complaints refuse to enter into a consent agreement with the staff, it can bring the matters to adjudication before an agency hearing examiner. Any party may appeal the decision of the hearing examiner to the full Commission, and decisions of the Commission are subject to review in a United States court of appeals. Id. at 1071-74.

In dealing with allegedly false advertising for foods, drugs, cosmetics and medical devices, the FTC has the option of issuing its own complaints or seeking injunctive relief in a U.S. district court. See 15 U.S.C. § 52(b). See also Note, The FTC's Injunctive Authority Against False Advertising of Food and Drugs, 75 Mich. L. Rev. 745 (1977).
challenge. FTC enforcement actions, if they reached the adjudication state and were contested by companies willing to use all the legal means at their disposal, might drag on for a period of time longer than the lifespan of the promotional campaign at which they were aimed.80 “Cease-and-desist” orders would thus become meaningless gestures because the advertising to be enjoined might already have been withdrawn and different claims of similarly dubious validity might be insinuating themselves into the consciousness of consumers.

Responding to complaints by Sterling against advertising claims being made by its competitors, the FTC sponsored the first independent study of the relative efficacy of five brands of aspirin.81 Researchers randomly distributed them to 298 women who had just given birth. The results of the test revealed that there was no difference in the pain relief provided by the various products.

The FTC concluded that this provided the agency with a basis for proving that aspirin advertisements claiming superior effectiveness were false (although the study dealt only with postpartum pain, to which aspirin commercials were not specifically referring), and in 1961 the agency filed complaints against the four aspirin makers whose brands had been involved in the study. But the test findings were inadvertently published and Sterling utilized them in commercials claiming that a “government-sponsored medical team” had established that “Bayer Aspirin brings relief that is as fast, as strong, and as gentle to the stomach as you can get.”82 The FTC responded with the passion normally associated with bulls confronted by red flags. The agency attempted to restrain the company from publicizing the results in a way the agency argued tended to mislead consumers, but this turned out to be an ill-advised diversion as the courts turned deaf ears to the Commission’s pleas.83

The next round in the struggle between the FTC and the aspirin makers began when the agency entered a new, activist phase in the 1970s. Criticism by a group of student investigators84 and corroboration of their findings by a committee of the American Bar Association85 led to major

30. The classic example of an endlessly prolonged FTC proceeding was the sixteen-year campaign that finally resulted in the removal of the word “Liver” from the name of Carter’s Little Liver Pills. See Carter Prods., Inc. v. Federal Trade Comm’n, 268 F.2d 461 (9th Cir.), cert. denied, 361 U.S. 884, 80 S. Ct. 155, reh’g denied, 361 U.S. 921, 80 S. Ct. 254 (1959).
31. The brands were Anacin, Bayer, Bufferin, St. Joseph’s (manufactured by Plough), and Excedrin (also manufactured by Bristol-Myers). ASPIRIN WARS, supra note 3, at 163.
32. Id. at 164.
changes in the FTC. One of the first initiatives taken by the freshly energized agency was an assault on aspirin advertising.

Building upon the ruling in Pfizer, Inc., which held that advertisements making an affirmative product claim without prior substantiation were unfair, the FTC’s lawyers brought charges against the “Big Three” aspirin-makers, whom they accused of making promotional claims that were not only deceptive but also were unfair because they lacked adequate substantiation. The complaints sought to restrain the companies from making certain claims, to require certain affirmative factual disclosures in aspirin advertisements, and to impose a novel remedy with which the agency had been experimenting, namely corrective advertising, which would have required companies to devote a certain percentage of their future advertising to dissipate misleading impressions created by past advertising campaigns.

What invested the FTC’s aspirin complaints with special significance was the fact that they answered two of the more telling criticisms that had been directed at the agency. The FTC had been accused of devoting excessive attention to the prosecution of trivial cases. It was now taking aim at powerful corporations that advertised heavily to nationwide audiences. Critics had also faulted the agency for not seeking additional enforcement powers from Congress. FTC lawyers were now trying to establish that they could make creative use of their existing statutory authority to police the marketplace effectively.

Moreover, the aspirin cases made good sense from an economic perspective. In 1970, the three major aspirin sellers spent $80 million to promote their analgesics, and their sales amounted to two-thirds of a $330 million market. Therefore, 36¢ out of every dollar consumers were spending to

36. 81 F.T.C. 23 (1972). On advertisement substantiation generally, see Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661, 681-83 (1977). Under the Pfizer doctrine, an unsubstantiated advertising claim that later turned out to have been true would still constitute an unfair practice.

37. These included assertions such as the claims that Bayer Aspirin was superior to any other aspirin, that Bufferin relieved pain faster than aspirin, that Anacin was more effective for pain relief than any other internal analgesic, and that Bayer Aspirin, Anacin, and Bufferin relieved nervous tension. See Federal Trade Commission News, Claims for Analgesics Challenged; Two Year Period for Corrective Ads Sought, Apr. 19, 1972 (press release).

In addition, the complaint against Sterling took aim at the contradiction between its claim that Bayer was the equivalent of all the other painkillers on the market, and its assertion that Vanquisch and Cope, two new pain relievers also sold by Sterling, were better than aspirin. See Aspirin Wars, supra note 3, at 174.

38. For example, it would require the disclosure of the presence of aspirin and caffeine in pain relievers covered by the proceeding. See Federal Trade Commission News, supra note 37. On affirmative disclosure generally, see Gage, The Discriminating Use of Information Disclosure Rules by the Federal Trade Commission, 26 U.C.L.A. L. Rev. 1037 (1979), and Pitofsky, supra note 36, at 685-87.


40. See E. Cox et al., supra note 34, at 43-49.

41. Id. at 87-95.

42. See Gardner, Attacks on Advertising Continue as Agencies Work on New Regulatory Poli-
purchase pain relievers from the "Big 3" went to advertising. Instead of competing to lower their prices or to develop a better product, the companies had locked themselves in a competition to differentiate their painkillers on the basis of massive advertising expenditures for claims that were arguably deceptive or, at best, unsubstantiated. In addition, by spending huge sums on promotion, the major aspirin-makers were making it impossible for new companies to enter the field and offer consumers cheaper (and perhaps better) headache remedies, because the cost would be prohibitive.

Mann and Plummer document the course of the FTC crusade against aspirin advertising. An aggressive defense mounted by the companies against which the administrative enforcement proceedings were brought forced the FTC to devote substantial resources to the prosecution of the cases, which ultimately went to trial before a Commission hearing examiner. Although the FTC prevailed on most of the disputed issues of fact, corrective advertising was imposed only upon AHP, which was ordered to disclose in its promotional campaigns that Anacin contained aspirin and was not a tension reliever. The full Commission eventually adopted the findings of the hearing examiner, but dropped the corrective-advertising order against AHP and toned down some of the other findings.

Contemporaneous developments, upon which Mann and Plummer touch only lightly, both inside and outside the FTC complicated the saga of the "aspirin wars." The FDA was undertaking a massive review of all over-the-counter (OTC) drugs, and it was not clear what impact this regulatory initiative might have on the aspirin cases. In the years that followed the filing of the aspirin complaints, the FTC shifted its priorities away from case-by-case adjudication and sought to develop substantive trade regulation rules setting standards that would apply to broad categories of products and claims made for them. A major initiative on this front dealt with OTC drugs generally, and implicated the relationship between the regulation of advertising claims by the FTC and labeling claims by the FDA. Moreover, political factors became increasingly in-

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43. See, e.g., Bristol-Myers Co. v. Federal Trade Comm'n, 598 F.2d 18 (D.C. Cir. 1978) (Freedom of Information Act case brought by one of the respondents seeking disclosure of 1300 documents withheld from respondent by the FTC; the agency had released 3160 documents comprising 31,742 pages; decision of district court judge granting summary judgment for the FTC on ground that information in the documents in question was protected under exemptions of Act set aside; case remanded for further proceedings).


45. See infra notes 52-77 and accompanying text.


47. See infra notes 78-79 and accompanying text.
trusive. The FTC stirred up a hornet’s nest of protest when it tried to place severe restrictions upon advertising directed at children and appointments made by the administration of President Ronald Reagan in the 1980s pointed the FTC on a deregulatory course.

Undoubtedly there are important lessons to be drawn from all this, but Mann and Plummer do not linger over them. The FTC staff filed its aspirin complaints in 1973, and the cases were not finally resolved until 1984. The authors do not reveal the extent to which companies changed their advertising philosophies (if they altered them at all) because of the final orders or because of any general legal principles that emerged from the cases. Nor do the authors expend any effort in exploring whether, in retrospect, the complaints were worth bringing, and why or why not. Instead, they merely observe that events external to the FTC proceedings had overtaken the aspirin manufacturers. Tylenol, a non-aspirin pain-killer marketed by Johnson & Johnson, had by now become the dominant force among OTC internal-analgesics, and the book quickly shifts to a new front in the “aspirin wars.”

B. At War with the FDA

At this point the authors bring the FDA into the main flow of their narrative. After chronicling the history of Tylenol, which is derived from a synthetic drug known as acetaminophen, and describing the promotional efforts that brought it to the top of the market for painkillers, the book introduces readers to the FDA’s OTC Drug Review, an ambitious project launched by the agency in 1972. The OTC Drug Review was born belatedly out of the 1962 Amend-

49. See Aspirin Wars, supra note 3, at 182.
50. One assessment of the results of the aspirin cases emphasized the distinction the FTC drew between “establishment claims,” which convey the message that an assertion has been scientifically verified, and “non-establishment claims.” For the former, an advertiser would need scientific proof to avoid a finding that the advertisement was misleading; for the latter a mere reasonable basis would suffice. See Buc & Maker, FTC Uses Common Sense to Interpret Ad Claims, LEGAL TIMES, Jan. 28, 1985, at 16. How much effect, if any, this has actually had upon advertising for pain relievers is not clear.
51. Extra-Strength Tylenol advertisements utilized what the authors refer to as the “Unique Selling Proposition,” a technique that differentiates a product from its competitors in the minds of consumers. When the “Proposition” derives from a truly unique aspect of a product, the device provides useful information to consumers and hence plays a constructive marketing role. When it stresses a difference that does not exist, it amounts to deception. The advertising for Extra-Strength Tylenol claimed “You Can’t Buy a More Potent Pain Reliever Without a Prescription.” As the authors point out, “For most types of pain, the claim is factually correct . . . , because all nonprescription analgesics have the same potency at the recommended doses. The claim thus could have been made by any of Tylenol’s competitors. But it wasn’t. And being first made all the difference in the world.” Aspirin Wars, supra note 3, at 185.
ments to the Federal Food, Drug, and Cosmetic Act, which provided that the FDA grant premarket approval to new drugs on the basis of efficacy as well as safety, and directed the agency to review the effectiveness of drugs already on the market. The difficulties the agency experienced in attempting to carry out this latter mandate as it applied to prescription drugs were so formidable that the agency sought a different approach for the review of OTC medications, which numbered in the hundreds of thousands.

The agency, of course, had authority to take enforcement action against them on an individual basis. The FDA’s burden would be to prove in court that the specific product in question fell within the statutory definition of a “new drug” and was being marketed without an approved new drug application. Case-by-case adjudication could involve the government in trials during which disputed issues of fact might have to be litigated. Moreover, the targeted companies could easily reformulate their products or re-word their labeling, and the FDA would be forced to go through the whole enforcement process from the beginning. The magnitude of the task was clearly beyond the agency’s capabilities and resources, unless it could devise an abbreviated process that would survive legal challenge yet ensure the safety and efficacy of all OTC drugs.

The OTC Drug Review was a response to this challenge. The goal of the project was to produce binding substantive regulations that would specify which ingredients were safe and effective for use in OTC medicines, and which labeling claims might be legitimately made for them. The FDA took the position that once the Review had been com-

56. For a summary of these difficulties, see P.B. HUTT & R. MERRILL, FOOD AND DRUG LAW: CASES AND MATERIALS 477-87 (2d ed. 1991).
57. At the onset of the OTC Drug Review, the agency estimated that the project would affect between 100,000 and 500,000 separate products. FDA Formally Proposes Extensive Review of Non-prescription Drugs’ Effectiveness, WALL ST. J., Jan. 5, 1972, at 4.
59. The procedures for securing FDA approval of a “new drug” are set out in 21 U.S.C. § 505. The introduction into interstate commerce of a drug for which FDA approval has not been granted is a prohibited act. Id. § 331(d).
60. For an example of the difficulties incurred by the FDA before the OTC Drug Review, when the agency attempted to bring an enforcement action against an OTC painkiller, see United States v. An Article of Drug • • • Excedrin P.M., [All States] Food Drug Cosm. L. Rep. (CCH) ¶ 40,486 (E.D.N.Y., Mar. 5, 1971), noted in 18 WAYNE L. REV. 867 (1972) (in seizure action against sleeping aid and nighttime pain reliever on ground that it was unapproved new drug, government’s motion for summary judgment denied; difference of scientific opinion over whether the combination of ingredients in product was generally recognized as safe and effective).
61. For general descriptions of the OTC Drug Review, see Ames & McCracken, Framing Reg-
pleted, the agency could prevail in enforcement actions merely by proving that the product in question did not comply with one or more of the regulations, because the product would then automatically fall within the category of "new drug." 62

Under the OTC Drug Review process, the FDA appointed panels of independent experts to evaluate various therapeutic categories of OTC medications. The panels would consider written submissions and testimony from the companies that sold these products, as well as from any other interested parties. They would then draft monographs spelling out which ingredients were safe and effective, and which were not, and which labeling claims contained clear and truthful information, and which did not. The monographs would be published for comment in the Federal Register. The FDA would then use the monographs as bases for proposed and final regulations, with the latter having the force of law. 63 More important was the hope that companies would voluntarily comply with the final regulations that emerged from the process, so that the agency would not have to resort to enforcement actions.

The linkage Mann and Plummer make between the OTC Drug Review and Tylenol rests upon the efforts made by Tylenol's competitors to convince the FDA advisory panel of experts drafting the regulations for internal analgesics to include health warnings that might frighten consumers away from the product, 64 and Johnson & Johnson's counterattack which urged the panel to adopt tough health warnings for aspirin. 65 But the authors also point out that the Review had other implications for acetylsalicylic acid.

Thus, the internal-analgesics panel considered the evidence underlying not only some of the major claims being made for painkillers containing aspirin, but also the efficacy of adding ingredients such as caffeine to aspirin products, and expressed skepticism about both. 66 In light of the guidelines of the OTC Drug Review with respect to both efficacy 67 and combi-

62. For the FDA's assertion of its authority to promulgate binding substantive regulations, see 37 Fed. Reg. 9471-72 (May 11, 1972). In the context of the OTC Drug Review, this claim has never been challenged in court. However, in other contexts courts have upheld the FDA's authority to promulgate substantive regulations. See, e.g., National Confectioners Ass'n v. Califano, 569 F.2d 690 (D.C. Cir. 1978) (upholding the FDA's authority to promulgate substantive regulations defining good manufacturing practices for producers of food); National Nutritional Foods Ass'n v. Califano, 603 F.2d 327 (2d Cir. 1979).
63. For the final order of the agency setting out the procedures for the Review, see 37 Fed. Reg. 9473 (May 11, 1972).
64. The particular hazard was a risk of liver damage associated with consumption of acetaminophen at high doses. See Aspirin Wars, supra note 3, at 205.
65. These proposed warnings focused on internal bleeding and other side effects associated with aspirin. Id. at 206-07.
66. See id. at 202-04.
67. "Proof of effectiveness shall consist of controlled clinical investigations . . . unless this requirement is waived on the basis of a showing that it is not reasonably applicable to the drug or
nations of ingredients, there was a very real possibility that some of the claims might have to be dropped or modified, and some of the combination products reformulated.

Yet at the outset of the Review, the FDA had asserted that it would not force manufacturers to make any changes in ingredients or labeling claims until the whole process had run its course. Had it demanded such changes, the agency would have had to bring enforcement actions that might well have consumed major resources, because companies would have a great deal at stake and could be expected to defend themselves with every means at their disposal. Moreover, in deciding which cases to bring (and which not to bring), the FDA would find itself in what it regarded as the uncomfortable position of exercising discretion in ways that could have significant competitive effects upon various sectors of the industry.

However, the agency could easily have developed a priority list for enforcement actions to be taken against particular OTC drugs. Factors such as the size of the market, the seriousness of potential health risks, and the deceptiveness of labeling claims might have provided a basis for allocating the limited resources available to the FDA for purposes of ensuring compliance with the law.

In addition, the decision to observe a moratorium on enforcement meant that consumers would continue to spend money on nonprescription medicines whose efficacy remained unproved (or was nonexistent), and might continue to be deceived by labeling claims that lacked substantiation (or veracity).

The trade-off made by the FDA in opting for the moratorium had other implications as well. By yielding to a perceived threat of administra-

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68. The standard for assessing combination OTC drugs postulated that such a drug would be considered generally recognized as safe and effective "when each active ingredient makes a contribution to the claimed effects." Id. § 330.10(a)(4)(iv).

69. This threat applied not only to internal analgesics, but also to products which featured aspirin as an added ingredient. The most notable was Alka-Seltzer, an antacid promoted for the treatment of upset stomach, but containing acetylsalicylic acid, which can cause gastrointestinal bleeding. On the controversy over Alka-Seltzer, see generally Hearings on Advertising of Proprietary Medicines (Pt. 4) Before the Subcomm. on Monopoly of the Sen. Select Comm. on Small Business, 93d Cong., 1st & 2d Sess. (1973-1974).

70. "A well-understood premise of the OTC review was that FDA would not devote its resources to enforcement actions against individual OTC products even though they might technically be unapproved new drugs. In short, the agency would countenance continued marketing of most pending OTC products pending completion of the review." P.B. Hutt & R. Merrill, supra note 56, at 597.


72. See id. (concern that agency could not bring simultaneous enforcement proceedings against all manufacturers of similar OTC drugs, and that selective enforcement would be inequitable).

73. Very early in the OTC Drug Review process a court upheld the FDA's exercise of discretion in adopting a policy of non-enforcement for the nonprescription drug industry, when the manufacturer of an animal drug claimed that the policy discriminated impermissibly against other industries regulated by the agency. See United States v. 14 Cases of "Naremco Medi-Matic Free Choice Poultry Formula," 374 F. Supp. 922 (W.D. Mo. 1974).
tive and legal conflict with the industry, the agency was embracing a mindset that produced some flagrant examples of excessive caution, such as its decision to classify ingredients and claims as not only generally recognized as safe and effective and not misbranded (the so-called Category One, containing permitted ingredients and claims) and not generally recognized as safe and effective and misbranded (Category Two, containing ingredients and claims that would be forbidden by law), but also as needing more testing (Category Three, a convenient escape mechanism that would allow continued marketing with no firmly fixed termination date). 74

As the Review proceeded, the FDA recognized one major exception to its moratorium policy, the discovery of serious health hazards, which triggered the expedited promulgation of substantive regulations and the threat of immediate enforcement action in the event of noncompliance. 75

The FDA made these policy decisions at the outset, when the agency expected that it could complete the Review within a reasonably short period of time. 76 This projection proved far off the mark. As the authors point out, the process has dragged on interminably, manufacturers of internal analgesics have continued to squabble over the claims they might make for their painkillers, and caffeine remains an ingredient in some of these medicines. 77

The FDA's involvement in the "aspirin wars" also raised the old issue of its proper relationship with the FTC, a matter which does not arouse the interest of Mann and Plummer. The FTC went ahead with its complaints against the major aspirin-makers after the OTC Drug Review process had already begun, an initiative that surely could not have pleased

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75. See 21 C.F.R. § 330.12. For the first instance of expedited action against an OTC ingredient, see id. § 250.250(a)-(c) (regulation promulgated in 1972 limiting the use of hexachlorophene as an antibacterial ingredient in drugs because of safety concerns). The FDA took expedited action to require that aspirin products bear a warning about Reye syndrome, a harmful consequence acetylsalicylic acid might provoke in children or teenagers with chicken pox or flu. See id. § 201.314. The regulation was proposed in 1982, but was not finalized until 1988. See 53 Fed. Reg. 21,633 (June 9, 1988). For an unsuccessful effort by a consumer group to convince an appellate court to force the FDA to issue the rule, see Public Citizen Health Research Group v. Commissioner, Food and Drug Admin., 740 F.2d 21 (D.C. Cir. 1984).

76. At a press conference announcing the OTC Drug Review, FDA Commissioner Charles C. Edwards stated that the project would take at least three years. Schneck, FDA to Review All Drugs Sold Over the Counter, N.Y. TIMES, Jan. 5, 1972, at 1, col. 1.

its sister agency. Shortly afterward, the FTC staff acknowledged the significance of the Review by proposing a trade regulation rule that would have limited advertising claims for nonprescription drugs to the exact language permitted by the FDA in labeling under the regulations that emerged from the Review.

The nonprescription drug industry then scored an impressive double triumph. It convinced the FTC Commissioners to drop the proposed trade regulation rule. In addition, it persuaded the FDA to back off from its proposal to limit labeling claims to the exact words approved in the final, substantive regulations adopted pursuant to the OTC Drug Review.

Like the FTC's crusade against aspirin advertising, the FDA's efforts to regulate the active ingredients of painkillers and the labeling claims made for them seem hardly to have been worth the effort. External pressures generated by health and safety concerns (and occasionally fueled by consumer groups) have succeeded in pushing the FDA to take decisive action, but these regulatory initiatives would undoubtedly have taken place even if there had been no OTC Drug Review.

Aspirin Wars invites a reassessment of the performances of both the FTC and the FDA in their efforts to protect the interests of consumers and impose restraints upon excesses arising from the production and marketing of pain-relievers. As the book implies, neither agency enjoyed much success with the regulatory strategy adopted in the 1970s. However, in a somewhat surprising turn of events, the companies themselves proceeded to don the mantle of "vicarious avengers" and set out to vindicate aggrieved consumers. They did so by resorting to a federal statute that enabled them to sue one another for deceptive advertising, ostensibly as a way of protecting the public from misinformation, but in fact as a way of preserving their market shares.

C. At War with One Another

Aspirin Wars describes how the major manufacturers discovered the Lanham Trademark Act of 1946, which created a new federal system of trademark registration and provided for federal jurisdiction over certain

78. The FTC's legal authority to bring an enforcement action against the maker of a nonprescription drug while the OTC Drug Review was pending was confirmed in Thompson Medical Co. v. F.T.C., 791 F.2d 189 (D.C. Cir. 1986). In that case the FTC sought to enjoin advertising for Aspercreme, a topical analgesic, on the ground that advertising for the product strongly suggested that it contained aspirin, but it did not. Defendant argued that the action was not in the public interest, and hence improper, because the FDA should be granted exclusive regulatory authority over the marketing and labeling of all nonprescription drugs while the Review was still pending. The court found nothing in the FTC's statutory authority to suggest such a limitation on the agency's jurisdiction.
82. See supra notes 74-75.
trademark infringement and unfair competition claims. Section 43(a) of the Act, as originally worded, provided a seemingly broad remedy for anyone damaged as a result of a false description or representation used in conjunction with goods shipped in interstate commerce. Although at first the courts construed the language of section 43(a) narrowly, subsequent decisions held that the statute permitted one competitor to sue another for deceptive advertising. If a plaintiff could prove that misleading promotions actually deceived consumers, he or she could recover money damages; to obtain equitable relief, a plaintiff would have to establish a mere likelihood of deception.

Mann and Plummer tell the story of American Home Products Corp. v. Johnson & Johnson, in which the maker of Tylenol successfully enjoined the maker of Anacin from using advertisements that implied the superiority of Anacin over Tylenol. This was the first time that the Lanham Act had been interpreted to provide a remedy for "innuendo, indirect intimations, and ambiguous suggestions" in advertising.

As the authors note, "The litigation floodgates were opened. Now the analgesics companies themselves could go directly after one another for the faintest whiff of a false or misleading claim." Indeed, Johnson & John-

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85. Any person who shall . . . use in connection with any goods . . . any false description or representation, including words or other symbols tending falsely to describe or represent the same, . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.
Pub. L. No. 79-480, § 43(a), 60 Stat. at 441.
89. Once again American Home Products emerges in a less-than-favorable light. Mann and Plummer describe how the company reacted to Tylenol. First it marketed a couple of acetaminophen painkillers with names so similar to Tylenol that Johnson & Johnson filed successful trademark infringement suits. Then AHP called its new acetaminophen pill Anacin-3—a mystifying choice since the company had never marketed an Anacin-2.

Finally, AHP brought suit against Johnson & Johnson and asked for declaratory relief. AHP alleged that Johnson & Johnson, in complaining to newspapers, TV networks, and the National Advertising Division of the Better Business Bureau about Anacin ads that made unfavorable references to Tylenol, was in fact claiming that AHP was violating section 43(a) of the Lanham Act. The company asked that the court declare that AHP was violating no rights of Johnson & Johnson.

90. 577 F.2d at 165.
91. ASPIRIN WARS, supra note 3, at 213-14.
son followed up its success with two more Tylenol vs. Anacin lawsuits that produced further headaches for AHP. Moreover, when the FDA approved ibuprofen, a new analgesic, for OTC use, and it was marketed as a nonprescription pain-reliever under the tradenames Nuprin and Advil, the "aspirin wars" became a three-way struggle (some might call it a three-ring circus), involving the promotional claims being asserted for products made from acetylsalicylic acid, acetaminophen, and ibuprofen.

Mann and Plummer quote Judge William C. Conner's pithy dictum that "[s]mall nations have fought for their very survival with less resources and resourcefulness than these antagonists have brought to their epic struggle for commercial primacy in the OTC analgesic field." The Judge's opinion goes on to add some interesting specifics drawn from the case before him:

The trial lasted four weeks, and involved the in-court testimony of 22 witnesses, many of them world-renowned physicians and medical researchers specializing in pharmacology, nephrology, hepatology, gastroenterology, hematology, epidemiology, and more particularly in the systemic effects of analgesics. The testimony of 37 additional witnesses was presented by deposition.

The parties filled eight file drawers with hundreds of exhibits, and presented almost a thousand pages of post-trial briefs and proposed findings of fact. The legal fees in this lawsuit alone must have been breathtaking. Moreover, any consideration of the costs of these cases cannot overlook the economic burden they place on the judicial system.

Given the lucrative nature of the market for pain-relievers, the compa-

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94. The Upjohn Company had been selling an ibuprofen painkiller called Motrin as a prescription drug. It licensed Bristol-Myers to market the OTC version of the drug, which was christened Nuprin. AHP bought a license to sell another ibuprofen drug it named Advil. After some hesitation on the part of the advisory committee the FDA consulted on whether to switch ibuprofen to OTC status, the agency gave a green light to AHP and Bristol-Myers. Aspirin Wars, supra note 3, at 223-25.
97. 654 F. Supp. at 572.
98. Id.
nies must have concluded that it was worth their while to incur the necessary expenses of litigation (and pass them on to consumers in the form of higher prices). Yet the question remains, from the perspective of the public interest, whether Lanham Act suits by competitors are the most efficient and effective way to deal with deceptive advertising, an issue that has come under recent debate in the legal literature.99

IV. Pax Aspirina

The third segment of Aspirin Wars documents the long and serendipitous process by which the apparent usefulness of acetylsalicylic acid in preventing heart attacks and other serious maladies was discovered. As Mann and Plummer point out, although the drug has been with us, in one form or another, for more than two millenia, it is only recently that scientists have begun to understand how it impacts the human body.100

One notable aspect of these discoveries is the fact that they did not follow from research initiated or funded by the aspirin industry.101 The reason for this is not difficult to ascertain. Although patent law protects new chemical entities or combinations of entities that might be sold as prescription drugs by giving the patent holder a monopoly for a fixed period of years, there is no way to secure a monopoly over newly discovered uses for home remedies already on the market. Once the FDA sanctions a new use, all manufacturers of the medicine in question may adjust their labeling accordingly. Thus, individual companies would have reduced incentives to invest in the discovery of new indications for the medicines they currently market.

When the new uses for aspirin came to light, the companies did not change their products' labeling to claim that regular consumption might prevent heart attacks, because this was an indication the FDA had not approved. Despite the agency's enforcement moratorium on OTC

99. See BeVier, Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception, 78 VA. L. REV. 1 (1992) (arguing that courts should toughen tests for materiality and likelihood of injury in section 43(a) suits); Schechter, Additional Pieces of the Puzzle: Some Reactions to Professor BeVier, 78 VA. L. REV. 57 (1992) (defending existing section 43(a) jurisprudence). See also Note, Replacing Skepticism: An Economic Justification for Competitors' Actions for False Advertising Under Section 43(a) of the Lanham Act, 77 VA. L. REV. 563 (1991) (arguing that section 43(a) suits serve a useful purpose of discouraging advertising claims against which consumers might otherwise protect themselves through skepticism, since these suits may tend to allay consumer skepticism and hence encourage consumer reliance on beneficial information); Note, The Risk of Chill: A Cost of the Regulation of False Advertising Under Section 43(a) of the Lanham Act, 77 VA. L. REV. 339 (1991) (arguing that section 43(a) suits, by utilizing standards that increasingly favor plaintiffs and are often vague, chill truthful advertising).


101. One effect of the discoveries, as Mann and Plummer wryly observe, is that they "convinced American Home to do what decades of FTC pressure never accomplished." The company finally admitted in some of its advertising that Anacin was made from aspirin. Aspirin Wars, supra note 3, at 318.
there was still a risk that the FDA might declare aspirin a "new drug" with respect to labeling claims for heart attack prevention, and might bestir itself to take action against products that bore such unpermitted labeling.

Some of the companies did advertise that aspirin taken on a regular basis might prevent second heart attacks. Although the FDA has no legal authority to regulate OTC drug advertising directly, it might have declared that because aspirin labeling contained no directions for the new use that was being advertised, the product was misbranded. Instead, the agency chose to do nothing.

But when a new study suggested that regular aspirin consumption might prevent first heart attacks as well, the FDA summoned representatives of the industry to a conference at which the agency took the position that it would not countenance promotion that publicized this information. Mann and Plummer, in their introductory chapter, describe how the point was raised that the advertising ban ought to be extended to cover claims about the prevention of second heart attacks, since consumers who had been told that aspirin could prevent second seizures might readily assume that the product might prevent initial seizures as well. Despite the eminent logic underlying this suggestion, the agency refused to follow it and announced to the press that the companies had agreed to a voluntary ban on promotion of aspirin as a preventive for first heart attacks. The authors quote the reaction of a disgruntled FDA official: "Everybody got what they wanted. The FDA got to show it was tough, and the companies got to advertise." Once again, the public interest seems to have been lost in the shuffle.

Yet when the authors tell the full story of the discovery of new uses for aspirin, they speculate about the tremendous good the industry might accomplish if the companies could use the modern advertising techniques they have perfected over the decades to convince consumers to take aspirin regularly as preventive medicine against heart attacks. "It would work; in a sense, it would be a testament to the free-market system, unshackled

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102. See supra note 70 and accompanying text.
103. The Federal Food, Drug, and Cosmetic Act defines "new drug" as a drug "the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under conditions prescribed, recommended, or suggested in the labeling thereof . . . ." 21 U.S.C. § 321(p)(1). No experts would have had the time or opportunity to evaluate the effectiveness of aspirin in the prevention of heart attacks.
104. Aspirin Wars, supra note 3, at 5.
105. See Alberty Food Prods. Co. v. United States, 185 F.2d 321 (9th Cir. 1950) (newspaper ads declared that drug in question could be used to treat arthritis and rheumatism; labeling did not state conditions for which drug was to be used; held, drug was misbranded because labeling was inadequate). See also Nelson, Control of Advertising by Section 502(j)(1), 7 Food Drug Cosm. L.J. 579 (1952).
106. See supra note 5.
108. Id. at 11.
from the constricting oversight of the FDA and FTC. This way of doing things," they add in a feathery caveat, "is dismaying to imagine; its only virtue seems to be that it can get things done faster and more thoroughly than the others."¹⁰⁹

It is as though Mann and Plummer suddenly forgot what they had written in great detail about the history of aspirin industry. They do not seem to think that this kind of "unshackled" promotion could possibly convey less-than-accurate information to consumers, that it might not adequately inform the public of any relevant new information about the prophylactic consumption of aspirin, and that it might serve only to touch off yet another round in the "aspirin wars.”

Aspirin Wars not only courts the risk of being criticized for “telling us more than we want to know” about pain-relievers. It also provokes thought and speculation about matters not covered or lightly touched upon by the authors. This is especially true with respect to the extent to which the consuming public has benefited from the corporate maneuvering and regulatory thrusts and parries that provide the book's focus.

Thus, the book devotes scant attention to the occasionally serious adverse reactions that have been linked to the consumption of aspirin and other pain relievers, especially when taken chronically or in combination with alcohol or other medications.¹¹⁰ Yet the stories it tells invite consideration of the degree to which images conveyed by advertising contribute to a false sense of security on the part of consumers (and to which accurate informational advertising might induce consumers to take appropriate precautions).

Another line of inquiry might derive from the proposition that pure acetylsalicylic acid is as effective an analgesic as any commercially available, aspirin-based painkiller.¹¹¹ If so, then sound public policy would seek ways to encourage the use of generic aspirin products. One way to accomplish this would be through counter-advertising, the use of the mass media by responsible public interest groups to rebut misleading or unsubstantiated promotional claims.¹¹²

¹⁰⁹ Id. at 335.
¹¹¹ This has been the position long espoused by consumer groups. See, e.g., Aspirin and its Competitors, Consumer Reps., Aug. 1972, at 540; Public Citizen Health Research Group, Over the Counter Pills That Don't Work (1983).
¹¹² In the early 1970s the Stern Community Law Firm produced a televised countercommercial against the painkiller industry. Burt Lancaster, looking over a display of analgesics, tells viewers to "Buy the least expensive plain aspirin you can find." See Wellford, The FTC's New Look: A Case Study of Regulatory Revival, in 2 Consumer Health and Product Hazards—Cosmetics and Drugs, Pesticides, Food Additives 347 (S. Epstein & R. Grundy eds. 1974). More recently, a public interest advertising agency has waged an advertising campaign attacking claims that Bayer Aspirin is superior to other brands, and asserting that generic-brand aspirin is equally effective and less expensive. See K. Foltz, Advertising Agency With a Cause, N.Y. Times, May 21, 1990, at D14,
Although Mann and Plummer describe in great detail the major campaigns in the “aspirin wars,” they generally ignore what might be termed “civil-defense” efforts by consumers and consumer groups to safeguard the public from relentless promotional assaults that have at best only a passing acquaintance with truth, and from products that pose risks of harm.\(^{113}\) Involvement in counter-advertising initiatives is but one way that consumers might contribute in an active and positive way to their own protection.

In addition, if deceptive advertising is such a problem that companies are permitted to utilize private suits under the Lanham Act to protect consumers from misinformation, this would seem to amount to the “privatization” of a function that Congress supposedly entrusted to the FTC. Whether the public is better served by the self-interest of companies than by the FTC’s exercise of statutory authority is an issue that cries out for reconsideration, especially in light of the “big picture” that *Aspirin Wars* provides.

V. Conclusion

As aspirin enters its second century, the German corporation that first marketed the “little white pill” has become one of the world’s largest chemical companies,\(^{114}\) the successor to I.G. Farben has enjoyed a remarkable comeback on the Frankfurt stock exchange,\(^{115}\) and Anacin still proclaims its superiority over Bayer and Bufferin because it contains not just one, but two ingredients for pain.\(^{116}\)

\(^{113}\) For example, in 1970 a group of consumers brought a class action suit against Bristol-Myers for false and deceptive advertising for Excedrin. Their complaint alleged that claims that the headache remedy was more than twice as effective as aspirin were untrue. *See Ads for Excedrin Called Deceptive*, *N.Y. Times*, July 24, 1970, at 38. *See also Excedrin’s Headache*, *The New Republic*, Aug. 15, 1970, at 7. The case was subsequently dismissed on the ground that a private cause of action cannot be implied under the Federal Trade Commission Act. *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973), *affg* 327 F. Supp. 17 (D.D.C. 1971). For other examples of consumer activism, see supra notes 74-75.


\(^{115}\) Although I.G. Farben was formally dissolved after World War II, it remained in existence to pay off pension obligations to its employees. With the reunification of Germany in 1990, the possibility that it might recover the substantial industrial assets it once held in what became East Germany incited the interest of stock speculators, and I.G. Farben shares were heavily traded on the Frankfurt stock exchange. *See Fuhrman, Almost Kaput*, *FORBES*, Oct. 22, 1990, at 14; G. Steichen, *I.G. Farben Claims East German Land*, *CHRISTIAN SCI. MONITOR*, Nov. 21, 1990, at 7.

\(^{116}\) The commercial in question declares: “What makes Anacin better? It’s simple. Regular Bayer and Bufferin have one ingredient for pain, but Anacin has two ingredients: an effective pain medicine plus a second ingredient that makes Anacin work better.” At the same time, a legend stating that “Anacin contains aspirin and caffeine” flashes briefly across the bottom of the television screen. Videotape on file with author. The advertisement does not disclose that the “effective pain medicine” it contains is the same pain medicine found in Bayer and Bufferin, nor that the efficacy of the second ingredient—caffeine—as a supplemental pain reliever has not been established.
Aspirin Wars provides readers with a broad historical perspective with which to view these and any other developments directly or indirectly involving acetylsalicylic acid and its painkilling competitors. It also raises important questions and invites fresh thinking about both unfettered competition and government regulation, neither of which emerges from the book in a particularly attractive light.