



2007

Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace

Kevin M. Lemley

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Antitrust and Trade Regulation Commons](#), and the [Securities Law Commons](#)

Recommended Citation

Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK. LITTLE ROCK L. REV. 283 (2007).

Available at: <https://lawrepository.ualr.edu/lawreview/vol29/iss2/3>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

RESOLVING THE CIRCUIT SPLIT ON STANDING IN FALSE ADVERTISING CLAIMS AND INCORPORATION OF PRUDENTIAL STANDING IN STATE DECEPTIVE TRADE PRACTICES LAW: THE QUEST FOR OPTIMAL LEVELS OF ACCURATE INFORMATION IN THE MARKETPLACE

*Kevin M. Lemley**

False advertising and state deceptive trade practices laws are two laws that should be applied to secure optimal levels of accurate information in the marketplace, while at the same time avoiding the anticompetitive effects caused by overenforcement. Prudential standing measures will preserve this balance. Prudential standing consists of judge-made rules to limit jurisdiction.¹ While a party may satisfy the minimum Article III² standing requirements (often stated as the “case or controversy” requirement),³ prudential standing considerations may require the court to decline to exercise jurisdiction over the present case.⁴

This article has two significant goals. First, it addresses the circuit split on the proper test for standing in false advertising claims under section 43(a) of the Lanham Act.⁵ With slight modification, courts should adopt the reasonable interest test as articulated in two recent opinions authored by Justice Alito while he was sitting on the Third Circuit Court of Appeals.⁶ Second, this article proposes similar prudential standing considerations, along with proposed legislative amendments, for state deceptive trade practices laws.⁷ This section of the article will focus primarily on Arkansas law, but the proposals set forth can be applied to other jurisdictions. The linking theme throughout this article is that unfair competition laws achieve optimal levels

* L.L.M., Intellectual Property, University of Houston Law Center, 2004; adjunct professor at the University of Arkansas at Little Rock School of Law. The author is an associate with the Allen Law Firm in Little Rock, Arkansas, and monitors developments in Eighth Circuit intellectual property law on the firm blog, the Arkansas Business Litigation Blog (www.arbusinesslitigation.com). I owe my deepest thanks to Chuck Dougherty, Jodie Hill, Hermann Ivester, Michael Muskheili, Jim Simpson, and Amy Stewart for their helpful comments and assistance in reviewing earlier drafts. All my love to my wife, Jenny Lemley.

1. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986).

2. UNITED STATES CONST. art. III.

3. *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

4. See *id.*; see also *Allen v. Wright*, 468 U.S. 737, 751 (1984).

5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Part V.

of accurate information in the market. False advertising and state deceptive trade practices laws are two such laws that should be applied to secure these optimal levels in the market.

The market economy is grounded upon procompetitive behavior. Usually, the notions of procompetitive and anticompetitive behavior conjure images of industry cartels fixing prices and limiting supply. However, information affects the competitive behavior of market participants. Accurate information fosters competitive conduct, while misinformation leads to anticompetitive conduct. Inequalities in the market created by misinformation can create harmful, if not devastating, effects on the market.⁸

The analysis does not end with the behavior of market participants. Information regulation also affects the competitive balance of the market. Information regulation must seek to achieve optimal levels of accurate information, not a complete abrogation of misinformation. Overenforcement of market inequalities caused by misinformation can lead to property rights in accurate information and ultimately cause equal or stronger anticompetitive harm than the inequalities they seek to redress. Proper enforcement of false advertising and state deceptive trade practices laws will yield procompetitive effects by alleviating market inequalities caused by misinformation.

This article will demonstrate why prudential standing measures will ensure proper enforcement of the Lanham Act and state deceptive trade practices laws to promote optimal levels of accurate information in the market. To accomplish this task, it will be necessary to explore the origins and development of both laws. Part I presents an overview of false advertising under section 43(a) of the Lanham Act. Part II discusses the legislative history and case law interpretation of section 43(a). Part III analyzes the reasonable interest test to evaluate prudential standing for false advertising. Part IV presents the relationship of false advertising law and state deceptive trade practices laws. Part V discusses Arkansas laws affecting false advertising and makes suggestions to incorporate prudential standing measures for deceptive trade practices claims into Arkansas law. By adopting these measures, courts can apply the Lanham Act and deceptive trade practices laws to secure optimal levels of accurate information in the marketplace and avoid the anticompetitive effects caused by overenforcement.

8. The Enron scandal still remains a popular example of the devastating effects of misinformation supplied to the market. For a thorough examination of Enron, see generally Milton C. Regan, Jr., *Teaching Enron*, 74 *FORDHAM L. REV.* 1139 (2005).

I. OVERVIEW OF FALSE ADVERTISING UNDER SECTION 43(A) OF THE LANHAM ACT

The Lanham Act is the federal statute controlling the law of trademarks and unfair competition.⁹ Most of the statute is devoted to trademarks, and scholarly attention to the Lanham Act is mostly devoted to trademarks. However, section 43(a) also codifies unfair competition and provides federal causes of action for unfair competition and false advertising:

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.¹⁰

The primary focus of this article is the false advertising prong, section 43(a)(1)(B). Although section 43(a)(1)(A) is typically referred to as the trademark infringement prong,¹¹ it does incorporate the form of false advertising in which a firm falsely suggests a celebrity endorses its goods or services.¹² Ultimately, this article supports a single rule of standing to apply to

9. 15 U.S.C. §§ 1051–1141n (2006).

10. *Id.* § 1125(a).

11. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 361 (3d Cir. 1997), *rev'd*, 527 U.S. 627 (1999); *see also* Bruce P. Keller, "It Keeps Going and Going and Going": *The Expansion of False Advertising Litigation Under the Lanham Act*, 59 LAW & CONTEMP. PROBS., Spring 1996, at 131, 134 (noting this subsection is primarily used to bring infringement actions for unregistered trademarks).

12. Keller, *supra* note 11, at 134; *see also generally* Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407 (9th Cir. 1996).

both prongs, and section 43(a) will be referenced in its entirety throughout this article, although false advertising will be the primary focus.

False advertising consists of two types of false statements: "(1) literally false factual commercial claims; and (2) literally true or ambiguous factual claims[,] 'which implicitly convey a false impression, are misleading in context, or are likely to deceive consumers.'"¹³ The courts are generally in agreement that the plaintiff in a false advertising case must establish the following elements: "(1) a false statement of fact that has deceived, or has the capacity to deceive, a not insubstantial segment of the target audience, (2) affecting interstate commerce, (3) in connection with commercial advertising and promotion, (4) that is material, and (5) that is likely to cause injury."¹⁴

A thorough examination of false advertising law requires analysis of the constitutional underpinnings and purpose of the Lanham Act. This section will review (1) the purpose of the Lanham Act, (2) how section 43(a) lowers consumer search costs, and (3) the disagreement among courts regarding section 43(a)'s purpose.

A. The Purpose of the Lanham Act Is to Lower Consumer Search Costs

The Lanham Act serves different policy goals than the other intellectual property statutes. Trademark law was undeveloped in the United States as late as the nineteenth century,¹⁵ and the framers of the Constitution had no reason to include trademarks in the intellectual property clause.¹⁶ While the Patent Act¹⁷ and the Copyright Act¹⁸ took force to "promote the Progress of Science and the useful Arts,"¹⁹ trademark law developed to protect the integrity of the marketplace.²⁰

Different social goals drive the different forms of intellectual property.²¹ Patent and copyright law serve to achieve optimal levels of innovation; trademark law lowers consumer search costs amid the information available

13. *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 390 (8th Cir. 2004).

14. Michael F. Clayton, *Handling Unfair Competition and False Advertising Cases*, 677 PLI/PAT 261, 269 (2001); Keller, *supra* note 11, at 140-41.

15. ROBERT P. MERGES, PETER S. MENELL & MARK A. LEMLEY, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 618 (4th ed. Aspen 2006) (citing LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 257 (2d ed. 1985)).

16. *See* UNITED STATES CONST. art. I, § 8, cl. 8.

17. 35 U.S.C. §§ 1-376 (2006).

18. 17 U.S.C. §§ 101-1332 (2006).

19. UNITED STATES CONST. art. I, § 8, cl. 8.

20. MERGES, MENELL & LEMLEY, *supra* note 15, at 20.

21. Roger D. Blair & Thomas F. Cotter, *The Elusive Logic of Standing Doctrine in Intellectual Property Law*, 74 TUL. L. REV. 1323, 1380 (2000).

in the market.²² A trademark is any word, name, symbol, device, or combination thereof used to identify one's goods or services²³ and to distinguish them from those provided by others.²⁴ The Lanham Act prohibits a later participant from using a trademark that is confusingly similar to an existing trademark.²⁵ Evaluating the likelihood of confusion dictates the bounds of trademark protection.²⁶ Two brief illustrations show that sometimes the trademark owner can prohibit the use of a similar mark, and sometimes he or she cannot. Jeff Foxworthy successfully enjoined a t-shirt manufacturer from producing t-shirts with "you ain't nothing but a redneck" jokes, as they were confusingly similar to Foxworthy's trademark "you might be a redneck."²⁷ Conversely, while CBS had registered its trademark, "Television City," for its television production studio, it could not prevent a television-themed restaurant from using the name "Television City."²⁸ Courts examine a number of factors to determine whether a likelihood of confusion exists,²⁹ which can lead to unpredictable results.³⁰ By focusing on the effect on the market rather than the rights of the trademark owner, trademark law has a much more symbiotic relationship with antitrust law than with copyright or patent law.³¹

22. *Id.* Consumer search costs involve the selection process between similar goods. These search costs increase when similar trademarks identify similar goods with differing levels of quality. Trademark law serves to lower these costs by ensuring that trademarks on competing goods are dissimilar enough so that each trademark signals its own level of quality to consumers.

23. The Lanham Act separately defines "service mark." See 15 U.S.C. § 1127 (2006). However, the distinction is relevant only for registration purposes. As the Eighth Circuit recently observed, "while the distinction between a trademark and a service mark may be relevant for registration purposes, it is not particularly relevant for the purposes of the likelihood of confusion analysis." *Mid-State Aftermarket Body Parts, Inc. v. MQVP, Inc.*, 466 F.3d 630, 633 (8th Cir. 2006) (citing *Frehling Enters., Inc. v. Int'l Select Group, Inc.*, 192 F.3d 1330, 1334 n.1 (11th Cir. 1999)).

24. 15 U.S.C. § 1127; see also Kevin M. Lemley, *I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287, 290 (2004) (comparing the different forms of intellectual property).

25. See 15 U.S.C. §§ 1114(1), 1125(a).

26. See *id.*

27. See generally *Foxworthy v. Custom Trees, Inc.*, 879 F. Supp. 1200 (N.D. Ga. 1995).

28. See generally *CBS, Inc. v. Liederman*, 866 F. Supp. 763 (S.D.N.Y. 1994).

29. The classic test is the eight-factor test in *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492, 495 (2d Cir. 1961). While the approach is basically the same, circuits apply different factors. See, e.g., *Kemp v. Bumble Bee Seafoods, Inc.*, 398 F.3d 1049, 1053-58 (8th Cir. 2005) (applying the six-factor test adopted by the Eighth Circuit).

30. Thomas G. Field, Jr., *Intellectual Property: Some Practical and Legal Fundamentals*, 35 IDEA 79, 125 (1994) (describing the prediction of trademark infringement as a "black art").

31. See MERGES, MENELL & LEMLEY, *supra* note 15, at 20; see also Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY

Trademark law fosters competitive markets by improving the quality of information but not necessarily eliminating all inaccurate information.³² Trademark law is a procompetitive tool that works to secure accurate information to the market,³³ but these procompetitive aims sometimes result in limitations on trademark rights, and even windfalls to competitors.³⁴ Over-enforcement of trademark rights imposes significant social costs, yielding market inequalities,³⁵ including inefficient monopoly profits.³⁶ Therefore, trademark law must be constantly re-evaluated against ever-changing market conditions to ensure the procompetitive policy goals of trademark law are still being met.³⁷

While the purpose of trademark law has been well defined, little attention has been provided to determining the primary policy of false advertising. Ascertaining this policy is important to develop the proper prudential standing analysis. Prudential standing ensures that the proper party is bringing a false advertising claim for an injury that was meant to be corrected by section 43(a). This determination can be made only by exploring the policy of section 43(a).

B. Section 43(a) Seeks to Lower Consumer Search Costs

Like trademark law in general, section 43(a) fosters competitive markets by improving the quality of information supplied to the market but not necessarily eliminating all levels of misinformation supplied to the market. The inclusion of false advertising in the Lanham Act shows the same policy should apply, but a more fundamental analysis of information supply also mandates this conclusion. Trademarks and advertising both convey information to consumers. Trademarks signal the source of goods; consumers can immediately link the level of quality with the source. Once the consumer has consumed a Coca-Cola, the consumer can immediately ascertain the ex-

L.J. 461, 467 (2005) ("The primacy of competition in trademark law stands in stark contrast with other areas of intellectual property law, which insulate creators from competition in order to encourage future acts of creation."). Not surprisingly, standing in trademark law differs from patent or copyright standing. See Blair & Cotter, *supra* note 21, at 1380.

32. Dogan & Lemley, *supra* note 31, at 467.

33. Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 Hous. L. Rev. 777, 788 (2004) [hereinafter *Trademarks and Consumer Search Costs on the Internet*]; see also Margreth Barrett, *Internet Trademark Suits and the Demise of "Trademark Use,"* 39 U.C. Davis L. Rev. 371, 376 (2006) ("The ultimate purpose of trademark protection is to foster competition.").

34. *Trademarks and Consumer Search Costs on the Internet*, *supra* note 33, at 792.

35. Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 Yale L.J. 1687, 1696 (1999).

36. Vincent Chiappetta, *Trademarks: More Than Meets the Eye*, 2003 U. Ill. J.L. Tech. & Pol'y 35, 49 (2003).

37. *Id.* at 50.

pected quality the next time he sees a Coca-Cola logo. Advertising also signals information to consumers, but advertising conveys direct information regarding the characteristics of the goods and services.³⁸ Through this direct conveyance of information, advertising seeks to simultaneously inform, influence, and persuade consumers to buy goods or services.³⁹ False advertising, in its purest form, is misinformation supplied to the market to misinform, influence, and persuade consumers to buy.⁴⁰ Section 43(a) regulates the misinformation supplied to the market.

All markets consist of competitive and monopolistic elements.⁴¹ Attempts to eliminate all monopolistic elements through regulation will ultimately yield anticompetitive effects by ignoring the established competitive balance of "workable competition."⁴² As Professor Brown observed, "pure competition is descriptive only of an ideal, not of the real world."⁴³ Seeking pure competition through the elimination of all misinformation will produce a system of overenforcement of false advertising law. Market inequalities will result from overenforcement, as already seen in the trademark context,⁴⁴ and similar market inequalities will arise through overenforcement of false advertising.

Overenforcement of section 43(a), whether through overextension by competitors or permitting consumer standing, produces market inequalities. While the costs of misinformation must be weighed against the costs of overenforcement, often the costs of overenforcement are more destructive than the original market inequality created by the misinformation. Competitors can impose market inequalities through section 43(a) by generating monopoly profits. Every section 43(a) lawsuit will threaten the defendant's ability to supply information to the market, and if section 43(a) is too expansive, firms can stifle their competitors' ability to supply information to the market. Overenforcement produces twin effects on the market: (1) the defendant is prevented from supplying information, and (2) the plaintiff is permitted to obtain monetary rewards. The end result is a net reduction of information in the market, causing it to fall below optimal levels.

Expanding the scope of section 43(a) to provide consumer standing is even worse. Consumers impose market inequalities through opportunistic

38. Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 57 YALE L.J. 1165 (1948), reprinted in Ralph S. Brown, Jr., *Advertising and the Public Interest: Legal Protection of Trade Symbols*, 108 YALE L.J. 1619, 1621-24 (1999).

39. *Id.*

40. See *id.* Professor Brown's observations analyzed the overall economic effects of advertising rather than considering the effects of misinformation. *Id.*

41. *Id.* at 1624-25.

42. *Id.* at 1624 (internal quotation omitted).

43. *Id.*

44. See, e.g., Lemley, *supra* note 35, at 1696.

behavior and profit seeking. Consumer standing creates a federal cause of action for levels of misinformation in which the law traditionally would not permit recovery. Driven by monetary relief and not competitive conditions, the consumer always has incentives to bring the action. The net results of this opportunistic behavior are additional social costs imposed on the market, which will ultimately increase the costs of goods and services to all consumers.

C. Courts Have Not Agreed on Section 43(a)'s Purpose

Courts diverge on the issue of standing to bring a false advertising claim.⁴⁵ The difficulty comes when interpreting the final sentence of section 43(a). Clearly, a competitor has standing to bring a false advertising claim against another competitor, but how far should standing extend beyond direct competitors? Read literally, section 43(a) gives standing to "any person" who believes he will be harmed.⁴⁶ This section has been left open to two opposing interpretations: an expansive view that would encompass "any person" and a narrow view that would restrict standing to competitors.⁴⁷

Courts also disagree on the purpose behind section 43(a). The Sixth Circuit views section 43(a) as a statute devoted to consumer protection,⁴⁸ while the Second Circuit interprets section 43(a) as an unfair competition remedy applied "virtually without regard for the interests of consumers generally and almost certainly without any consideration of consumer rights of action in particular."⁴⁹ These contradicting views demonstrate the problem in interpreting section 43(a). Courts and commentators have focused on Congressional intent and the "true" meaning, and they have tried to establish standing based on these principles.⁵⁰

While the substantive nature of false advertising is fairly uniform, standing to bring the cause of action is in a state of flux. The Eighth Circuit recently observed this problem, noting a circuit split existed regarding the requirements to establish standing in false advertising claims.⁵¹ One leading commentator has observed that, with the exception of the Seventh, Ninth, and Tenth Circuits, courts have held that a false advertising plaintiff does

45. See *Am. Ass'n of Orthodontists v. Yellow Book USA, Inc.*, 434 F.3d 1100, 1103-04 (8th Cir. 2006) (noting the circuit split).

46. 15 U.S.C. § 1125(a) (2006).

47. Compare Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807 (1999), with Richard A. De Sevo, *Consumer Standing Under Section 43(a)—an Issue Whose Time Has Passed*, 88 TRADEMARK REP. 1 (1998).

48. *Coca-Cola Co. v. Procter & Gamble Co.*, 822 F.2d 28, 31 (6th Cir. 1987).

49. *Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686, 692 (2d Cir. 1971).

50. See generally *id.*; Burns, *supra* note 47; De Sevo, *supra* note 47.

51. *Am. Ass'n of Orthodontists v. Yellow Book USA, Inc.*, 434 F.3d 1100, 1103-04 (8th Cir. 2006).

not always have to be a direct competitor to have standing.⁵² Yet, courts routinely state as a matter of law that the false advertising plaintiff must be a competitor to have standing.⁵³ The Ninth Circuit has even established separate tests for standing under the false advertising and trademark prongs of section 43(a).⁵⁴

It is time to bring order to the chaos and establish a single test for standing in section 43(a) cases. To identify this test, it is necessary to analyze both the legislative history and case law development of false advertising.

II. LEGISLATIVE HISTORY AND CASE LAW INTERPRETATION OF SECTION 43(A)

Other commentators have examined the legislative history of the Lanham Act without a singular accepted analysis of section 43(a).⁵⁵ Their only agreement is that the legislative history is scant; indeed, commentators have used legislative history to justify both sides of the argument as to whether consumers should have standing under section 43(a).⁵⁶ Often this analysis is restricted to the analysis provided in *Colligan v. Activities Club of New York, Ltd.*⁵⁷ This section will readdress the legislative history.

To understand Lanham Act standing, particularly section 43(a) standing, it is also necessary to review trademark law back to its origins. Because trademarks were not included in the Intellectual Property Clause, trademark and unfair competition law experienced a unique evolution through the twin prongs of statutory and common law.⁵⁸ This section will outline the development of the interpretation of section 43(a). First, this section will discuss how a restrictive view of the Commerce Clause in the late nineteenth cen-

52. 4 MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:32 (4th ed. West 2006).

53. See, e.g., *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1034 (9th Cir. 2005); *Island Insteel Sys., Inc. v. Waters*, 296 F.3d 200, 209 (3d Cir. 2002); see also generally Elizabeth Williams, *Standard to Bring False Advertising Claim or Unfair Competition Claim Under § 43(a)(1) of Lanham Act*, 124 A.L.R. FED. 189 (1995).

54. See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1109 (9th Cir. 1992) (holding that plaintiff under the false association prong must show a "commercial interest in the product wrongfully identified," while a plaintiff under the false advertising prong must show a "discernibly competitive injury").

55. See generally Burns, *supra* note 47; De Sevo, *supra* note 47; Keller, *supra* note 11; see also generally Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?*, 31 UCLA L. REV. 671 (1984).

56. Compare Burns, *supra* note 47, at 887-88 (concluding consumers should have standing), with De Sevo, *supra* note 47, at 40-41 (concluding consumers should not have standing).

57. 442 F.2d 686 (2d Cir. 1971).

58. See *infra* Part II.A.

ture forced trademark and unfair competition law to develop primarily through the common law.⁵⁹ Second, this section will address Congress's first opportunity to enact an expansive trademark law that codified the common law.⁶⁰ Next, this section will discuss how the issue of consumer standing for false advertising came to the forefront of the discussion and how the Supreme Court provided guidance on prudential standing in antitrust law.⁶¹ Finally, this section will review the Trademark Law Revision Act of 1988.⁶²

A. The Restrictive View of the Commerce Clause in the Late Nineteenth Century Forced Common Law Development of Trademark and Unfair Competition Laws

The original trademark statute⁶³ was struck down as unconstitutional because it rested its authority on the Intellectual Property Clause.⁶⁴ Congress created a new trademark act under its Commerce Clause powers in 1881,⁶⁵ but this act was more limited in scope than its predecessor.⁶⁶ This was an era when the Supreme Court held a restrictive view of the Commerce Clause,⁶⁷ and the Supreme Court frequently struck down laws passed under the Commerce Clause power.⁶⁸ Congress passed trademark acts in 1905⁶⁹ and 1920,⁷⁰ but the Court's continued restrictive view prevented Congress from passing a broad, unifying statute.⁷¹ Unfair competition law developed through the common law,⁷² and for the most part, federal unfair competition was limited to passing off and protecting trade names.⁷³

In 1938, the Supreme Court decided *Erie Railroad Co. v. Tompkins*.⁷⁴ The Court declared that no federal, general common law existed,⁷⁵ and it

59. See *infra* Part II.A.

60. See *infra* Part II.B.

61. See *infra* Part II.C-D.

62. See *infra* Part II.E.

63. Act of Aug. 14, 1876, ch. 274, 19 Stat. 141.

64. *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

65. See Act of Mar. 3, 1881, ch. 138, 21 Stat. 502.

66. Compare *id.*, with Act of Aug. 14, 1876, ch. 274, 19 Stat. 141.

67. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.3.3 (Aspen 1997).

68. *Id.*

69. Act of Feb. 20, 1905, ch. 592, Pub. L. No. 58-84, 33 Stat. 724, *repealed by* Lanham Act of 1946, § 46(a), 15 U.S.C. § 1125 (1946).

70. Act of Mar. 19, 1920, ch. 104, Pub. L. No. 66-163, 41 Stat. 533, *repealed by* Lanham Act of 1946, § 46(a), 15 U.S.C. § 1125 (1946).

71. See CHERMERINSKY, *supra* note 67, § 3.3.3.

72. For a summary of key unfair competition decisions prior to 1946, see Bauer, *supra* note 55, at 673-78.

73. Burns, *supra* note 47, at 814.

74. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

was widely agreed that the *Erie* decision eliminated the existing body of federal unfair competition common law.⁷⁶ At the same time, the Court began an expansive interpretation of the Commerce Clause. The *Erie* decision coincided with the beginning of a significant era (1937–1995) during which the Court did not overrule a single Commerce Clause law.⁷⁷

B. Congress Is Finally Able to Pass an Expansive Trademark Law and Codify the Common Law Eradicated by *Erie Railroad Co.*

With the Court now receptive to its Commerce Clause power, Congress was set to pass the type of broad trademark statute it had set out to create in the nineteenth century. Congress also had the task of deciding what to do with the common law developed since the *Trade-Mark Cases*⁷⁸ that had been somewhat abrogated by *Erie Railroad*. Congress chose to codify that common law⁷⁹ and enacted the Lanham Act in 1946.⁸⁰ Primarily because the body of common law was not overly expansive, section 43(a) garnered little attention.⁸¹ In fact, the original section 43(a) said nothing about advertising.⁸²

The exclusion of advertising is not surprising considering (1) false advertising never came up in the common law,⁸³ and (2) the prevailing anti-trust views concerning advertising were drastically different from the modern view.⁸⁴ During this era, advertising was viewed as an unnatural stimulant of demand that forged oligopoly through artificial price discrimination.⁸⁵ It would not be until the 1960s and 1970s that economists began to view advertising more favorably,⁸⁶ and not until 1976 that the Supreme

75. *Id.* at 78.

76. MCCARTHY, *supra* note 52, § 27:7.

77. CHERMERINSKY, *supra* note 67, § 3.3.4; *see also* Burns, *supra* note 47, at 811–12 (at the time of the Lanham Act, Congress passed a series of business regulatory laws that were approved by the Supreme Court).

78. 100 U.S. 82 (1879).

79. *See* S. REP. NO. 100-515 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5603.

80. *See generally* 1988 U.S.C.C.A.N. 5577.

81. Bauer, *supra* note 55, at 679.

82. Burns, *supra* note 47, at 814.

83. *Id.*

84. MERGES, MENELL & LEMLEY, *supra* note 15, at 620 (citing JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 89 (1933)); *see also generally* Beverly W. Pattishall, *Trademarks and the Monopoly Phobia*, 50 MICH. L. REV. 967 (1952).

85. MERGES, MENELL & LEMLEY, *supra* note 15, at 620.

86. *Id.* at 621 (citing Thomas T. Nagle, *Do Advertising-Profitability Studies Really Show that Advertising Creates a Barrier to Entry?*, 24 J.L. & ECON. 333 (1981); Phillip Nelson, *Advertising as Information*, 82 J. POL. ECON. 729 (1974); George Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961)).

Court viewed advertising as indispensable to the free market.⁸⁷ All told, Congress had no reason to address false advertising in 1946.

In 1954, the Third Circuit held in *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, that section 43(a) provided a cause of action for false advertising.⁸⁸ *L'Aiglon* was the first case to make such a holding.⁸⁹ False advertising emerged as a cause of action under section 43(a), but the courts remained split on this issue.⁹⁰ Even into the 1980s, some courts refused to recognize a claim for false advertising under section 43(a),⁹¹ and the courts that did recognize false advertising were left to define the contours of the claim through standing.

C. Consumer Standing in False Advertising Cases Comes to the Forefront

The Second Circuit, in *Colligan v. Activities Club of New York, Ltd.*, was the first to deal with consumer standing for a false advertising claim under section 43(a).⁹² The claim was a consumer class action brought by two high school students on behalf of two classes comprising at least 153 students.⁹³ The defendant advertised a weekend ski tour that included ski lessons, equipment, and proper transportation,⁹⁴ but the tour became a disaster.⁹⁵ Only one instructor showed, there was not enough equipment for the students, and one of the buses broke down in the middle of the night.⁹⁶ In considering *Colligan*, the court faced a monumental decision: a ruling for the plaintiffs would have interpreted section 43(a) as conveying a federal cause of action for consumer class actions, regardless of the injury.

The *Colligan* court entertained the question without guidance from the Supreme Court or a clearly articulated policy from Congress. The plaintiffs

87. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976). The Court went so far as to say consumers have a right to receive information from commercial speakers. *See id.* at 756. Society has "a general interest in commercial advertising because advertising helps consumers decide how to allocate their resources in a free-market economy." John M.A. DiPippa, *Regulating Food Advertisements: Some First Amendment Issues*, 28 U. ARK. LITTLE ROCK L. REV. 413, 415 (2006) (providing a thorough analysis of advertising in the context of commercial speech rights). The Court retreated from its position of treating commercial speech as a unique First Amendment right in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). *See id.* at 418–22.

88. 214 F.2d 649, 650 (3d Cir. 1954).

89. *Keller*, *supra* note 11, at 132.

90. *Id.* at 132–33.

91. *Id.*; *see also* *Bauer*, *supra* note 55, at 737 (opining that courts were interpreting false advertising under section 43(a) too narrowly).

92. 442 F.2d 686 (2d Cir. 1971).

93. *Id.* at 687.

94. *Id.*

95. *Id.* at 688.

96. *Id.*

based their argument on the phrase “any person.”⁹⁷ The plaintiffs argued this language was so plain and unambiguous it could only confer standing to consumers.⁹⁸ The court rejected this reasoning and turned to Judge Learned Hand’s observation that “words are not pebbles in alien juxtaposition.”⁹⁹ After examining the history of the Lanham Act, the court focused on section 45, which provides as follows: “The intent of this chapter . . . is to protect persons engaged in such commerce against unfair competition.”¹⁰⁰ The court concluded that section 43(a) created a limited unfair competition remedy for a limited class of commercial plaintiffs.¹⁰¹

The holding and reasoning of *Colligan* has received much attention, but commentators rarely discuss the facts of the case.¹⁰² The court was absolutely right in its conclusion because the misinformation at issue regarded a ski trip that did not meet the expectations of its participants. Permitting a federal class action lawsuit for this type of misinformation would have stretched section 43(a) beyond its intended scope. These types of misinformation are better left for state courts to apply state law, such as breach of contract.

It is easy to see how commentators overlooked the injury at issue in *Colligan*—so did the court. The court limited its standing analysis to what person would have standing rather than the more appropriate task of focusing on what type of injury may confer standing. Courts followed the *Colligan* rule that consumers do not have standing¹⁰³ and continued to focus on the party, rather than the injury, to evaluate standing. This is an efficient analysis for the courts to apply but a superficial one. Instead, courts should focus on the procompetitive policy aspects of false advertising, which mandate analysis of the injury above the party.

Had the *Colligan* court been faced with an indirect competitor, prudential standing may have developed with an emphasis on the injury. Nonetheless, by denying consumer standing, the court established a measure of prudential standing to determine who was a proper party for a section 43(a) false advertising claim.

During the 1980s, plaintiffs tried to create consumer standing through the Racketeer Influenced and Corrupt Organizations Act (RICO).¹⁰⁴ Like the

97. *Id.* at 689.

98. *Colligan*, 442 F.2d at 689.

99. *Id.* at 689 (citing *NLRB v. Federbush Co., Inc.*, 121 F.2d 954, 957 (2d Cir. 1941)).

100. *Id.* at 691.

101. *Id.* at 692.

102. See generally Bauer, *supra* note 55; Burns, *supra* note 47; De Sevo, *supra* note 47.

103. See generally, e.g., *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027 (9th Cir. 2005); *Island Insteel Sys., Inc. v. Waters*, 296 F.3d 200 (3d Cir. 2002); see also generally Williams, *supra* note 53.

104. Keller, *supra* note 11, at 138.

Lanham Act, RICO was not intended to federalize every facet of potential consumer harm.¹⁰⁵ Therefore, these suits were largely unsuccessful¹⁰⁶ because courts reasoned that the prudential standing requirement would be stretched only far enough to permit suits by indirect competitors¹⁰⁷ or consumers with substantial commercial interests.¹⁰⁸ But, the prudential standing requirements remained constant in that a competitive injury and some degree of competition was required to have standing for a section 43(a) false advertising claim.

D. The Supreme Court Provides Guidance on Prudential Standing in Anti-trust Law

A series of Supreme Court antitrust decisions set the stage for evaluating standing for section 43(a) claims. In 1978, the Court held against a literal interpretation of isolated statutory language in *National Society of Professional Engineers v. United States*.¹⁰⁹ Evaluating the Sherman Act, the Court noted that a literal interpretation would render every contract invalid as a restraint of trade.¹¹⁰ The Court also concluded that the legislative history of the Sherman Act showed Congressional intent to maintain judicial guidance in determining what actions constitute antitrust violations.¹¹¹ Additionally, the Court addressed the effect of common law prudential standing principles in relation to legislative action.¹¹² These decisions culminated into a rule of statutory interpretation that Congress is presumed to incorporate prudential standing unless the new statute expressly negates it.¹¹³

In 1983, the Supreme Court handed down a landmark decision in *Associated General Contractors v. California State Council of Carpenters*,¹¹⁴ focusing on the nature of the injury to determine standing in antitrust cases.¹¹⁵ The parties were engaged in collective bargaining agreements,¹¹⁶ and a

105. *Id.*

106. *Id.*

107. *See generally* Williams, *supra* note 53 (summarizing cases in which standing was granted or denied to indirect competitors).

108. *See generally* Thorn v. Reliance Van Co., 736 F.2d 929 (3d Cir. 1984) (major shareholder of failed company had false advertising standing).

109. 435 U.S. 679 (1978).

110. *Id.* at 687-88.

111. *Id.* at 688.

112. *See generally* Bennett v. Spear, 520 U.S. 154 (1997); United Food & Commercial Workers Union v. Brown Group, Inc., 517 U.S. 544 (1996); Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91 (1979); Warth v. Seldin, 422 U.S. 490 (1975).

113. *See generally* Bennett, 520 U.S. 154; United Food, 517 U.S. 544; Gladstone, 441 U.S. 91; Warth, 422 U.S. 490.

114. 459 U.S. 519 (1983).

115. *See generally id.*

116. *Id.* at 520.

labor union brought suit against a membership corporation of general contractors.¹¹⁷ The thrust of the union's complaint was that the corporation took measures to weaken the agreements.¹¹⁸ At issue was standing under section 4 of the Clayton Act, which provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides."¹¹⁹ The Court noted that a literal reading would grant standing to anyone directly or indirectly harmed by an antitrust violation.¹²⁰ Instead, the Court considered the legislative history and the common law backdrop that existed when the antitrust laws were passed.¹²¹ The Court determined that Congress passed the antitrust laws with an intent to maintain the existing principles developed in the common law,¹²² which had established that antitrust standing would be limited to certain injuries caused by antitrust violations, rather than apply a literal reading of section 4 of the Clayton Act.¹²³ The Court focused on the injury, holding that five factors are to be evaluated to determine standing:

- (1) Whether the plaintiff's alleged injury is of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws;¹²⁴
- (2) The directness or indirectness of the injury;¹²⁵
- (3) The plaintiff's proximity to the injurious conduct;¹²⁶
- (4) The degree to which the plaintiff's damages are speculative;¹²⁷ and
- (5) Risk of either duplicative damages or complex apportionment of damages.¹²⁸

After analyzing these factors, the Court determined that the Union did not have standing to bring an antitrust claim against the membership corporation.¹²⁹

117. *Id.* at 521.

118. *Id.* at 522.

119. *Id.* at 520, 529 (quoting 15 U.S.C. § 15 (2006)).

120. *Associated Gen. Contractors*, 459 U.S. at 529.

121. *Id.* at 531–32.

122. *Id.*

123. *Id.* at 534. This interpretation is opposite from the analysis of section 45 of the Lanham Act that supporters of consumer standing use to justify that Congress intended to grant consumer standing for false advertising claims. 15 U.S.C. §§ 1127–29 (2006).

124. *Associated Gen. Contractors*, 459 U.S. at 538 (internal quotations omitted).

125. *Id.* at 540.

126. *Id.* at 541–42.

127. *Id.* at 542.

128. *Id.* at 543–44.

Now, the stage was set to determine standing for section 43(a). The federal courts had developed a clear line of prudential standing denying consumers standing, although it was a party-focused analysis. The Supreme Court rejected the approach of literally interpreting isolated statutory text to create a broader cause of action than was intended by the statute. The Court also firmly set the statutory interpretation rule that a statute was presumed to incorporate prudential standing unless Congress expressly negated prudential standing. Moreover, the Court issued a five-factor test to evaluate anti-trust standing, which was an injury-focused approach that should have been applied to section 43(a) cases in the first place. All that was missing was a Lanham Act revision to see how Congress reacted to the current state of prudential standing measures applied in false advertising cases.

E. The Trademark Law Revision Act of 1988

Congress enacted the Trademark Law Revision Act of 1988 (TLRA)¹³⁰ primarily to correct inconsistencies in section 43(a) cases.¹³¹ There were two major goals: (1) codify the common law decisions that made false advertising actionable and (2) remove some of the restrictions developed through that common law.¹³² For instance, the TLRA did away with the "inherent characteristic" requirement¹³³ and the distinction between statements about the firm's own goods as opposed to statements about its competitors.¹³⁴

The TLRA did nothing to affect prudential standing that had developed in the courts. Surely Congress was aware of the Supreme Court's statutory interpretation rule that prudential standing would remain unless Congress had expressly abrogated it. The issue of consumer standing was addressed in the legislative history, and a proposed amendment to add consumer standing was defeated.¹³⁵ A leading proponent for consumer standing was Represent-

129. *Id.* at 545-46. The Supreme Court again held against abrogation of prudential standing in an environmental case. *See generally* *Bennett v. Spear*, 520 U.S. 154 (1997).

130. Trademark Revision Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 (codified as amended at 15 U.S.C. §§ 1051-72 (1988)).

131. Keller, *supra* note 11, at 134.

132. *Id.* at 134, 137.

133. *Id.* at 136. Under this requirement, the false statement was actionable only if it was directed to an inherent characteristic of the goods at issue. *See generally, e.g.,* *Fur Info. & Fashion Council, Inc. v. E.F. Timme & Son, Inc.*, 501 F.2d 1048 (2d Cir. 1974) (false advertising claim dismissed because advertisement, although conveying a false message about the fur garment industry, did not make a false statement regarding the characteristics of imitation furs).

134. Keller, *supra* note 11, at 136-37. Prior to 1988, only a firm's statements about its own goods or services were actionable. *Id.* Thus, firms could make false statements about competitors' goods or services without being subject to false advertising claims. *See id.*

135. 134 CONG. REC. H10411, 10419-23 (1988).

ative Kastenmeir, who published an article in favor of consumer standing¹³⁶ and declared on the floor of the House his belief that consumers already had standing under the 1946 Lanham Act.¹³⁷ Professor McCarthy viewed these statements as “only an optimistic opinion by a representative whose proposal was defeated in a House-Senate compromise.”¹³⁸ Moreover, these floor comments were worthless for interpretative guidance because the courts had already developed a seventeen-year history of prudential standing. This backdrop of prudential standing makes analysis of the 1946 Lanham Act meaningless; instead, analysis should focus upon any comments directed to standing made in the TLRA.¹³⁹ Here, Congress made its intent quite clear: “It is the committee’s intention that . . . standing under Section 43(a) continue to be decided on a case-by-case basis, and that the amendments it made to the legislation with respect to these issues should not be regarded as either limiting or extending applicable decisional law.”¹⁴⁰

Far from demonstrating an express intent to negate prudential standing, Congress was clear it wished to retain it.¹⁴¹ Entrusting the courts to develop prudential standing was a directive similar to Congress’s intent for the courts to develop antitrust law through prudential interpretation of the Sherman Act.¹⁴²

III. THE THIRD CIRCUIT REFINES THE REASONABLE INTEREST TEST FOR STANDING IN FALSE ADVERTISING CASES

While the TLRA left prudential standing intact, the courts were left yearning for the Supreme Court’s guidance to establish a uniform rule.¹⁴³ Professor McCarthy advocated use of the principles of antitrust standing articulated in *Associated General Contractors* in false advertising cases.¹⁴⁴ With this application, competitors and even noncompetitors would have standing; the injury would determine standing.¹⁴⁵ Other commentators also

136. See generally Robert W. Kastenmeir & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEG. 301 (1978). The House Judiciary Committee endorsed statements from Representative Kastenmeir in this article. See H.R. REP. NO. 100-1028, at 7-8 (1988).

137. 134 CONG. REC. H10419 (Oct. 19, 1988).

138. MCCARTHY, *supra* note 52, § 27.04.

139. See generally *Bennett v. Spear*, 520 U.S. 154 (1997); *United Food & Commercial Workers Union v. Brown Group, Inc.*, 517 U.S. 544 (1996); *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979); *Warth v. Seldin*, 422 U.S. 490 (1975).

140. S. REP. NO. 100-515 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5604.

141. *Id.*

142. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978).

143. A Westlaw search of sy,di(“false advertising”) in the United States Supreme Court database reveals no cases (last performed Oct. 15, 2006).

144. MCCARTHY, *supra* note 52, § 27:32.

145. *Id.*

suggested use of the antitrust standing analysis, but they misapplied the analysis in attempts to create consumer standing for false advertising claims.¹⁴⁶

Justice Alito, then sitting on the United States Court of Appeals for the Third Circuit, participated in a number of key antitrust decisions¹⁴⁷ that culminated in a test for false advertising standing based on antitrust principles.¹⁴⁸ The Third Circuit had adopted the reasonable interest test in 1984,¹⁴⁹ but it was Justice Alito's opinions that defined and provided the legal framework of the "reasonable interest."¹⁵⁰

A. *Conte Brothers Automotive, Inc. v. Quaker State-Slick 50, Inc.*

Quaker State marketed a Teflon-based engine lubricant called Slick 50,¹⁵¹ and Quaker State advertised that Slick 50 could be substituted for motor oil.¹⁵² These advertisements were false, and the Federal Trade Commission forced Quaker State to cease making these statements.¹⁵³ Conte Brothers, which was a retail seller of motor oils that competed with Slick 50,¹⁵⁴ brought a false advertising class action against Quaker State on behalf of all such retail sellers,¹⁵⁵ but the district court dismissed the complaint for lack of standing.¹⁵⁶

The *Conte Bros.* court had a different issue before it than the *Colligan* court, whose analysis was limited to whether the 1946 Lanham Act gave standing to consumers for false advertising claims.¹⁵⁷ The *Colligan* decision created a rule of prudential standing that limited the types of plaintiffs that

146. See generally Burns, *supra* note 47; Jean Wegman Burns, *The Paradox of Antitrust and Lanham Act Standing*, 42 UCLA L. REV. 47 (1994); Tawnya Wojciechowski, Note, *Letting Consumers Stand on Their Own: An Argument for Congressional Action Regarding Consumer Standing for False Advertising Under Lanham Act Section 43(a)*, 24 SW. U. L. REV. 213 (1994).

147. See generally *Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164 (3d Cir. 2001); *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221 (3d Cir. 1998); *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, 118 F.3d 178 (3d Cir. 1997); *Lerman v. Joyce Int'l, Inc.*, 10 F.3d 106 (3d Cir. 1993); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144 (3d Cir. 1993); *Ticor Title Ins. Co. v. Fed. Trade Comm'n*, 998 F.2d 1129 (3d Cir. 1991); *Miller v. Ind. Hosp.*, 930 F.2d 334 (3d Cir. 1991).

148. See generally *Conte Bros.*, 165 F.3d 221; *Joint Stock Soc'y*, 266 F.3d 164.

149. See generally *Thorn v. Reliance Van Co.*, 736 F.2d 929 (3d Cir. 1984).

150. See generally *Conte Bros.*, 165 F.3d 221; *Joint Stock Soc'y*, 266 F.3d 164. These were landmark decisions, but they did not even produce case notes in legal journals.

151. *Conte Bros.*, 165 F.3d at 223–24.

152. *Id.* at 224.

153. *Id.*

154. *Id.* at 223.

155. *Id.* at 223–24.

156. *Id.* at 223.

157. *Colligan v. Activities Club of N.Y., Ltd.*, 442 F.2d 686, 688–92 (2d Cir. 1971).

could bring a false advertising claim.¹⁵⁸ At issue before the *Conte Bros.* court was the effect of the 1988 Lanham Act on this established common law of prudential standing.¹⁵⁹ Namely, the court set out to determine if Congress had eliminated prudential standing in false advertising cases by passage of the 1988 Lanham Act.¹⁶⁰ The court acknowledged that “[a]s a matter of statutory interpretation[,] . . . Congress is presumed to incorporate background prudential standing principles, unless the statute expressly negates them.”¹⁶¹ This rule of interpretation places a level of presumption in favor of maintaining current standing principles—prudential standing remains in “force unless expressly negated by Congress.”¹⁶²

To make this determination, the court examined the statutory text, structure, and legislative history.¹⁶³ The court turned to section 45, which provided the stated purpose of the Lanham Act: “The congressionally-stated purpose of the Lanham act, far from indicating an express intent to abrogate prudential standing doctrine, evidences an intent to limit standing to a narrow class of potential plaintiffs possessing interests the protection of which furthers the purposes of the Lanham Act.”¹⁶⁴

The court held this statement of purpose, unchanged since 1946, showed a lack of Congressional intent to eliminate prudential standing.¹⁶⁵ Additionally, the court highlighted the clause discussing parties: “to protect persons engaged in such commerce against unfair competition.”¹⁶⁶ This language in section 45 has remained intact since the original passage in 1946.¹⁶⁷ Accordingly, the Lanham Act provides redress for anti-competitive conduct in a commercial context, such that standing should be limited to parties with a commercial or competitive interest to protect.¹⁶⁸

The court subsequently turned to legislative history, finding emphasis on anti-competitive conduct in the commercial arena in both the 1946¹⁶⁹ and 1988¹⁷⁰ acts. Nothing in the legislative history would suggest Congressional intent to drastically alter trademark law by introducing consumers as a new breed of plaintiffs.¹⁷¹ Predecessor trademark statutes limited the potential

158. *Id.* at 692.

159. *Conte Bros.*, 165 F.3d at 226–27.

160. *Id.*

161. *Id.* at 227.

162. *Id.*

163. *Id.*

164. *Id.* at 229.

165. *Conte Bros.*, 165 F.3d at 229.

166. *Id.* at 228.

167. *Id.* at 228 n.3 (citing Pub. L. No. 489, reprinted in 1946 U.S.C.C.A.N. 412, 429).

168. *Id.* at 229.

169. *Id.* (citing 1946 U.S.C.C.A.N. 1274, 1275).

170. *Id.* (citing S. REP. NO. 100-515 (1988), reprinted in 1988 U.S.C.C.A.N. 5577, 5604).

171. *Conte Bros.*, 165 F.3d at 229–30.

class of plaintiffs and were drafted amidst prudential standing doctrines that limited standing,¹⁷² and Congress never demonstrated intent, under the Lanham Act or predecessor acts, to abrogate prudential standing.¹⁷³ Based on the text of the Lanham Act and its legislative history, the court determined that Congress did not intend to abrogate prudential standing under section 43(a).¹⁷⁴

The court then shifted its focus to defining the contours of prudential standing for false advertising cases, analyzing its earlier decisions that determined standing based on the plaintiff's reasonable interest.¹⁷⁵ However, these decisions failed to provide a proper framework for evaluating reasonable interest.¹⁷⁶ Following the suggestion of Professor McCarthy¹⁷⁷ and the Restatement (Third) of Competition,¹⁷⁸ the court adopted the test set forth in *Associated General Contractors*¹⁷⁹ to determine standing under section 43(a).¹⁸⁰ As the first court of appeals to adopt this test, the court made careful evaluation of the following factors: (1) nature of the injury, (2) directness of the injury, (3) proximity to or remoteness from the injurious conduct, (4) risk that damages are speculative, (5) duplicative damages or complexity in apportioning damages, and (6) policy of the reasonable interest test.

1. *Nature of the Injury*

The Third Circuit has noted that the purpose of the Lanham Act is to redress commercial harms;¹⁸¹ therefore, the plaintiff must establish a commercial interest that has been harmed.¹⁸² The court reiterated that even a

172. *Id.* at 230.

173. *Id.*

174. *Id.*

175. See generally *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163 (3d Cir. 1993); *Thorn v. Reliance Van Co.*, 736 F.2d 929 (3d Cir. 1984).

176. See generally *Serbin*, 11 F.3d 1163; *Thorn*, 736 F.2d 929; *Conte Bros.*, 165 F.3d at 233.

177. MCCARTHY, *supra* note 52, § 27.32 n.1 ("In the author's opinion, some limit on the § 43(a) standing of persons remote from the directly impacted party should be applied by analogy to antitrust law, such as use of the criteria listed in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983).").

178. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 3 cmt. f (1995) ("In determining whether an asserted injury is sufficiently direct to justify the imposition of liability, the Supreme Court's analysis of similar issues under federal antitrust law may offer a useful analogy.").

179. 459 U.S. 519 (1983).

180. *Conte Bros.*, 165 F.3d at 233.

181. *Id.* at 234.

182. *Id.*

non-competitor may have standing, provided a commercial harm is at stake.¹⁸³

With this analysis, the court established the minimum level of market inequality that could be corrected through section 43(a). While these corrections are not necessarily limited to direct competitors, a commercial harm must have occurred.¹⁸⁴ The court maintained the long-standing rule that consumers do not have standing under section 43(a), but it stated the rule in terms of the types of redress provided by the Lanham Act.¹⁸⁵ By doing so, the court indicated policy considerations of trademark law would apply to false advertising.¹⁸⁶

2. *Directness of the Injury*

The directness factor prevents any commercial party from asserting a false advertising claim against any other commercial party.¹⁸⁷ All businesses compete for consumer dollars; theoretically, all businesses are in some degree of competition with each other. If a linen store misrepresents the quality of its bath towels, and consumers spend more money on bath towels, those dollars are unavailable for consumers to purchase clothes. Theoretically, the clothing store has been harmed because consumers now have fewer dollars to buy clothes. This was essentially the argument Conte Brothers offered—any sales of Slick 50 meant fewer dollars available to purchase motor oil.¹⁸⁸ The court rejected this argument, noting that even consumers whose purchases were influenced by false advertising were more direct.¹⁸⁹ The court held that Conte Brothers must establish either (1) a competitive harm or (2) direct or indirect harm to its reputation or goodwill,¹⁹⁰ and because Conte Brothers could establish only lost sales at the retail level,¹⁹¹ it did not satisfy either prong of the directness factor.¹⁹²

3. *Proximity to, or Remoteness from, the Injurious Conduct*

The proximity/remoteness factor is closely related to the directness factor, but it serves the ultimate policy goal of determining whether the present claim is a market inequality that should be corrected through section 43(a).

183. *Id.*

184. *Id.*

185. *Id.*

186. *See Conte Bros.*, 165 F.3d at 234.

187. *Id.*

188. *Id.* at 224, 235.

189. *Id.* at 234–35.

190. *Id.*

191. *Id.*

192. *Conte Bros.*, 165 F.3d at 234–35.

This factor serves that policy by analyzing the effect on the market if any given plaintiff is granted standing for a section 43(a) claim.¹⁹³ The more direct competitors that are available in the market, the less likely it is that an indirect competitor will achieve standing. If the more indirect competitor is granted standing, all of the more direct competitors will consequently have standing. This factor permits a court to examine whether granting standing to the current plaintiff, which would grant standing to other more direct competitors, would impose more costs on the market than the false advertising at issue.

Conte Brothers was remote from the injurious conduct.¹⁹⁴ More direct competitors would have normal motivations to vindicate the public interest.¹⁹⁵ Allowing such a remote competitor to have standing for a false advertising claim would yield overenforcement of section 43(a) by permitting too many parties to have standing for the same challenged conduct.¹⁹⁶ Therefore, Conte Brothers was too remote from the injurious conduct to be granted standing.

4. *Risk That Damages Are Speculative*

Under the *Conte Bros.* analysis, this is actually a two-part factor that considers (1) if the damages are speculative and (2) if they are avoidable.¹⁹⁷ At best, Conte Brothers could articulate only a theoretical reputational harm for selling a product that had been falsely advertised.¹⁹⁸ Although Conte Brothers chose to sell only other products, Quaker State did not prevent Conte Brothers from selling Slick 50.¹⁹⁹ In fact, the court reasoned, Conte Brothers would have profited from the false advertising had they stocked Slick 50.²⁰⁰ If consumers had been deceived into buying Slick 50, Conte Brothers would have enjoyed increased sales.²⁰¹ The fact that Conte Brothers chose to stock only other products did not convert its speculative claim into a concrete harm.²⁰²

193. *Id.*

194. *Id.* at 234.

195. *Id.*

196. *Id.* at 235.

197. *Id.*

198. *Conte Bros.*, 165 F.3d at 235.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

5. *Duplicative Damages or Complexity in Apportioning Damages*

This factor examines the results of granting standing to the instant plaintiff.²⁰³ Had the court granted standing to Conte Brothers, then every party in the distribution chain would also have a false advertising claim against Quaker State.²⁰⁴ Such a result would threaten to clog the federal courts with insignificant cases.²⁰⁵ The court elaborated as follows:

If every retailer had a cause of action for false advertising regardless of the amount in controversy, regardless of any impact on the retailer's ability to compete, regardless of any impact on the retailer's good will or reputation, and regardless of the remote nature of the injury suffered, the impact on the federal courts could be significant.²⁰⁶

This congestion of insignificant cases would run afoul of section 43(a)'s purpose of resurrecting federal unfair competition law after *Erie Railroad*.²⁰⁷

This factor works in conjunction with the third factor to ascertain the effect on the market if standing is granted. Even if the third factor weighs in favor of standing, this factor examines the effects of other similarly situated parties having standing. If granting standing to the current plaintiff would generate more market harm than the false advertising at issue, it should weigh against standing.

A good way to analyze the third and fifth factors is that the standing analysis does not look at the instant lawsuit with blinders. Because section 43(a) promotes competitive behavior, the court must be careful that permitting a section 43(a) claim does not promote anticompetitive behavior. Allowing standing in a certain case could represent the old axiom that hard cases make bad law.

6. *Policy of the Reasonable Interest Test*

The court closed with an observation that the *Associated General Contractors* test "provides appropriate flexibility in application to address factually disparate scenarios that may arise in the future, while at the same time supplying a principled means for addressing standing under both prongs of [section] 43(a)."²⁰⁸ The court rejected the approach of the Ninth Circuit that

203. *Id.*

204. *Conte Bros.*, 165 F.3d at 235.

205. *Id.*

206. *Id.*

207. *Id.*; see also generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

208. *Conte Bros.*, 165 F.3d at 236.

adopted different standards for the different prongs of section 43(a).²⁰⁹ As discussed above, the five factors set forth in *Conte Bros.* serve the ultimate purpose of section 43(a). The reasonable interest test seeks to grant standing when it would foster procompetitive behavior and to deny standing when it would foster anticompetitive behavior. The test constructs the proper framework to serve the policy without narrowing false advertising, and the test is flexible and can adapt to different situations as they are presented. Shortly after the *Conte Bros.* decision, the court was given the opportunity to refine the reasonable interest test.

B. *Joint Stock Society v. UDV North America, Inc.*

The Third Circuit, again in an opinion authored by Justice Alito, was soon presented with a false advertising case in which to apply the new test for standing.²¹⁰ Joint Stock Society ("Joint Stock") was a vodka trading house in Russia.²¹¹ The Joint Stock family had produced vodka in Russia since the 1860s under the labels "Smirnov" and "Smirnoff," after the surname of the founder, Piotr Arsenvitch Smirnov.²¹² Joint Stock never sold vodka in the United States.²¹³ UDV had been selling vodka under the "Smirnoff" label in the United States since 1934.²¹⁴ UDV held seventeen trademark registrations for "Smirnoff."²¹⁵ Joint Stock brought an action against UDV under both prongs of section 43(a),²¹⁶ basing its claims on UDV's use of the "Smirnoff" label and its use of the Smirnoff family crest, insignia, emblems, and medals.²¹⁷ Joint Stock also included two counts under the Delaware Uniform Deceptive Trade Practices Act²¹⁸ for the same activities that formed the basis of its section 43(a) counts.²¹⁹

The district court granted summary judgment to UDV for lack of standing.²²⁰ The district court held that Joint Stock lacked Article III standing because it had not meaningfully or adequately prepared to begin selling

209. *Id.* at 232, 236.

210. *See generally* Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164 (3d Cir. 2001).

211. *Id.* at 170.

212. *Id.* at 168.

213. *Id.* at 170.

214. *Id.* at 170-71.

215. *Id.* at 171.

216. Joint Stock Soc'y, 266 F.3d at 171-72.

217. *Id.*

218. DEL. CODE ANN. tit. 6, §§ 2531-36 (2006).

219. Joint Stock Soc'y, 266 F.3d at 172-73. The complaint also included some counts against UDV's registered trademarks, but discussion of these counts is beyond the scope of this article. *Id.* at 175.

220. *Id.* at 173.

vodka in the United States.²²¹ The district court also held that Joint Stock failed to establish prudential standing for both the Lanham Act and deceptive trade practices claims.²²² The Third Circuit affirmed, holding Joint Stock lacked Article III standing because they had not marketed vodka in the United States and were not prepared to sell vodka in the United States.²²³ The court did, however, clarify that a noncompetitor could have standing in a false advertising claim if the noncompetitor could satisfy the prudential standing test.²²⁴ Because the district court made a ruling on prudential standing, the Third Circuit was able to apply its new prudential standing test developed in *Conte Bros.*,²²⁵ and it took this opportunity to clarify the five factors of its test by relying on principles set forth in prior antitrust cases.²²⁶

1. *Nature of the Injury*

The court stated that the plaintiff must show an injury that flows from the false advertising.²²⁷ Joint Stock attempted to “shotgun” a series of proposed injuries to satisfy prudential standing. First, Joint Stock argued it was “inevitable and imminent” that the Bureau of Alcohol, Tobacco, and Firearms would deny its application to import vodka with the Smirnov label.²²⁸ The court disagreed, stating it was UDV’s prior use of the Smirnoff mark, not false advertising, that prohibited Joint Stock’s use of Smirnov in the United States.²²⁹ Second, Joint Stock claimed injury because it could not enter into distribution contracts in the United States.²³⁰ Again, the court held this injury was caused by UDV’s prior use of the Smirnoff mark.²³¹ Third, Joint Stock claimed UDV’s false advertising that Smirnoff vodka came from Russia caused harm to manufacturers of Russian vodka.²³² The court held that while this was a proper false advertising injury,²³³ Joint Stock could not

221. *Id.*

222. *Id.*

223. *Id.* at 176.

224. *Id.* at 180.

225. *Joint Stock Soc’y*, 266 F.3d at 173, 179.

226. *Id.* at 179 (citing *Bennett v. Spear*, 520 U.S. 154 (1997)), 179–80 (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983)), 180 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)).

227. *Id.* at 180 (citing *Brunswick*, 429 U.S. at 489) (Antitrust injury must “flow[] from that which makes defendants’ acts unlawful.”).

228. *Id.* at 175, 180.

229. *Id.* at 177–78, 180–81.

230. *Id.* at 181.

231. *Joint Stock Soc’y*, 266 F.3d at 181.

232. *Id.*

233. *Id.*

assert it because it had neither actually suffered, nor was it ever under an imminent threat of suffering this injury.²³⁴

2. *Directness of the Injury*

The court explained the directness of the injury factor as follows: "The issue under this factor is whether the defendants' conduct has had a direct effect on either the plaintiffs or the market in which they participate."²³⁵ Joint Stock provided evidence that Russian vodka manufacturers would have a direct injury.²³⁶ There was no doubt UDV's packaging of Smirnoff vodka conveyed the impression it was from Russia,²³⁷ and Joint Stock presented a study showing a substantial number of consumers believed Smirnoff is made in Russia.²³⁸ The court held this factor would favor standing for a Russian importer who could claim diminished sales,²³⁹ however, Joint Stock was "more attenuated" because they had not sold any vodka in the United States.²⁴⁰ Joint Stock could claim only that the United States market would be less profitable once they did enter.²⁴¹ Thus, Joint Stock's injury was too indirect, and this factor weighed against standing.²⁴²

Joint Stock's efforts to establish directness of injury are important for two reasons. First, the court seemed to approve the use of survey evidence to establish directness of the injury. The court's approval of survey evidence will guide future plaintiffs attempting to establish standing. Second, it sheds more light on the relationship between false advertising and trademark law because survey evidence is the standard tool used to establish trademark infringement.²⁴³

3. *Proximity to, or Remoteness from, the Injurious Conduct*

Under the *Joint Stock* decision, this factor determines whether there is "an identifiable class of persons whose self-interest would normally moti-

234. *Id.*

235. *Id.*

236. *Id.*

237. *Joint Stock Soc'y*, 266 F.3d at 181.

238. *Id.* at 182.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. See, e.g., *Citizens Fin. Group, Inc. v. Citizens Nat'l Bank of Evans City*, 383 F.3d 110, 118–20 (3d Cir. 2004); *Sally Beauty Co., Inc. v. Beautyco, Inc.*, 304 F.3d 964, 974 (10th Cir. 2002); *Big Dog Motorcycles, LLC v. Big Dog Holdings, Inc.*, 402 F. Supp. 2d 1312, 1333–34 (D. Kan. 2005); see also MCCARTHY, *supra* note 52, § 32:158 (discussing proper survey methods).

vate them to vindicate the public interest' by bringing an enforcement action."²⁴⁴ "The existence of such a class diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general."²⁴⁵ The court noted that Russian vodka manufacturers who were currently selling in the United States constituted such a class and were more proximate to the injurious conduct.²⁴⁶ Such manufacturers would have a stronger commercial interest to protect than Joint Stock.²⁴⁷ The court explained that this factor does not require the plaintiff to be a direct competitor, but "a direct competitor will usually have a stronger commercial interest than a noncompetitor."²⁴⁸

4. *Risk That Damages Are Speculative*

According to the court, any calculation of damages for Joint Stock would have been speculative because Joint Stock had not established a market presence in the United States.²⁴⁹ Joint Stock offered three damages calculations: (1) reasonable royalty rate for UDV's use of the Smirnoff name; (2) costs of Joint Stock's corrective advertising; and (3) disgorgement of UDV's profits.²⁵⁰ All three calculations were unavailing. Joint Stock cited no cases in which a false advertising plaintiff was awarded a reasonable royalty rate,²⁵¹ and the corrective advertising and defendant's profits calculations could be claimed by any plaintiff.²⁵² The court rejected the latter assertion because damages must be particular to the plaintiff to satisfy this factor;²⁵³ otherwise, this factor would be meaningless because a plaintiff could always satisfy it by claiming remedial advertising and disgorgement of profits.²⁵⁴

244. *Joint Stock Soc'y*, 266 F.3d at 182 (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 542 (1983)).

245. *Id.* (internal quotations omitted).

246. *Id.*

247. *Id.* at 182-83.

248. *Id.* at 183 n.10.

249. *Id.* at 183.

250. *Joint Stock Soc'y*, 266 F.3d at 183.

251. *Id.* A reasonable royalty rate is the preferred method of damages calculation in patent infringement cases. See 35 U.S.C. § 284 (2006); *Oiness v. Walgreen Co.*, 88 F.3d 1025, 1029 (Fed. Cir. 1996). It is also available in trademark infringement cases but rarely awarded. *McCARTHY*, *supra* note 52, § 30:85.

252. *Joint Stock Soc'y*, 266 F.3d at 184.

253. *Id.*

254. *Id.*

5. *Duplicative Damages or Complexity in Apportioning Damages*

The court identified three groups who could assert the damage claims proffered by Joint Stock: (1) importers of Russian vodka doing business in the United States; (2) all other vodka manufacturers in the American market; and (3) all manufacturers of vodka who have not yet entered the United States market but have taken minimal steps for entry.²⁵⁵ Granting standing to Joint Stock would subject UDV to multiple lawsuits and complex apportionment of damages.²⁵⁶ Accordingly, this factor also weighed against standing.²⁵⁷

6. *The State Deceptive Trade Practices Act Claim*

The Delaware Uniform Deceptive Trade Practices Act defines a proper plaintiff as "[a] person likely to be damaged by a deceptive trade practice of another."²⁵⁸ The court concluded that standing under this state law for false advertising activities should be no broader than prudential standing under section 43(a).²⁵⁹ Therefore, Joint Stock lacked standing to bring its section 43(a) claims as violations of the Act as well.²⁶⁰

C. *Reconciling the Reasonable Interest Test with the Policy of False Advertising to Promote Optimal Levels of Competition*

The reasonable interest test strikes the appropriate balance between securing accurate information in the market and prohibiting anticompetitive conduct through overenforcement of section 43(a). False advertising is one of the general unfair competition laws in force to promote optimal levels of competition,²⁶¹ and this policy is served by correcting some, but not all, inequalities generated by misinformation supplied to the market. Section 43(a) strives to provide causes of action for unacceptable competition, while prohibiting causes of action for acceptable competition.

Some actions of misinformation are actionable, while others are not. Too little enforcement would clearly generate anticompetitive behavior,²⁶² but too much enforcement would also generate anticompetitive behavior by

255. *Id.* at 184-85.

256. *Id.* at 185.

257. *Id.*

258. *Joint Stock Soc'y*, 266 F.3d at 186 (citing DEL. CODE ANN. tit. 6, § 2533 (1999)).

259. *Id.*

260. *Id.*

261. See Blair & Cotter, *supra* note 21, at 1380.

262. Dennis Crouch, *The Social Welfare of Advertising to Children*, 9 U. CHI. L. SCH. ROUNDTABLE 179, 188 (2002).

instilling property rights in accurate information.²⁶³ While false advertising creates inequalities, efforts to eradicate all levels of misinformation yield unjustifiable costs. Finding the optimal balance between accurate and inaccurate information benefits both competitors and consumers, but neither party is the sole intended beneficiary of false advertising.

False advertising law should serve to ensure accurate information is disseminated but also to avoid the overenforcement that has taken hold in some Lanham Act cases.²⁶⁴ Moreover, the reasonable interest test brings false advertising claims into harmony with other section 43 claims, which are laser beams for specific causes of action, e.g., common law trademark infringement, dilution, cybersquatting, and false association.²⁶⁵ The reasonable interest test maintains this tradition of section 43 serving as a statute that provides narrow rights for discreet commercial injuries that supply misinformation to the market.

Prudential standing is needed to filter false advertising lawsuits that do not serve the purpose of achieving optimal levels of accurate information. Prudential standing in the false advertising context addresses three basic questions. First, has the defendant's conduct caused accuracy of information in the marketplace to fall below acceptable levels? If so, which parties should be able to take corrective action? When those parties are identified, how should the misinformation be corrected? The efforts employed by courts in previous false advertising cases work to answer these three questions. The reasonable interest test provides uniform guidance to ascertain which inequalities should be remedied and by which parties.

In the *Conte Bros.* decision, the court illustrated the effects of overenforcement through the hypothetical of a candy bar manufacturer that falsely represented the chocolate content of its candy bar.²⁶⁶ If the false representation of chocolate content was an action to correct, and anyone could correct it, the effect on the market would be destructive.²⁶⁷ Every retailer, competing firm, and consumer of chocolate bars would have a cause of action against the party that provided the misinformation regarding its chocolate content.²⁶⁸ The corrective action would cause more harm to the market than the misinformation. Conversely, assume the same firm advertises that consumers will lose weight if they eat three of the firm's candy bars every day.

263. See *id.* at 188; see generally Lemley, *supra* note 35 (arguing against overprotection of trademarks). Professor Lemley warned of the increased social costs from overprotection of trademarks. *Id.* at 1696. The same principle should hold true for false advertising.

264. See *supra* Part I.A. (analyzing overenforcement of trademarks).

265. See generally 15 U.S.C. § 1125 (2006).

266. *Conte Bros. Auto, Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 235 (3d Cir. 1998).

267. See *id.*

268. See *id.*

This is a significant degree of misinformation that causes more harm to the market than corrective action.

1. *Entrusting the Market to Take Corrective Action*

The market will generally correct a dissemination of false information. Consumer behavior has a notable effect because once consumers have been duped by misinformation, they will no longer trust the firm (or the trademarks identifying the firm's goods or services). Consumers will correct the misinformation by no longer buying the firm's goods or services and by conveying their bad experience to other consumers. Any short-term gains from the misinformation are converted into long-term losses, as consumers no longer trust the firm. Firms committed to long-term positions in the market gain little from supplying misinformation.²⁶⁹

Competitors also have alternatives to litigation to combat misinformation. The competitor may engage in its own positive, corrective advertising campaign, which is often much cheaper and more effective than even successful litigation.²⁷⁰ The decisional calculus for competitors will have to consider the likelihood the market will correct itself, the costs/benefits of its own advertising campaign, and the risks/rewards associated with litigation.²⁷¹

To some extent, the market must retain the power to correct itself. These corrective actions are natural market forces to remedy the inequality created by the misinformation, and if these corrective actions were subsumed by section 43(a), the results on the market would ultimately be negative.

2. *Traditional Causes of Action for Consumers and Commercial Parties That Fail to Meet Standing*

It is important to consider that the denial of section 43(a) standing is not a denial of all remedies. Consumers still have traditional causes of action—breach of contract, fraud, breach of warranties, and the like.²⁷² Commercial parties that lack false advertising standing may have claims for tortious interference with contract, business expectancy, or other business torts. These traditional causes of action are based on state law. The Lanham Act was designed to coexist with state laws, and it was never meant to preempt state law causes of action. Overenforcement of section 43(a) by granting

269. See Crouch, *supra* note 262, at 190–91 (explaining that the market provides disincentives for firms to participate in false advertising).

270. De Sevo, *supra* note 47, at 33–34.

271. *Id.*

272. *Id.* at 35.

standing to too many parties would defeat the purpose of the Lanham Act to supplement existing state laws.

3. *Alternative Forms of Redress for Consumers and Competitors*

Consumers and competitors have other choices to seek redress without traditional corrective action or litigation. The National Advertising Division of the Council of Better Business Bureaus (NAD) offers a forum for both consumers and competitors.²⁷³ In fact, this procedure is a much cheaper alternative to litigation.²⁷⁴ The level of proof for an alleged violation is low because the NAD bases its judgment on its own reaction to the advertisement.²⁷⁵ Although the NAD cannot force a firm to take corrective action, its member firms will usually abide by the ruling, and the NAD can refer cases to governmental agencies.²⁷⁶ The major television networks have their own rules controlling advertisements they broadcast,²⁷⁷ and consumers and competitors can challenge commercials both before and after they air.²⁷⁸ These alternative forms of redress often present a more attractive option than litigation.

4. *Practical Considerations Serve a Protective Function of Correcting Misinformation Without Litigation*

The realities of section 43(a) litigation have served a protective function on the market by correcting inaccuracies without litigation.²⁷⁹ False advertising damages are difficult to prove, and injunctive relief is the chief remedy.²⁸⁰ This remedial aspect of false advertising litigation has made such lawsuits unattractive for contingency-fee cases.²⁸¹ Therefore, legal fees remain high for plaintiffs, and plaintiffs typically choose less expensive alternatives to litigation.²⁸² These realities form a natural barrier to an overflow of false advertising litigation because without substantial rewards for bringing a false advertising claim, parties turn to some of the other corrective tools available. If parties could circumvent these natural barriers, section

273. *Id.* at 32–33; see also National Advertising Division, <http://www.nadreview.org> (last visited Oct. 15, 2006).

274. See generally Lawrence I. Weinstein, *False Advertising Claims: Consumer Class Actions*, NAT'L L.J., Oct. 10, 2005.

275. De Sevo, *supra* note 47, at 32.

276. *Id.* at 32–33.

277. *Id.* at 33.

278. *Id.*

279. See generally Weinstein, *supra* note 274.

280. *Id.*

281. *Id.*

282. *Id.*

43(a) litigation could reach undesirable levels and produce anticompetitive conduct.

D. Adopting the Reasonable Interest Test and Proposal for Future Application

Courts should adopt the reasonable interest test as articulated by the Third Circuit in *Conte Bros.* and refined in *Joint Stock*. As of this writing, only the Fifth Circuit has adopted the reasonable interest test.²⁸³ This article, however, presents a slight modification to the test to balance the factors when indirect competitor standing is desirable.

Under the directness of the injury prong, courts should consider whether the defendant's market has adopted levels of misinformation so as to create an information-distressed market. Information-distressed markets readily accept misinformation, and the participants in these markets build their business models on misinformation. Examples of information-distressed markets are quick weight-loss products, debt reduction services, and home mortgages. The participants in these markets want to maintain the current levels of misinformation in order to create monopolistic behavior within the competitive market.²⁸⁴ Because the reasonable interest test as now defined always favors direct competitors over indirect competitors, focusing on whether direct competitors *could* bring the action will cause this factor to disfavor standing for indirect competitors. To correct this problem, this factor should also consider the likelihood of direct competitors bringing corrective action. If the market is distressed with misinformation that is fostered by the direct participants, the prudential standing doctrine should afford standing to indirect-competitors who will remedy the misinformation when direct competitors will not.

The *Conte Bros.* and *Joint Stock* decisions also provide guidance on procedural advice for courts to follow when faced with the issue of standing in false advertising cases. There was no dispute in *Conte Bros.* that the plaintiff met Article III standing requirements. In *Joint Stock*, the court determined that the plaintiff lacked constitutional standing under Article III but also provided a prudential standing analysis.²⁸⁵ This is the proper procedure in the event of appeal. Because courts can address standing *sua*

283. See generally *Ford v. Nylcare Health Plans of the Gulf Coast, Inc.*, 301 F.3d 329 (5th Cir. 2002); *Logan v. Burgers Ozark Country Cured Hams, Inc.*, 263 F.3d 447 (5th Cir. 2001); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001).

284. Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1667–68 (2006) (“[E]ven competitive markets may act monopolistically as to some features.”); see also Burns, *supra* note 47, at 875 (noting a market injury may not negatively affect direct competitors).

285. *Joint Stock Soc’y v. UDV N. Am., Inc.*, 266 F.3d 164, 177–85 (3d Cir. 2001).

sponte,²⁸⁶ courts should do so even if the defendant fails to challenge standing. Courts should also evaluate prudential standing in false advertising cases even after determining Article III standing is lacking.²⁸⁷

A Supreme Court precedent on section 43(a) standing is long overdue. The Court seems poised to grant certiorari on this issue and adopt the reasonable interest test. The addition of Justice Alito is an obvious indicator, but other recent opinions show rationales of antitrust and intellectual property law consistent with the reasonable interest test. In an opinion authored by Justice Ginsburg, the Court restricted the scope of the Robinson-Patman Act²⁸⁸ to harmonize it with other antitrust laws by placing heightened requirements for competitive injury.²⁸⁹ Recently, Justice Stevens delivered an opinion holding that patents do not automatically confer market power on the patent holder,²⁹⁰ and Justice Thomas presented an opinion holding that courts should not automatically grant permanent injunctions in patent infringement cases, but instead, should apply the traditional four-factor test to determine if such an injunction is appropriate.²⁹¹ These decisions show the Court would likely be receptive to the reasonable interest test as a procompetitive tool to serve the policy of section 43(a).

E. Effects of the Reasonable Interest Test

The most notable effect of a section 43(a) precedent is the application of a uniform standard among the federal courts. Of course, a uniform standard does not mean uniform results. Plenty of differences exist among the different circuits regarding interpretation of other provisions of the Lanham Act.²⁹²

286. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001).

287. *Joint Stock Soc'y*, 266 F.3d at 177–85; *see also generally* Am. Ass'n of Orthodontists v. Yellow Book USA, Inc., 434 F.3d 1100 (8th Cir. 2006) (finding no Article III standing and holding that, under the facts of that case, prudential standing would fail under either test).

288. 15 U.S.C. § 13(a) (2006). This section deals with price discrimination involving competition between different purchasers for direct resale of the product. *See id.* If the products are of like quality, the seller cannot discriminate in price between the purchasers if the discrimination would injure competition or create a monopoly. *See id.* The seller remains able to charge different prices for variable expenses of manufacture, sale, or delivery. *See id.*

289. *Volvo Trucks of N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 564 U.S. 164, 176–77 (2006)).

290. *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1293 (2006).

291. *Ebay, Inc. v. MercExchange, LLC*, 126 S. Ct. 1837, 1840 (2006).

292. Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105, 143 n.150 (2005) (discussing the standards applied by various circuits for trademark infringement); *see also* Bruce P. Keller & David H. Bernstein, *The Right of Publicity: Towards a Federal Statute?*, 532 PLI/PAT 413, 435 n.68 (1998) (noting different proof requirements for compensatory damages for Lanham Act claims among the circuits). The American Intellectual Property Law Association provides a

A less obvious effect of the reasonable interest test is that lower courts are likely to increase the frequency of summary judgments granted to defendants for lack of prudential standing. This phenomenon has already taken place in patent law.²⁹³ District courts may view granting summary judgment as an effective tool because it would avoid the situation of having a trial just to have the case reversed for lack of prudential standing. This is not necessarily a bad result. *Conte Bros.* and *Joint Stock* were both cases in which standing was clearly inappropriate. It would be beneficial to see appellate opinions addressing cases in which the facts present a more balanced prudential standing analysis.

As these effects take shape in the coming years, state laws will have a growing impact on false advertising law. To this point, this article has analyzed the development of false advertising law through the federal system. While false advertising was transitioning into its present form, states passed deceptive trade practice laws that could have a profound effect on false advertising law. While these state laws have remained rather dormant, their application has intensified in recent years, and this surge in state deceptive trade practice law could upset the balance of false advertising and create negative market effects.²⁹⁴

IV. THE RELATIONSHIP OF FALSE ADVERTISING LAW AND STATE DECEPTIVE TRADE PRACTICES LAWS

The Federal Trade Commission (FTC) also regulates false advertising. The FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."²⁹⁵ Under this language, it is unlawful to "disseminate, or cause to be disseminated, any false advertisement . . . [that] induc[es], or . . . is likely to induce . . . the purchase of food, drugs, devices, services, or cosmetics."²⁹⁶ Enforcement of this Act is entrusted to the FTC.²⁹⁷

Federal Circuit Map examining controlling standards on key trademark issues among the different circuits. See Federal Circuit Map, available at http://www.aipla.org/MSTemplate.cfm?Site=Trademark_Litigation1 (follow "Trademark Litigation Federal Circuit Map" hyperlink) (last visited Oct. 21, 2006).

293. Cheryl L. Johnson, *Why Judges Are Destined to Flunk Their Markman Tests: The History of Their Claim Construction Assignment*, 873 PLI/PAT 9, 61 (2006); see also Paul M. Janicke & LiLan Ren, *Who Wins Patent Infringement Cases?*, 34 AIPLA Q.J. 1, 4 (2006).

294. See *supra* Part I.B.

295. Jon Mize, *Fencing off the Path of Least Resistance: Re-Examining the Role of Little FTC Act Actions in the Law of False Advertising*, 72 TENN. L. REV. 653, 656 (2005) (citing 15 U.S.C. § 45(a)(1) (2006)).

296. *Id.* at 656–57 (citing 15 U.S.C. § 52 (2006)).

297. *Id.*

FTC Act lawsuits are significantly different from Lanham Act claims.²⁹⁸ The most striking difference is what the FTC *does not* have to prove: a false statement, intent to deceive, or injury.²⁹⁹ The FTC Act standards are more lenient than section 43(a) because the FTC Act is shielded from overenforcement by practical and political restraints.³⁰⁰ For instance, because FTC commissioners are appointed to limited terms,³⁰¹ the commissioner can be removed, and Congress can send signals through hearings, legislation, and directives.³⁰² Commissioners remain sensitive to political pressures and developments, which serve as a controlling function to keep their actions in check.³⁰³ Additionally, the FTC is provided with a relatively small budget and staff.³⁰⁴ This limitation of resources compels the FTC to focus its efforts on nontrivial deceptions.³⁰⁵ Moreover, the FTC Act limits the scope of actions; the FTC can pursue only claims that “would be to the interest of the public.”³⁰⁶

In response to these restraints and to its limited ability to bring claims, the FTC produced rules that have made it easy for the FTC to prove that actions are deceptive.³⁰⁷ Courts have generally been receptive to the FTC’s procedures for enhancing its ability to bring deceptive practices claims.³⁰⁸ Thus, the FTC Act developed through an arm of case law enforcement similar to the common law development of section 43(a). Because section 43(a) enforcement had unlimited resources, the common law restricted the types of claims that could be pursued. Conversely, with limited resources available to the FTC, the case law broadened the scope of actions the FTC could bring.³⁰⁹ The FTC Act served as a public enforcement prong, and the restrictions fostered the policy of procompetitive behavior because the FTC did not have the resources to impose anticompetitive effects through overenforcement.³¹⁰

298. *Id.* at 657.

299. *Id.* at 657–58.

300. Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 441–45 (1991) [hereinafter *Private Actions*].

301. *Id.* at 441.

302. *Id.*

303. *Id.*

304. *Id.* at 442. The FTC’s 2004 budget was \$186 million. See Mize, *supra* note 295, at 666.

305. *Private Actions*, *supra* note 300, at 442.

306. *Id.*

307. *Id.* at 444.

308. *Id.* at 444–45.

309. *Id.*

310. *Id.*

A. Policy and Goals of Consumer Protection

The main problem with the FTC Act is that it does not establish a concrete definition of deceptive trade practice.³¹¹ Another part of the problem is the broad interpretation provided to the phrase "consumer protection." Consumer protection seems to connote either eliminating all amounts of misinformation supplied to the market or equalizing bargaining power between consumers and commercial parties.³¹² A pursuit of either of these goals will ultimately yield anticompetitive results. Rather, consumer protection is best defined as "a means to prevent consumers from misallocating resources due to misinformation about a product's attributes."³¹³ This definition has restraints on what conduct will be considered deceptive. First, it is undesirable to make actionable every amount of commercial information that may generate misallocations³¹⁴ because "[a]n attempt to eradicate all incorrect beliefs would result in the cessation of communication."³¹⁵ Second, attempts to equalize bargaining power will yield only short-term gains, if any, to the consumer.³¹⁶ If the costs of consumer protection exceed the net benefits to consumers, the net effect is anticompetitive, and consumers ultimately shoulder the costs.³¹⁷

After a series of political maneuvers, the federal courts accepted a new standard of deception set forth by the FTC.³¹⁸ This new standard was called the reasonable consumer test, and it essentially imposed a cost-benefit analysis.³¹⁹ Under this test, the FTC must show (1) that deception was probable (not just possible) and (2) that the deception would occur to "consumers acting reasonably in the circumstances."³²⁰ As a third factor, the test applies only to material deceptions that are likely to cause injury to a reasonably relying consumer.³²¹ The reasonable consumer test is the controlling federal standard for deception.³²² This standard has helped foster the policy of granting redress only when doing so will ultimately benefit consumers as a

311. See 15 U.S.C. § 45 (2006).

312. Thomas J. Holdych, *Standards for Establishing Deceptive Conduct Under State Deceptive Trade Practices Statutes That Impose Punitive Remedies*, 73 OR. L. REV. 235, 246-48 (1994).

313. *Id.* at 246-47.

314. *Id.* at 247.

315. *Id.*

316. *Id.* at 248.

317. *Id.*

318. Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 DICK. L. REV. 373, 386-87 (1990).

319. *Id.* at 388.

320. *Id.*

321. *Id.*

322. *Id.*

whole, not just the current consumer-plaintiff. As this standard of deception developed in federal courts, states were generating their own standards for deception and granting causes of action to consumers.

B. The States Adopt Little FTC Acts but Grant Public and Private Enforcement

Nearly every state has passed a deceptive trade practices law based on the FTC Act.³²³ These laws are often referred to as little FTC acts.³²⁴ States adopted these acts during the “heyday of consumerism” in the 1960s and 1970s,³²⁵ a period when sweeping consumer rights laws were in vogue.³²⁶ The political climate of this era encouraged states to hastily pass these laws without a thorough evaluation of their overall effect on the market.³²⁷

These acts share a problem with their federal counterpart: they do not define what constitutes a deceptive trade practice.³²⁸ Little FTC acts grant consumers private causes of action for deceptive trade practices.³²⁹ Most of the state laws provide a list of deceptive trade practices, but the list is non-exhaustive and often includes a catch-all provision.³³⁰ Accordingly, little FTC acts provide the “path of least resistance” for consumer plaintiffs and could soon reach *tort du jour* status for bringing false advertising claims.³³¹ These acts could also supplant traditional causes of action, like conversion or breach of implied warranty of fitness³³² because rather than prove elements under these traditional causes of action, plaintiffs can bring suit under

323. *Id.* at 374–75; *Private Actions*, *supra* note 300, at 438–39; Mize, *supra* note 295, at 653.

324. Karns, *supra* note 318, at 374–75; Mize, *supra* note 295, at 653; *Private Actions*, *supra* note 300, at 438–39.

325. J. R. Franke & D. A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 347 (1992); Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Act*, 54 U. KAN. L. REV. 1, 16 (2005).

326. For example, the Magnuson-Moss Warranty Act was enacted on July 4, 1975 to enhance consumer rights. See 15 U.S.C. §§ 2301–12 (2006); see also H.R. REP. NO. 93-1107 (1974), reprinted in 1974 U.S.C.C.A.N. 7702.

327. See Franke & Ballam, *supra* note 325, at 347.

328. Karns, *supra* note 318, at 376–77; see also Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 658 (1985) (noting that everyone agrees deceptive trade practices are bad, but a consensus has not been forged as to how to define it).

329. Mize, *supra* note 295, at 660.

330. See generally *id.*; *Private Actions*, *supra* note 300; see also, e.g., ARK. CODE ANN. § 4-88-107(b) (LEXIS Supp. 2005).

331. Mize, *supra* note 295, at 661.

332. See *id.* at 664–65.

the little FTC act.³³³ Then, the plaintiff just has to show that the behavior falls into one of the listed categories or the catch-all provision.³³⁴

The key difference between the FTC Act and little FTC acts is that enforcement of little FTC acts is free from the restraints imposed on the FTC Act. States enacted little FTC acts based on the model of the public agency as a vicarious avenger on behalf of consumers.³³⁵ State agencies, like attorneys general, have power to bring deceptive trade practices actions, but individual consumers also have standing to bring these actions.³³⁶ Under little FTC acts, these plaintiffs are free from the restraints that limit the FTC's power, yet they still enjoy the benefit of a cause of action that requires significantly less proof than its common law counterparts.³³⁷

Moreover, in their haste to protect consumers, little FTC acts often provide additional awards in the form of treble damages, statutory damages, punitive damages, and attorney's fees.³³⁸ Almost half of the states require an award of reasonable legal fees and costs to successful plaintiffs, providing greater incentives for plaintiffs' attorneys to bring little FTC act lawsuits.³³⁹

Now an expansive body of statutory law exists that misapplies ill-fitted and lenient FTC standards to general consumer standing without procedural safeguards.³⁴⁰ When enacting little FTC acts, states have failed to appreciate the overarching effects of granting consumers causes of action for a broad range of conduct.³⁴¹ Absent from little FTC acts are the restraints that led to the lenient standards upon which these laws are based. Attorneys general and other state agencies are subject to political pressures and finite resources, but they do not have the public interest requirement imposed on the FTC. For example, an attorney general can choose not to bring an action on behalf of all state consumers, but instead, choose to bring an action on behalf of a state agency that could not prove a standard cause of action, such as breach of implied warranty of fitness. Consumer standing presents an even bigger problem because, considered in the aggregate, private plaintiffs have no restraints. The plaintiff pool is literally every consumer and every law firm in the state. They are subject to no political controls or public interest concerns, and their resources are essentially infinite. Consumers can bring any claim for any reason, no matter how insignificant the damages, if the action can be construed as a deceptive trade practice.

333. *See id.*

334. *See id.*

335. *Private Actions*, *supra* note 300, at 446.

336. *Id.* at 448.

337. *Id.* at 450; *see also* Mize, *supra* note 295, at 667.

338. *Private Actions*, *supra* note 300, at 448-49.

339. Schwartz & Silverman, *supra* note 325, at 26.

340. *See Private Action*, *supra* note 300, at 446-50.

341. Schwartz and Silverman, *supra* note 325, at 5.

Actions based primarily on little FTC acts have yet to be in vogue, but it could be just beyond the horizon.³⁴² Some states have tried to create additional elements for plaintiffs to establish,³⁴³ such as reliance³⁴⁴ or the fact that the suit serves the public interest.³⁴⁵ However, state-law based false advertising class actions have experienced a recent boom³⁴⁶ as courts in New York, Massachusetts, and California have set a low bar for standing in these class actions.³⁴⁷ Additionally, the recently added removal procedures provided in the Class Action Fairness Act³⁴⁸ will transplant a number of these cases into federal courts that normally would have remained in state courts.³⁴⁹

C. The Need for Judicial Deference to Limit the Scope of Little FTC Acts

The problem with little FTC acts is that, if enforced literally, they will lead to gross anticompetitive behavior. The FTC was a small tool with limited enforcement capabilities that posed no real danger to the market because the limited resources were incentives to focus cases on significant market harms. Little FTC acts, on the other hand, give carte blanche power to consumers to bring claims for any amount of misinformation. Consider a basic trademark infringement case: Firm A sues Firm B for trademark infringement. Under normal circumstances, this is the extent of the lawsuit. If Firm A proves infringement, Firm B ceases its conduct and pays damages. A little FTC act, applied literally, can wreck havoc on this lawsuit. The attorney general can bring a claim on behalf of state agencies that were confused by the infringement. Note that the attorney general does not have to act on behalf of consumers; he can decide not to bring such an action. Then Mr. Smith, a consumer, can also bring a class action on behalf of all Arkansas consumers who were confused by the infringement.³⁵⁰ With these plausible applications, the little FTC act has generated anticompetitive effects greater than the trademark infringement originally at issue. These effects result because the literal application of the little FTC act leads to opportunis-

342. Mize, *supra* note 295, at 668.

343. *Id.*

344. *Id.* (citing *Baranco, Inc. v. Bradshaw*, 456 S.E.2d 592, 593–94 (Ga. Ct. App. 1995); *Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa. 2001)).

345. *Id.* (citing *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 647 N.E.2d 741, 744 (N.Y. 1995)).

346. *See generally* Weinstein, *supra* note 274.

347. *Id.*

348. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

349. *Id.*

350. *See* Schwartz & Silverman, *supra* note 325, at 29 (“A business can face both a class action lawsuit and a state Attorney General action arising out of the same conduct.”).

tic behavior by parties seeking monetary recovery when, ordinarily, they would have no cause of action.

The anticompetitive effect of this opportunistic behavior also leads to overenforcement of trademarks. If the above scenario became an acceptable standard through courts' application of the little FTC act, the very threat of a trademark lawsuit would cause the defendant to forego rights, whether or not the initial trademark claim had merit. The newly created opportunistic behavior would permit trademark owners to extend the reach of their trademark rights beyond their intended scope.³⁵¹

Another example is the popular advertisement "Snickers Really Satisfies." Obviously, not every consumer will be satisfied from eating a Snickers bar. Under traditional legal rules, nothing happens aside from the unsatisfied consumer not buying more Snickers bars. But, with a literal interpretation of the little FTC act, that consumer can bring a class action with any number of subclasses: (1) consumers who were not satisfied or (2) businesses who put Snickers in their vending machines in anticipation of their customers being satisfied, to name a few. If the little FTC act provides for attorney's fees and/or statutory damages, this provides further incentive for a consumer to engage in opportunistic behavior.

While these examples may appear extreme, they comport with real cases that have been brought under little FTC acts. In a New York case, a department store advertised dishes in the newspaper, but the newspaper mistakenly printed the wrong price.³⁵² A consumer went to the department store expecting the advertised price, but discovered the real price.³⁵³ Under established principles of contract law, the consumer would have no cause of action because the misinformation supplied to the market was accidental, and no contract had been formed at the incorrect price. However, given a literal interpretation of the deceptive trade practices act, the department store engaged in deceptive trade practices.³⁵⁴ The customer brought suit and was actually awarded statutory damages under New York's little FTC act.³⁵⁵ In another case, a Texas sheriff brought suit against a newspaper for publishing a story linking the sheriff to drug trafficking.³⁵⁶ Bringing the suit under the little FTC act, rather than libel law, allowed him to seek attorney's fees.³⁵⁷

Professor Sovern provides a number of examples of market misinformation that would become deceptive under a literal application of little FTC

351. See *supra* Part I.A.

352. See *Private Actions*, *supra* note 300, at 452 (citing *Geismar v. Abraham & Strauss*, 439 N.Y.S.2d 1005 (N.Y. Dist. Ct. 1981)).

353. See *id.* (citing *Geismar*, 439 N.Y.S.2d 1005).

354. See *id.* (citing *Geismar*, 439 N.Y.S.2d 1005).

355. See *id.* (citing *Geismar*, 439 N.Y.S.2d 1005).

356. *Franke & Ballam*, *supra* note 325, at 347-48.

357. *Id.* at 348.

acts. If a business changes its location, its current yellow pages ad showing the old address would be a violation.³⁵⁸ If a singer gets sick and reschedules a concert, that would be a violation.³⁵⁹ Political advertisements require subjective interpretation of facts, and nearly every political advertisement could be construed as a deceptive trade practice.³⁶⁰

Turning to traditional rules of false advertising, puffery is nonactionable misinformation, but taken literally, puffery is a deceptive trade practice.³⁶¹ Puffery consists of (1) exaggerated statements of bluster or boast upon which no reasonable consumer would rely or (2) vague or highly subjective claims of product superiority, including bald assertions of superiority.³⁶² While a competitor cannot assert a cause of action for puffery under section 43(a), consumers can likely bring a cause of action under a little FTC act.

1. *The Phenomenon of Attempted Overenforcement by Plaintiffs*

The situations discussed above illustrate a recent phenomenon. During the first twenty years of their passage, consumers only occasionally brought claims under little FTC acts.³⁶³ While commentators warned against the broad language of these laws, private enforcement had not reached abusive levels.³⁶⁴ That trend is beginning to reverse, however, and consumers are bringing actions that were never intended by these laws.³⁶⁵ For example, California had the broadest consumer fraud statute in the country.³⁶⁶ Consumers filed a number of abusive lawsuits, including a claim against a restaurant for having a bathroom mirror that was an inch too high.³⁶⁷ California recently amended its law to prevent these abusive practices.³⁶⁸ The trend in California is the rule rather than the exception. At an alarming rate, plaintiffs are using little FTC acts to assert novel causes of action when no liability should exist.³⁶⁹

358. *Private Actions*, *supra* note 300, at 456.

359. *Id.*

360. *Id.*

361. *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 390–91 (8th Cir. 2004) (denying a false advertising claim for the slogan “America’s Favorite Pasta”).

362. *Id.*

363. Schwartz & Silverman, *supra* note 325, at 32.

364. *Id.*

365. *Id.* at 32–33.

366. *Id.* at 34.

367. *Id.* at 36–37.

368. *Id.* at 37.

369. Schwartz & Silverman, *supra* note 325, at 37–38, 38–48 (discussing recent lawsuits in which little FTC acts were applied beyond their intended use).

Moreover, plaintiffs are using little FTC acts to circumvent other laws.³⁷⁰ For example, if the plaintiff cannot show defective design to establish a products liability case, the consumer can state the claim as a violation of the little FTC act.³⁷¹ A recent Delaware case shows the extent of this movement.³⁷² The buyer ordered twenty industrial hoses from the seller.³⁷³ The buyer was sophisticated and provided detailed specifications to the seller;³⁷⁴ the buyer even rejected suggested changes to the specifications recommended by the seller.³⁷⁵ The hoses met the specifications but did not work properly,³⁷⁶ and the buyer brought suit for violation of Delaware's little FTC act.³⁷⁷ But, the claim was dismissed on procedural grounds.³⁷⁸

2. *Nominal Misinformation and Non-Misinformation*

Analyzing the phenomenon of attempted overenforcement requires examination of the word "deceptive." The FTC Act and little FTC acts are in agreement that the term "deceptive" should not be confined to a restrictive definition. However, the essence of deception dictates some level of misinformation. For the defendant's conduct to be deceptive, the defendant must supply misinformation. For example, if the defendant says the product will yield certain results, but it does not; the defendant promises a certain price, but charges a higher price—whatever the case, the defendant must supply misinformation to the plaintiff.

The recent trend in attempted overenforcement can be categorized on two levels. At the first level, plaintiffs are asserting causes of action for nominal misinformation. These are the situations, discussed by Professor Sovern above, in which a party does supply misinformation to the market, but the level of misinformation is too low to merit a lawsuit. In the trademark infringement example, Firm B supplies nominal misinformation. Some consumers purchase the Firm B product intending to get the Firm A product.

370. *Id.* at 63–64.

371. *Id.* at 64.

372. *See generally* *Don's Hydraulics, Inc. v. Colony Ins. Co.*, 417 F. Supp. 2d 601 (D. Del. 2006).

373. *Id.* at 605.

374. *Id.*

375. *Id.*

376. *Id.* at 605–06.

377. *Id.* at 606.

378. *Don's Hydraulics*, 417 F. Supp. 2d at 612. The Delaware little FTC act applies only to the promotion of one's business; it does not apply to the relationship between a business and its customer. *See id.* Delaware's Consumer Fraud Act applies to the relationship between a business and its customer. *See id.* (discussing DEL. CODE ANN. tit. 6, §§ 2511–26 (1999)). The court granted summary judgment because the plaintiff pleaded the wrong statute. *Id.* at 612.

The only “harm” to the plaintiff is the difference in quality between the two products. These claims are unfavorable but at least understandable. Although the plaintiffs are engaging in opportunistic behavior, they have a right to do so until the law says they cannot.

At the second level, plaintiffs are asserting little FTC causes of action in situations in which the defendant did not supply misinformation to the market. Because deception should be viewed in terms of misinformation, this article will refer to these situations as non-misinformation. In *Don's Hydraulics, Inc. v. Colony Insurance Co.* discussed above, the buyer had complete control of the transaction and provided detailed specifications for the goods.³⁷⁹ This is a classic example of non-misinformation: the seller never had an opportunity to supply misinformation. These claims are unacceptable because they represent an outright misapplication of little FTC acts.

No matter whether the claim is for nominal misinformation or non-misinformation, both levels of claims lead to overenforcement, which negatively affects consumers in general. The term “deceptive” should be more narrowly defined to avoid this potential for overenforcement.

3. *Changing Market Condition of Consumer Sophistication and Sensitivity*

Professor Chiappetta observed that trademark law must be constantly re-evaluated against current market conditions to ensure that trademark law still serves its procompetitive goals.³⁸⁰ The same re-evaluation applies to little FTC acts. The market realities regarding consumer sensitivity are much different than they were in the 1960s and 1970s when the little FTC acts were passed. The internet has caused a significant change in the amount of information available to consumers. With greater information access has come greater sophistication, as consumers are able to better research firms and their goods and services. More importantly, the internet provides a speech forum for dissatisfied consumers to discuss their experience with other potential consumers, so the dissatisfied consumer has much more power today to induce corrective action than the consumer of the 1960s or 1970s.

Decades of advertising have further desensitized consumers so that they are less susceptible to predatory practices. During the consumerism heyday, national media advertising was still relatively new, and consumers were more susceptible to claims and practices. Today's onslaught of irrational advertising claims through spam, television, and internet advertising have caused consumers to be less susceptible to deceptive advertising. Little

379. *Id.* at 605–06.

380. Chiappetta, *supra* note 36, at 50. *See also supra* Part I.A.

FTC acts need to be re-evaluated according to these changes in the market conditions.

Because the little FTC acts have not been re-evaluated in light of changing market conditions, the growing trend of little FTC act lawsuits is even more alarming. When consumers were less informed and less sophisticated, these lawsuits were filed infrequently. Now that consumers are less vulnerable and more sophisticated, consumers are engaging in opportunistic behavior by applying these laws beyond their intended scope. If courts support this opportunistic behavior through literal interpretations of little FTC acts, it will cause destructive market effects. Even worse, consumers not engaging in opportunistic behavior will ultimately bear the costs imposed by consumers engaging in opportunistic behavior.

D. Consumers Ultimately Bear the Cost of Abusive Applications of Little FTC Acts

Little FTC acts were drafted during the pro-consumer movement of the twentieth century.³⁸¹ Unfortunately, this pro-consumer philosophy focused on the consumers involved in the transaction at issue, and equal consideration was not given to the effect on all other consumers. When little FTC acts are subject to overenforcement, an imbalance is created, adding costs imposed upon all other consumers that were not involved in the transaction, because little FTC acts, like other business laws, determine when the costs of a transaction will be imposed on businesses. Businesses will redistribute these costs to consumers either directly, by increasing prices of goods and services, or indirectly, by not making goods and services available. The proper philosophical concern is the market in general, and all consumers in general, rather than the consumers involved in the challenged transaction. The concept of pro-consumer action should focus on all consumers because taking a pro-consumer action with respect to only the immediate consumers involved in the challenged transaction could be an anti-consumer action with respect to all consumers.

Overenforcement of little FTC acts produces market inequalities, much like misinformation supplied to the market. Creating causes of action for every misinformation supplied will yield anticompetitive effects greater than the inequality created by the misinformation.³⁸² These anticompetitive effects could be devastating to local economies. Similarly, in jurisdictions applying overenforcement of little FTC acts, consumers will experience higher prices and less available goods and services. In jurisdictions applying

381. See Franke & Ballam, *supra* note 325, at 347; Schwartz & Silverman, *supra* note 325, at 16.

382. See *supra* Part I.B.

excessive enforcement of little FTC acts, market participants will choose to forego the local economy altogether. The proper approach is a level of enforcement that can secure optimal levels of accurate information and avoid the anticompetitive effects of overenforcement.

E. Prudential Standing Considerations for Deceptive Trade Practices Claims

Section 43(a) of the Lanham Act and the FTC Act serve the same policy goal of providing narrow causes of action to correct market misinformation under certain circumstances. Because little FTC acts were molded from the FTC Act, they share a similar relationship with section 43(a) as does the FTC Act. Just as prudential standing is the proper solution for molding the scope of section 43(a), it is also the proper solution for little FTC acts.³⁸³ The Third Circuit briefly touched on this concept in *Joint Stock*.³⁸⁴ However, the issue of general application of little FTC acts was not before the court, and it did not provide guidance for state courts in crafting prudential standing measures for little FTC acts. States will have to develop prudential standing measures for little FTC acts. The final section of this article will make proposals for prudential standing under little FTC acts with a particular emphasis on Arkansas law. The principles and proposals discussed below can have equal application to other jurisdictions.

V. INCORPORATING PRUDENTIAL STANDING AND LEGISLATIVE PROPOSALS FOR THE ARKANSAS DECEPTIVE TRADE PRACTICES ACT

Up to this point, this article has addressed section 43(a) of the Lanham Act and little FTC acts from a national perspective. The purpose now is to shift focus to Arkansas law, with a number of goals in mind. This section will provide Arkansas practitioners with a framework for handling Arkansas false advertising cases. Also, this section will analyze the statutory scheme and case law development of the Arkansas Deceptive Trade Practices Act (ADTPA).³⁸⁵ Finally, this article will present proposals for Arkansas courts to incorporate prudential standing and for legislative action to amend the ADTPA.

383. Messrs. Schwartz and Silverman touched on this concept by calling for "common-sense construction" of little FTC acts. See Schwartz & Silverman, *supra* note 325, at 49–66.

384. *Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 186 (3d Cir. 2001).

385. ARK. CODE ANN. §§ 4-88-101 to -607 (LEXIS Repl. 2001).

A. Arkansas Trademark and Unfair Competition Law

The Lanham Act does not preempt state trademark and unfair competition laws.³⁸⁶ Also, because the Lanham Act applies only to interstate commerce, trademark and unfair competition claims arising in intrastate commerce are governed by state law. Arkansas has its own statutory scheme for trademarks and unfair competition.³⁸⁷ Arkansas trademark law mirrors the Lanham Act, and federal developments of the Lanham Act should have equal application in Arkansas.³⁸⁸ A key difference, however, is that Arkansas does not have a false advertising provision that mirrors section 43(a).³⁸⁹ Arkansas common law for unfair competition should provide a section 43(a)-style false advertising case, but research reveals no published decisions in which such a cause of action was asserted.³⁹⁰ A number of Eighth Circuit cases that address false advertising under section 43(a) can provide adequate guidance for state courts.³⁹¹

The vernacular "false advertising" appears sporadically in Arkansas cases³⁹² and statutes.³⁹³ The cases present false advertising as a fraud or ADTPA type claim, rather than a section 43(a) type claim.³⁹⁴ The statutes usually apply to a certain regulation of a particular industry³⁹⁵ or the requirements of a professional service's governing body.³⁹⁶ However, Arkansas also has a broad criminal statute prohibiting false advertising,³⁹⁷ which occurs when a false, "misleading," or "deceptive" statement is disseminated

386. MCCARTHY, *supra* note 52, § 22:2. A state law would be preempted, however, if the state law sought to override rights provided by federal law. *Id.*

387. ARK. CODE ANN. §§ 4-71-201 to -218 (LEXIS Repl. 2001).

388. Gaston's White River Resort v. Rush, 701 F. Supp. 1431, 1435 (W.D. Ark. 1988).

389. See ARK. CODE ANN. §§ 4-71-201 to -218 (LEXIS Repl. 2001).

390. Based upon Westlaw search sy,di("false advertising"). The available Arkansas cases addressing "false advertising" involve consumers seeking redress. There are no cases of a competitor bringing a false advertising claim against another competitor under Arkansas common law for unfair competition.

391. See, e.g., Am. Ass'n of Orthodontics v. Yellow Book USA, Inc., 434 F.3d 1100, 1103-04 (8th Cir. 2006); Allsup, Inc. v. Advantage 2000 Consultants, Inc., 428 F.3d 1135, 1138 (8th Cir. 2005); EFCC Corp. v. Symons Corp., 219 F.3d 734, 739-40 (8th Cir. 2000); United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1180 (8th Cir. 1998).

392. See Ferguson v. Kroger Co., 343 Ark. 627, 37 S.W.3d 590 (2001); Mega Life & Health Ins. Co. v. Jacola, 330 Ark. 261, 954 S.W.2d 898 (1997).

393. See, e.g., ARK. CODE ANN. § 17-102-104 (LEXIS Repl. 2002) (regulating acupuncturists); *id.* § 20-59-308 (LEXIS Repl. 2001) (regulating sales of milk); *id.* § 23-66-206(8) (LEXIS Supp. 2005) (regulating insurance policies).

394. See Arkansas cases *supra* note 392.

395. See Arkansas statutes *supra* note 393.

396. See, e.g., ARK. CODE ANN. § 17-29-311(a) (LEXIS Supp. 2005) (State Board of Embalmers and Funeral Directors); *id.* § 17-42-311(a)(10) (LEXIS Supp. 2005) (Real Estate Commission); *id.* § 17-90-305(a)(9) (LEXIS Repl. 2002) (State Board of Optometry).

397. *Id.* § 5-37-515 (LEXIS Repl. 2006).

with the intent to sell goods or services.³⁹⁸ Violation of the statute is a misdemeanor, punishable by fines and imprisonment.³⁹⁹

Preliminary injunctive relief is commonplace with intellectual property litigation and could be appropriate for a state false advertising claim. The Arkansas standard for preliminary injunctive relief differs from most jurisdictions⁴⁰⁰ in that Arkansas does not distinguish a temporary restraining order from a preliminary injunction.⁴⁰¹ The only factors considered in Arkansas are the plaintiff's likelihood of success on the merits and irreparable harm to the plaintiff if the preliminary injunction is not issued.⁴⁰² Potential harm to the defendant and public interests are not considerations,⁴⁰³ unlike the federal standards.⁴⁰⁴ As a result, the initial motion and hearing for preliminary injunctive relief can move faster in Arkansas state courts than in federal courts. Despite these differences from the federal standards, obtaining preliminary injunctive relief should not be considered "easy."⁴⁰⁵ Even when successful, the moving party must post an appropriate bond and incur the additional attorney's fees involved with obtaining preliminary injunctive relief.⁴⁰⁶

B. Arkansas Deceptive Trade Practices Act

In 1971, Arkansas enacted its own little FTC act, the Arkansas Deceptive Trade Practices Act (ADTPA).⁴⁰⁷ Like other little FTC acts, the ADTPA does not define deception,⁴⁰⁸ although it does specifically prohibit pyramid schemes.⁴⁰⁹ There are four substantive sections that merit close attention. First, the main section sets out eleven general descriptions of violations that

398. *Id.* § 5-37-515(b).

399. *Id.* § 5-37-515(d). Thankfully, this statute has never actually been applied to imprison anyone. The author has serious concerns with this statute, but that is a discussion for another day.

400. *See* ARK. R. CIV. P. 65.

401. *See id.*

402. *See id.*; *see also* Baptist Health v. Murphy, No. 04-430, 2006 WL 242670, at *2 (Ark. Feb. 2, 2006).

403. ARK. R. CIV. P. 65.

404. *See* FED. R. CIV. P. 65.

405. *See generally, e.g.,* AJ & K Operating Co., Inc. v. Smith, 355 Ark. 510, 140 S.W.3d. 475 (2004) (reversing temporary restraining order on appeal); Three Sisters Petroleum, Inc. v. Langley, 348 Ark. 167, 72 S.W.3d 95 (2002) (reversing temporary restraining order on appeal); Johnson v. Langley, No. CA 05-354, 2005 WL 3196776 (Ark. App. Nov. 30, 2005) (denying temporary restraining order); City Slickers, Inc. v. Douglas, 73 Ark. App. 64, 40 S.W.3d 805 (2001) (denying temporary restraining order).

406. *See* ARK. R. CIV. P. 65(a)(2).

407. ARK. CODE ANN. §§ 4-88-101 to -607 (LEXIS Repl. 2001).

408. *See id.* § 4-88-102 (LEXIS Supp. 2005).

409. *Id.* § 4-88-109 (LEXIS Repl. 2001).

would be considered an unconscionable or deceptive trade practice.⁴¹⁰ This section also includes a catch-all provision for any other conduct falling outside the general descriptions.⁴¹¹ Second, the advertising section deems deception made in the course of advertising a violation.⁴¹² Given the breadth of the main section, it is unclear what additional conduct the advertising section adds that is not subsumed in the main section.⁴¹³ Third, the civil enforcement section provides for injunctive relief,⁴¹⁴ actual damages,⁴¹⁵ and attorney's fees;⁴¹⁶ however, the ADTPA does not provide treble damages or statutory damages.⁴¹⁷ Fourth, the ADTPA provides a five-year statute of limitations for all violations, running from the date of the violation or the date the cause of action accrued.⁴¹⁸

A cursory review of these sections shows the problems with enacting such broad, sweeping legislation. The main section is written so broadly that a literal interpretation would encompass any degree of misinformation supplied to the market. The remedy sections allow for attorneys fees and extend the limitations period to five years. Plaintiffs can attempt to circumvent traditional claims like negligence, malpractice, or breach of an implied warranty by re-pleading these established causes of action as a breach of the ADTPA. If successful, this circumvention will provide a greater limitations period and more extensive remedies (attorney's fees) to which these plaintiffs were not previously entitled.

1. *Development of the ADTPA Through Arkansas State Courts*

The ADTPA remained dormant until a recent surge in ADTPA litigation.⁴¹⁹ The available decisions illustrate some important points in the development of the ADTPA. First, only a few decisions provide substantive analysis. Second, earlier decisions established that attorney's fees are not available when only injunctive relief is sought,⁴²⁰ and the catch-all provision is not

410. *Id.* § 4-88-107(a) (LEXIS Supp. 2005).

411. *Id.* § 4-88-107(b).

412. *Id.* § 4-88-108 (LEXIS Repl. 2001).

413. *Compare* ARK. CODE ANN. § 4-88-107 (LEXIS Supp. 2005), *with id.* § 4-88-108.

414. *Id.* § 4-88-113(a)(1) (LEXIS Repl. 2001).

415. *Id.* § 4-88-113(a)(2).

416. *Id.* § 4-88-113(f).

417. *Id.*

418. *Id.* § 4-88-115 (LEXIS Repl. 2001).

419. The basis for this assertion is a Westlaw search for "deceptive trade" in Arkansas state cases conducted on August 18, 2006. This search revealed thirty-three cases, the earliest appearing in 1991. Most available decisions were handed down in 1999 or later.

420. *State ex rel. Bryant v. McLeod*, 318 Ark. 781, 786-87, 888 S.W.2d 639, 642 (1994).

too vague for enforcement.⁴²¹ Third, in the only case to determine what conduct is not a violation, the Arkansas Court of Appeals held that a subsidiary corporation's use of the parent corporation's name and logo was not, by itself, an ADTPA violation,⁴²² and the court affirmed summary judgment denying the ADTPA claim.⁴²³ Finally, Judge Phillips, in an unpublished opinion denying class certification, noted that under the ADTPA, the defendant must "knowingly" commit a deceptive trade practice in order to be liable.⁴²⁴

Often the published decision is a procedural matter without a substantive ADTPA analysis,⁴²⁵ even when the court is affirming a summary judgment denying the ADTPA claim.⁴²⁶ However, three recent cases provide substantive rules. First, the plaintiff's subjective belief of the defendant's deceptive conduct cannot, by itself, establish an issue of fact to avoid summary judgment.⁴²⁷ Second, regarding the requisite injury for an ADTPA claim, the plaintiff must establish an ascertainable loss.⁴²⁸ Finally, the ADTPA cannot be used to circumvent established law governing products liability and implied warranties.⁴²⁹

421. *State ex rel. Bryant v. R & A Inv. Co.*, 336 Ark. 289, 295, 985 S.W.2d 299, 302 (1999).

422. *Little Rock Elec. Contractors, Inc. v. Entergy Corp.*, 79 Ark. App. 337, 343, 87 S.W.3d 842, 846 (2002).

423. *Id.*

424. *Frelin v. Oakwood Homes Corp.*, No. CIV-2001-53-3, 2002 WL 31863487, at *5 (Ark. Cir. Ct. Nov. 25, 2002).

425. *See generally Alltel Corp. v. Sumner*, 360 Ark. 573, 203 S.W.3d 77 (2005) (denying motion to compel arbitration).

426. *See generally Ver Weire v. CNA Fin. Corp.*, No. CA 04-1355, 2005 WL 2293475 (Ark. App. Sept. 21, 2005); *Little Rock Elec. Contractors, Inc.*, 79 Ark. App. at 342, 87 S.W.3d at 845-46.

427. *Little Rock Elec. Contractors, Inc.*, 79 Ark. App. at 342-43, 87 S.W.3d at 845-46 (affirming summary judgment).

428. *Wallis v. Ford Motor Co.*, 362 Ark. 317, 327-28, 208 S.W.3d 153, 161 (2005). The plaintiff brought a consumer class action under the ADTPA claiming a design defect in the Ford Explorer, but the plaintiff could not show any actual injury. *Id.* at 318, 208 S.W.3d at 154. The damage claim was limited to a theory of diminished economic value. *Id.*, 208 S.W.3d at 154-55.

429. *See generally Pilcher v. Suttle Equip. Co.*, No. 05-143, 2006 WL 137220 (Ark. Jan. 18, 2006) (affirming summary judgment when the buyer purchased logging machinery that caught fire three years after purchase).

2. *Arkansas Federal Courts Provide Additional Guidance*

Federal cases involving the ADTPA have also experienced a recent spike.⁴³⁰ While the decisions rarely yield a substantive ADTPA analysis, two decisions provide guidance on application of the ADTPA. In one case, Judge Van Sickle of the United States District Court for the Eastern District of Arkansas upheld the ADTPA as an affirmative defense.⁴³¹ A limited partnership sold partnership interests to certain limited partners.⁴³² The partners purchased the interests by providing notes payable to the partnership.⁴³³ After filing for bankruptcy, the partnership sued for the balances on the notes, but the partners raised fraud and the ADTPA as affirmative defenses.⁴³⁴ The court found that the partnership had made misrepresentations that violated the ADTPA, and those violations would serve as a complete defense to the action on the notes.⁴³⁵

In *Mid-State Aftermarket Body Parts, Inc. v. MQVP, Inc.*,⁴³⁶ Judge Holmes issued an important opinion regarding the ADTPA. MQVP, Inc. stated twin causes of action for false advertising under section 43(a) and violation of the ADTPA.⁴³⁷ Determining the false advertising claim was untenable, the court granted summary judgment to Mid-State Aftermarket.⁴³⁸ The court refused to permit circumvention of section 43(a) and held that the claim for violation of the ADTPA was dependent upon showing a section 43(a) violation.⁴³⁹ The court also granted summary judgment to Mid-State Aftermarket on the ADTPA claim.⁴⁴⁰ This was effectively the same approach as Justice Alito's reasoning in applying section 43(a) prudential standing to state deceptive trade practices law.⁴⁴¹ Although this case was recently reversed because the Eighth Circuit determined an issue of fact

430. A search was performed in Westlaw, "deceptive trade" /10 Arkansas, in all federal courts in the Eighth Circuit, performed on August 18, 2006. The results produced twenty-six cases, the earliest in 1989.

431. *New Equity Sec. Holders Comm. for Golden Gulf, Ltd. v. Phillips*, 97 B.R. 492, 502 (Bankr. E.D. Ark. 1989).

432. *Id.* at 494.

433. *Id.*

434. *Id.* at 495.

435. *Id.* at 502.

436. 361 F. Supp. 2d 896 (E.D. Ark. 2005).

437. *Id.* at 901.

438. *Id.* at 904.

439. *Id.* at 911.

440. *Id.*

441. *See id.*; *see also* *Joint Stock Soc'y v. UDV. N. Am., Inc.*, 266 F.3d 164, 186 (3d Cir. 2001).

exists as to the false advertising claim, the Eighth Circuit did not address the ADTPA claim.⁴⁴²

3. *Analyzing the Trends in ADTPA Litigation*

This brief survey of the ADTPA shows four significant trends in Arkansas law. First, plaintiffs are trying to use the ADTPA to circumvent established causes of action, like products liability and section 43(a) violations. Without corrective action, this pattern will continue to grow and ultimately yield anticompetitive effects. Second, Arkansas courts have refused to permit circumvention of established laws through the ADTPA. The analyses of these decisions are not overly thorough, but it appears that Arkansas courts are applying some level of prudential standing considerations to ADTPA claims. Third, the appellate courts have had few opportunities to substantively evaluate ADTPA claims. The case law above provides relatively little guidance to trial courts, defendants, and plaintiffs. Fourth, it is reasonable to conclude that Arkansas trial courts are experiencing a surge in ADTPA claims. This increase is apparent in the appellate courts and reflects the nationwide trend.

The legislature has been relatively inactive regarding the ADTPA. There have been no efforts to codify defenses or to clarify the main section. The legislature's inactivity is largely a result of ADTPA cases not being pursued through appeal. Without substantive rulings from the appellate courts, the legislature has no guidance for needed statutory revisions. Measures need to be taken to address the growing trend in ADTPA litigation and legislative inactivity. This article suggests that both goals can be accomplished through application of prudential standing in ADTPA cases.

C. Proposal for Adopting Prudential Standing Considerations in ADTPA Cases

Prudential standing will serve as an effective tool to achieve optimal levels of accurate information and to prevent the anticompetitive effects of overenforcement of the ADTPA. Arkansas federal courts have already touched on the Lanham Act policy presented in this article to promote optimal levels of accurate information.⁴⁴³ Arkansas has the opportunity to

442. See generally *Mid-State Aftermarket Body Parts, Inc. v. MQVP, Inc.*, 466 F.3d 630 (8th Cir. 2006). An issue of fact also existed on the trademark infringement claim, and the Eighth Circuit criticized the district court's application of the term "service mark." *Id.* at 633.

443. *Mid-State Aftermarket Body Parts, Inc. v. MQUP, Inc.*, 361 F. Supp. 2d 896, 900-01 (E.D. Ark. 2005), *rev'd*, 466 F.3d 630 (8th Cir. 2006) (citing *Gaston's White River Resort v. Rush*, 701 F. Supp. 1431, 1434 (W.D. Ark. 1988)) ("The purpose of the Lanham Act is to

emerge as a leading jurisdiction in solving the dilemma of overenforcement of little FTC acts by completing two simple tasks.

The first task is to establish the general elements of ADTPA claims. The appellate courts have not listed out elements for trial courts to consider, and parties to ADTPA litigation are left without guidance. An ADTPA claim should consist of four basic elements: (1) the defendant wrongfully supplied misinformation to the plaintiff; (2) the plaintiff reasonably relied on the misinformation; (3) the plaintiff suffered an actual injury; and (4) the injury is of the type intended to be remedied by the ADTPA.

The second task is to adopt prudential standing requirements for ADTPA claims. This article proposes the following prudential standing factors: (1) nature of the injury; (2) culpability of the defendant; (3) reasonable reliance by the plaintiff; (4) effects on Arkansas consumers; and (5) practical considerations of the desired remedy. Each factor will be addressed in turn.

1. *Nature of the Injury*

This factor examines the type of harm the plaintiff has suffered because of the misinformation. The analysis should answer the following question: Did the misinformation at issue cause the type of harm meant to be remedied through the ADTPA? The Arkansas Supreme Court has already stated that a consumer must show an actual injury, rather than a theory of diminished economic value of property.⁴⁴⁴ Consequently, the ADTPA already has an injury-in-fact requirement, which is missing from the little FTC acts of many other states.

Once an injury-in-fact is established, courts should evaluate the misinformation giving rise to the claim. First, the court should consider whether the claim asserts nominal misinformation.⁴⁴⁵ Second, the court should consider whether the claim asserts non-misinformation to circumvent traditional causes of action.⁴⁴⁶ If the claim asserts nominal misinformation or non-misinformation, the injury is not one meant to be remedied through the ADTPA.

protect consumers and competitors against misdescription or misrepresentation of products and services.”).

444. *Wallis v. Ford Motor Co.*, 362 Ark. 317, 327–29, 208 S.W.3d 153, 161–62 (2005).

445. See examples of nominal misinformation *supra* Part IV.C.2.

446. Recent Arkansas cases have demonstrated claims for non-misinformation to circumvent traditional causes of action for products liability and false advertising. See *generally* *Pilcher v. Suttle Equip. Co.*, No. 05-143, 2006 WL 137220 (Ark. Jan. 18, 2006); *Mid-State Aftermarket*, 466 F.3d 630.

2. *Culpability of the Defendant*

Although the ADTPA does not require proof of the defendant's intent, several of the established factors incorporate a "knowingly" standard. Thus, this factor should focus on the defendant's culpability but not require an all-out element of proof to maintain an ADTPA claim. The essential question should be the following: Is it equitable for this defendant to be liable for the misinformation at issue? Courts should not consider the plaintiff's subjective statements about the defendant's intent but should consider circumstantial evidence surrounding the transaction at issue. Because the purpose of this factor is to avoid the anticompetitive effects of providing ADTPA claims for misinformation inadvertently supplied to the market, no defendant should incur ADTPA liability without some degree of mental culpability to supply misinformation to the market.

3. *Reasonable Reliance by the Plaintiff*

Because consumers are better informed and more sophisticated than their consumerism heyday counterparts, reasonable limits should apply to the scope of consumer reliance. This factor requires the plaintiff to behave like a reasonable consumer in that the plaintiff must actually rely on the misinformation when making the purchasing decision, and this reliance must be reasonable. This factor prevents ADTPA claims for puffery and situations in which the consumer's choice was based upon representations of a party other than the defendant. This factor should also consider the sophistication of the buyer for the particular goods or services at issue. For example, although a typical consumer may have standing against the manufacturer of a quick weight loss product, a medical professional should not.

4. *Effects of the Present Action on Other Arkansas Consumers*

This factor analyzes the claim outside the vacuum of the instant dispute and is synonymous with the third and fifth factors of the reasonable interest test for section 43(a) standing.⁴⁴⁷ Here, the court should address the overall market effect of allowing the current plaintiff to bring an ADTPA claim. A successful ADTPA claim for the present consumer will impose costs on all Arkansas consumers; therefore, standing is desirable only when these costs are less than the market inequalities generated from the misinformation at issue. The more individualized the transaction at issue, the more likely standing will be appropriate.

447. See *supra* Part I.D.

Courts should closely scrutinize ADTPA claims asserted for standard business dealings applied to all consumers. These claims present maximum profit potential for the plaintiff, particularly through class action litigation, which increases the likelihood that the plaintiff is engaging in opportunistic behavior. Conversely, these claims are desirable in information-distressed markets in which market participants are not correcting the misinformation.

Application of this factor turns on the anticompetitive effects by declaring the misinformation at issue a deceptive trade practice. If permitting the ADTPA claim would lead to anticompetitive effects, this factor should weigh against standing. The significant anticompetitive effects to consider are increased costs to nonparticipating consumers and the effects on extra-territorial investment in Arkansas. If Arkansas becomes a haven for excessive ADTPA enforcement, it will cause a reduction in economic investment in Arkansas from outside sources.

5. *Practical Considerations of the Desired Remedy*

This factor focuses on the remedy sought. The purpose of the ADTPA is to achieve optimal levels of accurate information in the market, and the remedy sought must serve that purpose. The chief remedy will be injunctive relief to prevent further dissemination of the misinformation, and in addition to injunctive relief, the plaintiff will request her actual damages. The remedy must be tailored to correct the misinformation without encouraging inefficient profit-seeking by the current plaintiff and potential future plaintiffs.

Situations can arise in which the misinformation should be corrected, but any remedy would be impractical. Suppose an Arkansas consumer brings a claim against a nationwide retailer doing business in Arkansas. The challenged conduct consists of statements appearing in the retailer's nationwide advertising campaign regarding certain products. The statements appear on the retailer's website and all media advertisements. Even if the statements were deemed an ADTPA violation, any remedy would be impractical. An injunction could apply only to advertisements sent directly to Arkansas in local media. The Arkansas injunction could not shut down the website to prevent dissemination into Arkansas by national media. If damages were awarded, it would create a revolving door for all other Arkansas consumers to bring an ADTPA claim. Enforcing the remedy would generate anticompetitive effects. The retailer would distribute its costs to Arkansas consumers and decrease investment in Arkansas. More importantly, other nationwide businesses would respond in kind given the threat of extensive liability exposure in Arkansas. Therefore, if a practical remedy is unavailable, this factor should weigh against standing.

D. Effects of Prudential Standing

The prudential standing model proposed in this article will promote the interest of having optimal levels of accurate information in the market. Meritorious ADTPA claims will meet the standing requirements and correct market inequalities created through misinformation. Prudential standing will serve as a tool against overenforcement, particularly against claims for nominal misinformation or non-misinformation. Even more importantly, adoption of prudential standing considerations will produce more substantive analyses from the appellate courts. In cases in which the appellate courts are primarily addressing procedural matters, the courts can evaluate prudential standing. The trial courts, legislature, and practitioners are starved for substantive ADTPA precedents, and evaluating prudential standing will generate this needed substantive precedent and provide better guidance for ADTPA development in the circuit courts.

Additionally, prudential standing will yield procompetitive effects by limiting ADTPA claims to those that serve to achieve optimal levels of accurate information in the market. Even when consumers are denied ADTPA standing, they are not denied all forms of redress because they can still bring traditional causes of action, such as fraud, breach of contract, or unjust enrichment. By and large, ADTPA claims are brought as companion claims for these types of actions; rarely is the ADTPA the singular cause of action asserted. Prudential standing limits only the types of actions that can be brought under the ADTPA.

E. Proposal for Legislative Measures

The American Legislative Exchange Council (ALEC), a non-partisan membership organization of state legislators,⁴⁴⁸ recently prepared the Model Act on Private Enforcement of Consumer Protection Statutes ("Model Act").⁴⁴⁹ The Model Act is designed as a comprehensive overhaul of various little FTC acts, and some of the suggested provisions are relevant to Arkansas.

This article proposes that the Arkansas legislature should adopt three provisions from the Model Act. First, the Model Act provides a notice provision:

At least ten days prior to the commencement of any action brought under this section, any person intending to bring such an action shall notify the

448. See American Legislative Exchange Council, *available at* <http://www.alec.org> (last visited Aug. 19, 2006).

449. See *id.* (reproduced as an appendix in Schwartz & Silverman, *supra* note 325, at 69–72).

prospective defendant of the intended action, and give the prospective defendant an opportunity to confer with the person, the person's counsel, or other representative as to the proposed action. Such notice shall be given to the prospective defendant by mail, postage prepaid, to the prospective defendant's usual place of business, or if the prospective defendant has no usual place of business, to the prospective defendant's last known address.⁴⁵⁰

This notice provision creates an opportunity for corrective action without litigation. A similar notice provision is found in the consumer-protective Magnuson-Moss Warranty Act,⁴⁵¹ and has been adopted in other states' little FTC acts.⁴⁵² Second, the Model Act proposes limited awards of attorney's fees. The attorney's fees provision should be a "may" provision, rather than a "shall" provision.⁴⁵³ The plaintiff should receive attorney's fees only when the defendant's conduct is found to be willful, with the purpose of deceiving the public.⁴⁵⁴ Additionally, the prevailing defendant should receive attorney's fees if the action was groundless, brought in bad faith, or brought for the purpose of harassment.⁴⁵⁵ The attorney's fees provision mirrors the Lanham Act, which provides that attorney's fees may be awarded in exceptional cases.⁴⁵⁶ The Lanham Act does not define exceptional cases, but courts generally award attorney's fees when the trademark infringement is malicious, fraudulent, deliberate, or willful, or when the litigation is conducted in a vexatious manner.⁴⁵⁷ Successful defendants may also win attorney's fees for bad faith claims, but these awards are rare.⁴⁵⁸ Making attorney's fees discretionary, rather than mandatory, reduces opportunistic behavior by plaintiffs. Finally, the Model Act suggests a one-year limitations period.⁴⁵⁹ This seems too harsh, but the current Arkansas five-year limitations period is too long.

450. See Model Act § 1(b).

451. See 15 U.S.C. § 2301 (2006).

452. See, e.g., TEX. BUS. & COM. CODE ANN. § 17.505(a) (Vernon 2002). For a thorough discussion of the Texas Deceptive Trade Practices Act, see RICHARD M. ALDERMAN, *THE LAWYER'S GUIDE TO THE TEXAS DECEPTIVE TRADE PRACTICES ACT* (LEXIS Law Pub. 2d ed. 2003).

453. See Model Act § 2.

454. See *id.* § 2(a).

455. See *id.* § 2(b).

456. 15 U.S.C. § 1117(a) (2006).

457. See *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1232 (10th Cir. 2000); *Seatrac, Inc. v. Sonbeck Int'l, Inc.*, 200 F.3d 358, 372-73 (5th Cir. 2000); *Blue Dane Simmental Corp. v. Am. Simmental Ass'n*, 178 F.3d 1035, 1043 (8th Cir. 1999); *Blockbuster Videos, Inc. v. City of Tempe*, 141 F.3d 1295, 1300 (9th Cir. 1998); see also generally Christopher P. Bussert, *Interpreting the "Exceptional Cases" Provision of Section 1117(a) of the Lanham Act: When an Award of Attorney's Fees Is Appropriate*, 92 TRADEMARK REP. 1118 (2002).

458. MCCARTHY, *supra* note 52, § 30:101.

459. See Model Act § 3.

It should be changed to three years, which is the customary limitations period for statutory rights.⁴⁶⁰

In addition to these amendments, the legislature should become responsive to judicial developments in prudential standing. Federal unfair competition law develops through case law interpretation with periodic Lanham Act amendments to codify or abrogate case law doctrine. Arkansas should use the same procedure with the ADTPA. As more published opinions are produced with prudential standing analyses, the legislature should create defenses and other statutory revisions to adopt and/or modify case law development.

VI. CONCLUSION

Information drives the market economy, and decisions regarding information regulation will remain on the forefront of legal issues in the years to come. False advertising and deceptive trade practices laws are two components of information law that, when applied properly, can promote optimal levels of accurate information in the marketplace. Conversely, overenforcement will produce market inequalities greater than the original misinformation at issue. The reasonable interest test for prudential standing, as modified, fosters the procompetitive effect of securing accurate information without the anticompetitive effects of overenforcement. Arkansas can accomplish the same results by incorporating prudential standing considerations into ADTPA claims, which can provide a model for other jurisdictions to follow. With these standards, courts can effectively adjudicate cases involving misinformation supplied to the market.

460. See ARK. CODE ANN. § 16-56-105(3) (LEXIS Repl. 2005); see also *McDonald v. Mueller*, 123 Ark. 226, 230, 183 S.W. 751, 752 (1916); *Zimmerman v. W & S Fire Ins. Co.*, 121 Ark. 408, 410–11, 181 S.W. 283, 284 (1915); *Neb. Nat'l Bank v. Walsh*, 68 Ark. 433, 59 S.W. 952 (1900).

