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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. While a party may satisfy the minimum Article III standing requirements (often stated as the "case or controversy" requirement), prudential standing considerations may require the court to decline to exercise jurisdiction over the present case.

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. 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. Second, this article proposes similar prudential standing considerations, along with proposed legislative amendments, for state deceptive trade practices laws. 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

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2. UNITED STATES CONST. art. III.
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. 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, it does incorporate the form of false advertising in which a firm falsely suggests a celebrity endorses its goods or services. Ultimately, this article supports a single rule of standing to apply to

10. Id. § 1125(a).
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.'" 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." 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, and the framers of the Constitution had no reason to include trademarks in the intellectual property clause. While the Patent Act and the Copyright Act took force to "promote the Progress of Science and the useful Arts," trademark law developed to protect the integrity of the marketplace. Different social goals drive the different forms of intellectual property. Patent and copyright law serve to achieve optimal levels of innovation; trademark law lowers consumer search costs amid the information available

16. See UNITED STATES CONST. art. I, § 8, cl. 8.
19. UNITED STATES CONST. art. I, § 8, cl. 8.
in the market. A trademark is any word, name, symbol, device, or combination thereof used to identify one's goods or services and to distinguish them from those provided by others. The Lanham Act prohibits a later participant from using a trademark that is confusingly similar to an existing trademark. Evaluating the likelihood of confusion dictates the bounds of trademark protection. 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." 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." Courts examine a number of factors to determine whether a likelihood of confusion exists, which can lead to unpredictable results. 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.

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)).


26. See id.


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).


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.\(^\text{32}\) Trademark law is a procompetitive tool that works to secure accurate information to the market,\(^\text{33}\) but these procompetitive aims sometimes result in limitations on trademark rights, and even windfalls to competitors.\(^\text{34}\) Overenforcement of trademark rights imposes significant social costs, yielding market inequalities,\(^\text{35}\) including inefficient monopoly profits.\(^\text{36}\) 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.\(^\text{37}\)

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.


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


37. Id. at 50.
JECTED 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.\textsuperscript{38} THROUGH THIS DIRECT CONVEYANCE OF INFORMATION, ADVERTISING SEeks TO SIMULTANEOUSLY INFORM, INFLUENCE, AND PERSUADE CONSUMERS TO BUY GOODS OR SERVICES.\textsuperscript{39} FALSE ADVERTISING, IN ITS PUREST FORM, IS MISINFORMATION SUPPLIED TO THE MARKET TO MISINFORM, INFLUENCE, AND PERSUADE CONSUMERS TO BUY.\textsuperscript{40} SECTION 43(A) REGULATES THE MISINFORMATION SUPPLIED TO THE MARKET.

ALL MARKETS CONSIST OF COMPETITIVE AND MONOPOLISTIC ELEMENTS.\textsuperscript{41} ATTEMPTS TO ELIMINATE ALL MONOPOLISTIC ELEMENTS THROUGH REGULATION WILL ULTIMATELY YIELD ANTI-COMPETITIVE EFFECTS BY IGNORING THE ESTABLISHED COMPETITIVE BALANCE OF "WORKABLE COMPETITION."\textsuperscript{42} AS PROFESSOR BROWN OBSERVED, "PURE COMPETITION IS DESCRIPTIVE ONLY OF AN IDEAL, NOT OF THE REAL WORLD."\textsuperscript{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,\textsuperscript{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

\textsuperscript{39} Id.
\textsuperscript{40} See id. Professor Brown's observations analyzed the overall economic effects of advertising rather than considering the effects of misinformation. Id.
\textsuperscript{41} Id. at 1624-25.
\textsuperscript{42} Id. at 1624 (internal quotation omitted).
\textsuperscript{43} Id.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{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).
  \item \textsuperscript{46} 15 U.S.C. § 1125(a) (2006).
  \item \textsuperscript{48} Coca-Cola Co. v. Procter & Gamble Co., 822 F.2d 28, 31 (6th Cir. 1987).
  \item \textsuperscript{49} Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686, 692 (2d Cir. 1971).
  \item \textsuperscript{50} See generally id.; Burns, supra note 47; De Sevo, supra note 47.
  \item \textsuperscript{51} Am. Ass'n of Orthodontists v. Yellow Book USA, Inc., 434 F.3d 1100, 1103-04 (8th Cir. 2006).
\end{itemize}
not always have to be a direct competitor to have standing. Yet, courts routinely state as a matter of law that the false advertising plaintiff must be a competitor to have standing. The Ninth Circuit has even established separate tests for standing under the false advertising and trademark prongs of section 43(a).

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). 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). Often this analysis is restricted to the analysis provided in Colligan v. Activities Club of New York, Ltd. 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. 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-

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.
tury 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.
64. *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879).
67. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.3.3 (Aspen 1997).
68. Id.
71. See CHEMERINSKY, 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.
was widely agreed that the *Erie* decision eliminated the existing body of federal unfair competition common law. 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.

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* that had been somewhat abrogated by *Erie Railroad*. Congress chose to codify that common law and enacted the Lanham Act in 1946. Primarily because the body of common law was not overly expansive, section 43(a) garnered little attention. In fact, the original section 43(a) said nothing about advertising.

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

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75. *Id.* at 78.
77. *Chemerinsky*, *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).
82. *Burns*, *supra* note 47, at 814.
83. *Id.*
Court viewed advertising as indispensable to the free market.\textsuperscript{87} All told, Congress had no reason to address false advertising in 1946.

In 1954, the Third Circuit held in \textit{L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.}, that section 43(a) provided a cause of action for false advertising.\textsuperscript{88} \textit{L'Aiglon} was the first case to make such a holding.\textsuperscript{89} False advertising emerged as a cause of action under section 43(a), but the courts remained split on this issue.\textsuperscript{90} Even into the 1980s, some courts refused to recognize a claim for false advertising under section 43(a),\textsuperscript{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 \textit{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).\textsuperscript{92} The claim was a consumer class action brought by two high school students on behalf of two classes comprising at least 153 students.\textsuperscript{93} The defendant advertised a weekend ski tour that included ski lessons, equipment, and proper transportation,\textsuperscript{94} but the tour became a disaster.\textsuperscript{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.\textsuperscript{96} In considering \textit{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 \textit{Colligan} court entertained the question without guidance from the Supreme Court or a clearly articulated policy from Congress. The plaintiffs

\begin{thebibliography}{99}
\bibitem{88} 214 F.2d 649, 650 (3d Cir. 1954).
\bibitem{89} Keller, \textit{supra} note 11, at 132.
\bibitem{90} \textit{Id.} at 132–33.
\bibitem{91} \textit{Id.; see also} Bauer, \textit{supra} note 55, at 737 (opining that courts were interpreting false advertising under section 43(a) too narrowly).
\bibitem{92} 442 F.2d 686 (2d Cir. 1971).
\bibitem{93} \textit{Id.} at 687.
\bibitem{94} \textit{Id.}
\bibitem{95} \textit{Id.} at 688.
\bibitem{96} \textit{Id.}
\end{thebibliography}
based their argument on the phrase "any person." The plaintiffs argued this language was so plain and unambiguous it could only confer standing to consumers. The court rejected this reasoning and turned to Judge Learned Hand's observation that "words are not pebbles in alien juxtaposition." 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." The court concluded that section 43(a) created a limited unfair competition remedy for a limited class of commercial plaintiffs.

The holding and reasoning of Colligan has received much attention, but commentators rarely discuss the facts of the case. 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 standing 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). 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. Therefore, these suits were largely unsuccessful because courts reasoned that the prudential standing requirement would be stretched only far enough to permit suits by indirect competitors or consumers with substantial commercial interests. 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 Antitrust 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. Evaluating the Sherman Act, the Court noted that a literal interpretation would render every contract invalid as a restraint of trade. 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. Additionally, the Court addressed the effect of common law prudential standing principles in relation to legislative action. These decisions culminated into a rule of statutory interpretation that Congress is presumed to incorporate prudential standing unless the new statute expressly negates it.

In 1983, the Supreme Court handed down a landmark decision in Associated General Contractors v. California State Council of Carpenters, focusing on the nature of the injury to determine standing in antitrust cases. The parties were engaged in collective bargaining agreements, 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).
110. Id. at 687–88.
111. Id. at 688.
113. See generally Bennett, 520 U.S. 154; United Food, 517 U.S. 544; Gladstone, 441 U.S. 91; Warth, 422 U.S. 490.
115. See generally id.
116. Id. at 520.
labor union brought suit against a membership corporation of general contractors.\textsuperscript{117} The thrust of the union’s complaint was that the corporation took measures to weaken the agreements.\textsuperscript{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.”\textsuperscript{119} The Court noted that a literal reading would grant standing to anyone directly or indirectly harmed by an antitrust violation.\textsuperscript{120} Instead, the Court considered the legislative history and the common law backdrop that existed when the antitrust laws were passed.\textsuperscript{121} The Court determined that Congress passed the antitrust laws with an intent to maintain the existing principles developed in the common law,\textsuperscript{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.\textsuperscript{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;\textsuperscript{124}

2. The directness or indirectness of the injury;\textsuperscript{125}

3. The plaintiff’s proximity to the injurious conduct;\textsuperscript{126}

4. The degree to which the plaintiff’s damages are speculative;\textsuperscript{127} and

5. Risk of either duplicative damages or complex apportionment of damages.\textsuperscript{128}

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

\begin{itemize}
\item \textsuperscript{117} Id. at 521.
\item \textsuperscript{118} Id. at 522.
\item \textsuperscript{119} Id. at 520, 529 (quoting 15 U.S.C. § 15 (2006)).
\item \textsuperscript{120} Associated Gen. Contractors, 459 U.S. at 529.
\item \textsuperscript{121} Id. at 531–32.
\item \textsuperscript{122} Id.
\item \textsuperscript{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).
\item \textsuperscript{124} Associated Gen. Contractors, 459 U.S. at 538 (internal quotations omitted).
\item \textsuperscript{125} Id. at 540.
\item \textsuperscript{126} Id. at 541–42.
\item \textsuperscript{127} Id. at 542.
\item \textsuperscript{128} Id. at 543–44.
\end{itemize}
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 antitrust 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) primarily to correct inconsistencies in section 43(a) cases. 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. For instance, the TLRA did away with the "inherent characteristic" requirement and the distinction between statements about the firm's own goods as opposed to statements about its competitors. 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. 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).
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.
ative Kastenmeir, who published an article in favor of consumer standing and declared on the floor of the House his belief that consumers already had standing under the 1946 Lanham Act. Professor McCarthy viewed these statements as "only an optimistic opinion by a representative whose proposal was defeated in a House-Senate compromise." 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. 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." Far from demonstrating an express intent to negate prudential standing, Congress was clear it wished to retain it. 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.

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. Professor McCarthy advocated use of the principles of antitrust standing articulated in Associated General Contractors in false advertising cases. With this application, competitors and even noncompetitors would have standing; the injury would determine standing. Other commentators also

138. McCarthy, supra note 52, § 27.04.
141. Id.
143. A Westlaw search of "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.\textsuperscript{146}

Justice Alito, then sitting on the United States Court of Appeals for the Third Circuit, participated in a number of key antitrust decisions\textsuperscript{147} that culminated in a test for false advertising standing based on antitrust principles.\textsuperscript{148} The Third Circuit had adopted the reasonable interest test in 1984,\textsuperscript{149} but it was Justice Alito's opinions that defined and provided the legal framework of the "reasonable interest."\textsuperscript{150}

A. \textit{Conte Brothers Automotive, Inc. v. Quaker State-Slick 50, Inc.}

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

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

\textsuperscript{148} See generally \textit{Conte Bros.}, 165 F.3d 221; \textit{Joint Stock Soc'y}, 266 F.3d 164.
\textsuperscript{149} See generally Thorn v. Reliance Van Co., 736 F.2d 929 (3d Cir. 1984).
\textsuperscript{150} See generally \textit{Conte Bros.}, 165 F.3d 221; \textit{Joint Stock Soc'y}, 266 F.3d 164. These were landmark decisions, but they did not even produce case notes in legal journals.
\textsuperscript{151} \textit{Conte Bros.}, 165 F.3d at 223–24.
\textsuperscript{152} Id. at 224.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 223.
\textsuperscript{155} Id. at 223–24.
\textsuperscript{156} Id. at 223.
\textsuperscript{157} Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686, 688–92 (2d Cir. 1971).
could bring a false advertising claim.\textsuperscript{158} At issue before the \textit{Conte Bros.} court was the effect of the 1988 Lanham Act on this established common law of prudential standing.\textsuperscript{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.\textsuperscript{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."\textsuperscript{161} This rule of interpretation places a level of presumption in favor of maintaining current standing principles—prudential standing remains in "force unless \textit{expressly} negated by Congress."\textsuperscript{162}

To make this determination, the court examined the statutory text, structure, and legislative history.\textsuperscript{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."\textsuperscript{164}

The court held this statement of purpose, unchanged since 1946, showed a lack of Congressional intent to eliminate prudential standing.\textsuperscript{165} Additionally, the court highlighted the clause discussing parties: "to protect persons engaged in such commerce against unfair competition."\textsuperscript{166} This language in section 45 has remained intact since the original passage in 1946.\textsuperscript{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.\textsuperscript{168}

The court subsequently turned to legislative history, finding emphasis on anti-competitive conduct in the commercial arena in both the 1946\textsuperscript{169} and 1988\textsuperscript{170} acts. Nothing in the legislative history would suggest Congressional intent to drastically alter trademark law by introducing consumers as a new breed of plaintiffs.\textsuperscript{171} Predecessor trademark statutes limited the potential

\begin{footnotesize}
\begin{enumerate}
\item[158.] \textit{Id.} at 692.
\item[159.] \textit{Conte Bros.}, 165 F.3d at 226–27.
\item[160.] \textit{Id.}
\item[161.] \textit{Id.} at 227.
\item[162.] \textit{Id.}
\item[163.] \textit{Id.}
\item[164.] \textit{Id.} at 229.
\item[165.] \textit{Conte Bros.}, 165 F.3d at 229.
\item[166.] \textit{Id.} at 228.
\item[168.] \textit{Id.} at 229.
\item[169.] \textit{Id.} (citing 1946 U.S.C.C.A.N. 1274, 1275).
\item[171.] \textit{Conte Bros.}, 165 F.3d at 229–30.
\end{enumerate}
\end{footnotesize}
class of plaintiffs and were drafted amidst prudential standing doctrines that limited standing, and Congress never demonstrated intent, under the Lanham Act or predecessor acts, to abrogate prudential standing. 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).

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. However, these decisions failed to provide a proper framework for evaluating reasonable interest. Following the suggestion of Professor McCarthy and the Restatement (Third) of Competition, the court adopted the test set forth in Associated General Contractors to determine standing under section 43(a).

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; therefore, the plaintiff must establish a commercial interest that has been harmed. The court reiterated that even a

172. Id. at 230.
173. Id.
174. Id.
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.”).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{185} By doing so, the court indicated policy considerations of trademark law would apply to false advertising.\textsuperscript{186}

2. \textit{Directness of the Injury}

The directness factor prevents any commercial party from asserting a false advertising claim against any other commercial party.\textsuperscript{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.\textsuperscript{188} The court rejected this argument, noting that even consumers whose purchases were influenced by false advertising were more direct.\textsuperscript{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,\textsuperscript{190} and because Conte Brothers could establish only lost sales at the retail level,\textsuperscript{191} it did not satisfy either prong of the directness factor.\textsuperscript{192}

3. \textit{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).

\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{See Conte Bros., 165 F.3d at 234.}
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id. at 224, 235.}
\textsuperscript{189} \textit{Id. at 234–35.}
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Id.}
\textsuperscript{192} \textit{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.\textsuperscript{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.\textsuperscript{194} More direct competitors would have normal motivations to vindicate the public interest.\textsuperscript{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.\textsuperscript{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.\textsuperscript{197} At best, Conte Brothers could articulate only a theoretical reputational harm for selling a product that had been falsely advertised.\textsuperscript{198} Although Conte Brothers chose to sell only other products, Quaker State did not prevent Conte Brothers from selling Slick 50.\textsuperscript{199} In fact, the court reasoned, Conte Brothers would have profited from the false advertising had they stocked Slick 50.\textsuperscript{200} If consumers had been deceived into buying Slick 50, Conte Brothers would have enjoyed increased sales.\textsuperscript{201} The fact that Conte Brothers chose to stock only other products did not convert its speculative claim into a concrete harm.\textsuperscript{202}

\textsuperscript{193} Id.
\textsuperscript{194} Id. at 234.
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 235.
\textsuperscript{197} Id.
\textsuperscript{198} Conte Bros., 165 F.3d at 235.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{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

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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).

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. Joint Stock Society ("Joint Stock") was a vodka trading house in Russia. 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. Joint Stock never sold vodka in the United States. UDV had been selling vodka under the "Smirnoff" label in the United States since 1934. UDV held seventeen trademark registrations for "Smirnoff." Joint Stock brought an action against UDV under both prongs of section 43(a), basing its claims on UDV's use of the "Smirnoff" label and its use of the Smirnoff family crest, insignia, emblems, and medals. Joint Stock also included two counts under the Delaware Uniform Deceptive Trade Practices Act for the same activities that formed the basis of its section 43(a) counts.

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

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209. Id. at 232, 236.
211. Id. at 170.
212. Id. at 168.
213. Id. at 170.
214. Id. at 170–71.
215. Id. at 171.
217. Id.
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. The district court also held that Joint Stock failed to establish prudential standing for both the Lanham Act and deceptive trade practices claims. 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. 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. 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., and it took this opportunity to clarify the five factors of its test by relying on principles set forth in prior antitrust cases.

1. Nature of the Injury

The court stated that the plaintiff must show an injury that flows from the false advertising. 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. 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. Second, Joint Stock claimed injury because it could not enter into distribution contracts in the United States. Again, the court held this injury was caused by UDV's prior use of the Smirnoff mark. Third, Joint Stock claimed UDV's false advertising that Smirnoff vodka came from Russia caused harm to manufacturers of Russian vodka. The court held that while this was a proper false advertising injury, 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.
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.\textsuperscript{234}

2. \textit{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.”\textsuperscript{235} Joint Stock provided evidence that Russian vodka manufacturers would have a direct injury.\textsuperscript{236} There was no doubt UDV’s packaging of Smirnoff vodka conveyed the impression it was from Russia,\textsuperscript{237} and Joint Stock presented a study showing a substantial number of consumers believed Smirnoff is made in Russia.\textsuperscript{238} The court held this factor would favor standing for a Russian importer who could claim diminished sales;\textsuperscript{239} however, Joint Stock was “more attenuated” because they had not sold any vodka in the United States.\textsuperscript{240} Joint Stock could claim only that the United States market would be less profitable once they did enter.\textsuperscript{241} Thus, Joint Stock’s injury was too indirect, and this factor weighed against standing.\textsuperscript{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.\textsuperscript{233}

3. \textit{Proximity to, or Remoteness from, the Injurious Conduct}

Under the \textit{Joint Stock} decision, this factor determines whether there is “an identifiable class of persons whose self-interest would normally moti-
vate them to vindicate the public interest’ by bringing an enforcement action.” The existence of such a class diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general.” 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. Such manufacturers would have a stronger commercial interest to protect than Joint Stock. 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.”

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. 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. All three calculations were unavailing. Joint Stock cited no cases in which a false advertising plaintiff was awarded a reasonable royalty rate, and the corrective advertising and defendant’s profits calculations could be claimed by any plaintiff. The court rejected the latter assertion because damages must be particular to the plaintiff to satisfy this factor; otherwise, this factor would be meaningless because a plaintiff could always satisfy it by claiming remedial advertising and disgorgement of profits.

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.\(^{257}\)


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.

instilling property rights in accurate information. 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. 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. 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. 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. 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. 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).


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. In fact, this procedure is a much cheaper alternative to litigation. The level of proof for an alleged violation is low because the NAD bases its judgment on its own reaction to the advertisement. 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. The major television networks have their own rules controlling advertisements they broadcast, and consumers and competitors can challenge commercials both before and after they air. 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. False advertising damages are difficult to prove, and injunctive relief is the chief remedy. This remedial aspect of false advertising litigation has made such lawsuits unattractive for contingency-fee cases. Therefore, legal fees remain high for plaintiffs, and plaintiffs typically choose less expensive alternatives to litigation. 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).
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. 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. 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. This is the proper procedure in the event of appeal. Because courts can address standing sua


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

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.
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. 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.

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." 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." Enforcement of this Act is entrusted to the FTC.


294. See supra Part I.B.


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

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

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. Courts have generally been receptive to the FTC's procedures for enhancing its ability to bring deceptive practices claims. 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. 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.

298. Id. at 657.
299. Id. at 657–58.
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. 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. 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." 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 misallocations because "[a]n attempt to eradicate all incorrect beliefs would result in the cessation of communication." Second, attempts to equalize bargaining power will yield only short-term gains, if any, to the consumer. If the costs of consumer protection exceed the net benefits to consumers, the net effect is anticompetitive, and consumers ultimately shoulder the costs.

After a series of political maneuvers, the federal courts accepted a new standard of deception set forth by the FTC. This new standard was called the reasonable consumer test, and it essentially imposed a cost-benefit analysis. 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." As a third factor, the test applies only to material deceptions that are likely to cause injury to a reasonably relying consumer. The reasonable consumer test is the controlling federal standard for deception. This standard has helped foster the policy of granting redress only when doing so will ultimately benefit consumers as a

313. Id. at 246-47.
314. Id. at 247.
315. Id.
316. Id. at 248.
317. Id.
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. These laws are often referred to as little FTC acts. States adopted these acts during the “heyday of consumerism” in the 1960s and 1970s, a period when sweeping consumer rights laws were in vogue. The political climate of this era encouraged states to hastily pass these laws without a thorough evaluation of their overall effect on the market.

These acts share a problem with their federal counterpart: they do not define what constitutes a deceptive trade practice. Little FTC acts grant consumers private causes of action for deceptive trade practices. 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. 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.

These acts could also supplant traditional causes of action, like conversion or breach of implied warranty of fitness 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.
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).
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.\textsuperscript{333} Then, the plaintiff just has to show that the behavior falls into one of the listed categories or the catch-all provision.\textsuperscript{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.\textsuperscript{335} State agencies, like attorneys general, have power to bring deceptive trade practices actions, but individual consumers also have standing to bring these actions.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{339}

Now an expansive body of statutory law exists that misapplies ill-fitted and lenient FTC standards to general consumer standing without procedural safeguards.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{333} See id.
\textsuperscript{334} See id.
\textsuperscript{335} Private Actions, supra note 300, at 446.
\textsuperscript{336} Id. at 448.
\textsuperscript{337} Id. at 450; see also Mize, supra note 295, at 667.
\textsuperscript{338} Id. at 448-49.
\textsuperscript{339} Schwartz & Silverman, supra note 325, at 26.
\textsuperscript{340} See Private Action, supra note 300, at 446–50.
\textsuperscript{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.\textsuperscript{342} Some states have tried to create additional elements for plaintiffs to establish,\textsuperscript{343} such as reliance\textsuperscript{344} or the fact that the suit serves the public interest.\textsuperscript{345} However, state-law based false advertising class actions have experienced a recent boom\textsuperscript{346} as courts in New York, Massachusetts, and California have set a low bar for standing in these class actions.\textsuperscript{347} Additionally, the recently added removal procedures provided in the Class Action Fairness Act\textsuperscript{348} will transplant a number of these cases into federal courts that normally would have remained in state courts.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{342} Mize, \textit{supra} note 295, at 668.
\textsuperscript{343} \textit{Id}.
\textsuperscript{344} \textit{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)).
\textsuperscript{345} \textit{Id.} (citing Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 647 N.E.2d 741, 744 (N.Y. 1995)).
\textsuperscript{346} \textit{See generally} Weinstein, \textit{supra} note 274.
\textsuperscript{347} \textit{Id}.
\textsuperscript{349} \textit{Id}.
\textsuperscript{350} \textit{See} Schwartz & Silverman, \textit{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.
\(^{353}\) 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. If a singer gets sick and reschedules
a concert, that would be a violation. Political advertisements require sub-
jective interpretation of facts, and nearly every political advertisement could
be construed as a deceptive trade practice.

Turning to traditional rules of false advertising, puffery is nonactiona-
ble misinformation, but taken literally, puffery is a deceptive trade prac-
tice. Puffery consists of (1) exaggerated statements of bluster or boast
upon which no reasonable consumer would rely or (2) vague or highly sub-
jective claims of product superiority, including bald assertions of superiori-
ty. 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. While commentators warned against the
broad language of these laws, private enforcement had not reached abusive
levels. That trend is beginning to reverse, however, and consumers are
bringing actions that were never intended by these laws. For example,
California had the broadest consumer fraud statute in the country. Con-
sumers filed a number of abusive lawsuits, including a claim against a res-

4. 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.\textsuperscript{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.\textsuperscript{371} A recent Delaware case shows the extent of this movement.\textsuperscript{372} The buyer ordered twenty industrial hoses from the seller.\textsuperscript{373} The buyer was sophisticated and provided detailed specifications to the seller,\textsuperscript{374} the buyer even rejected suggested changes to the specifications recommended by the seller.\textsuperscript{375} The hoses met the specifications but did not work properly,\textsuperscript{376} and the buyer brought suit for violation of Delaware’s little FTC act.\textsuperscript{377} But, the claim was dismissed on procedural grounds.\textsuperscript{378}

2. \textit{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.

\textsuperscript{370} Id. at 63–64.
\textsuperscript{371} Id. at 64.
\textsuperscript{373} Id. at 605.
\textsuperscript{374} Id.
\textsuperscript{375} Id.
\textsuperscript{376} Id. at 605–06.
\textsuperscript{377} Id. at 606.
\textsuperscript{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. 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. 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. The Third Circuit briefly touched on this concept in Joint Stock. 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). Finally, this article will present proposals for Arkansas courts to incorporate prudential standing and for legislative action to amend the ADTPA.

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 cases\(^{392}\) 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 industry\(^{395}\) 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).


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

\(^{390}\) Based upon Westlaw search sy.dii("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); EFCO 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).


\(^{394}\) See Arkansas cases supra note 392.

\(^{395}\) See Arkansas statutes supra note 393.


\(^{397}\) Id. § 5-37-515 (LEXIS Repl. 2006).
with the intent to sell goods or services. Violation of the statute is a misdemeanor, punishable by fines and imprisonment.

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 jurisdictions in that Arkansas does not distinguish a temporary restraining order from a preliminary injunction. 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. Potential harm to the defendant and public interests are not considerations, unlike the federal standards. 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." Even when successful, the moving party must post an appropriate bond and incur the additional attorney's fees involved with obtaining preliminary injunctive relief.

B. Arkansas Deceptive Trade Practices Act

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

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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.
401. See id.
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.\textsuperscript{410} This section also includes a catch-all provision for any other conduct falling outside the general descriptions.\textsuperscript{411} Second, the advertising section deems deception made in the course of advertising a violation.\textsuperscript{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.\textsuperscript{413} Third, the civil enforcement section provides for injunctive relief,\textsuperscript{414} actual damages,\textsuperscript{415} and attorney's fees;\textsuperscript{416} however, the ADTPA does not provide treble damages or statutory damages.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{420} and the catch-all provision is not

\textsuperscript{410} Id. § 4-88-107(a) (LEXIS Supp. 2005).
\textsuperscript{411} Id. § 4-88-107(b).
\textsuperscript{412} Id. § 4-88-108 (LEXIS Repl. 2001).
\textsuperscript{414} Id. § 4-88-113(a)(1) (LEXIS Repl. 2001).
\textsuperscript{415} Id. § 4-88-113(a)(2).
\textsuperscript{416} Id. § 4-88-113(f).
\textsuperscript{417} Id.
\textsuperscript{418} Id. § 4-88-115 (LEXIS Repl. 2001).
\textsuperscript{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.
\textsuperscript{420} State ex rel. Bryant v. McLeod, 318 Ark. 781, 786–87, 888 S.W.2d 639, 642 (1994).
too vague for enforcement. 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, and the court affirmed summary judgment denying the ADTPA claim. 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.

Often the published decision is a procedural matter without a substantive ADTPA analysis, even when the court is affirming a summary judgment denying the ADTPA claim. 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. Second, regarding the requisite injury for an ADTPA claim, the plaintiff must establish an ascertainable loss. Finally, the ADTPA cannot be used to circumvent established law governing products liability and implied warranties.

423. Id.
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.
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.
\(^{432}\) *Id.* at 494.
\(^{433}\) *Id.*
\(^{434}\) *Id.* at 495.
\(^{435}\) *Id.* at 502.
\(^{437}\) *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.
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.\footnote{Wallis v. Ford Motor Co., 362 Ark. 317, 327–29, 208 S.W.3d 153, 161–62 (2005).} 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.\footnote{See examples of nominal misinformation supra Part IV.C.2.} Second, the court should consider whether the claim asserts non-misinformation to circumvent traditional causes of action.\footnote{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.} If the claim asserts nominal misinformation or non-misinformation, the injury is not one meant to be remedied through the ADTPA.

\begin{footnotesize}
\begin{itemize}
\item[445.] See examples of nominal misinformation supra Part IV.C.2.
\item[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.
\end{itemize}
\end{footnotesize}
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. 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 extraterritorial 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, recently prepared the Model Act on Private Enforcement of Consumer Protection Statutes (“Model Act”). 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
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).
453. See Model Act § 2.
454. See id. § 2(a).
455. See id. § 2(b).
457. See United Phosphorus, Ltd. v. Midland Fumigant, Inc., 205 F.3d 1219, 1232 (10th Cir. 2000); Seatrax, 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).
459. See Model Act § 3.
It should be changed to three years, which is the customary limitations period for statutory rights.\textsuperscript{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.

\textbf{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.
