Elements Implied in the Legal Definition of Deception

In addition to the core elements previously described, there are elements required for a finding of deception that, while not explicitly stated in formal statements, have been included in detailed analyses of prior decisions. Table 1 presents a summary of the requirements of deception as they pertain to the FTC or the Lanham Act. Note that the following additional elements are included: (1) the communication in question must be of a commercial nature and must be disseminated to consumers. (2) Explicit or implied claims must be examined in the context of what is conveyed by the entire communication to a criterion number of consumers. (3) The advertising claim must be considered apart from consumers’ knowledge and other sources of information. (4) In Lanham Act cases, the likelihood or actual damages to the plaintiff from a false representation must be shown. (5) For both Lanham Act and FTC cases, the advertiser’s intention to deceive is not an issue (Preston 1990a; Deception Policy Statement 1983; Lanham Trademark Act 1982).

Factuality and Truth or Substantiation

Comparative advertisements are most often challenged on the basis of their factuality and whether the sponsor possesses adequate substantiation for its claims. Factuality refers to whether the truth or falsity of a claim can be objectively determined. This is the basis for exclusion of puffery and other subjective claims for which objective evidence cannot be gathered (Deception Policy Statement 1984). Once the factuality of a claim can be objectively determined, an evaluation of the product is undertaken to determine if the seller has a reasonable basis to make such a claim (Preston 1989b, 1990;