

1993

# Section 43(a), Commercial Falsehood, and the First Amendment: A Proposed Framework

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## Recommended Citation

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# Section 43(a), Commercial Falsehood, and the First Amendment: A Proposed Framework

Arlen W. Langvardt\*

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## I. INTRODUCTION

Business entities have become increasingly inclined in recent years to institute litigation as a means of vindicating corporate reputation or economic interests when false statements have been made about their products, services, or commercial activities.<sup>1</sup> In these suits, business plaintiffs have relied primarily on defamation law, under which protection of reputation is the paramount concern.<sup>2</sup> They have also invoked injurious falsehood law, which addresses false statements that damage economic interests but do not harm corporate reputation.<sup>3</sup>

Defamation and injurious falsehood share a fundamental attribute: both impose liability for the consequences of written

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1. See Milo Geyelin, *Corporate Mudslinging Gets Expensive*, WALL ST. J., Aug. 4, 1989, at B1.

2. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 111, at 771 (5th ed. 1984). See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990), cert. denied, 111 S. Ct. 1586 (1991); *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914 (3d Cir.), cert. denied, 111 S. Ct. 58 (1990); *Brown & Williamson Tobacco Co. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), cert. denied, 485 U.S. 993 (1988); *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 516 A.2d 220 (N.J. 1986).

3. KEETON et al., *supra* note 2, § 128, at 962-63; RESTATEMENT (SECOND) OF TORTS §§ 623A & cmt. g, at 633 (1977). Among the most common injurious falsehood claims are those based on allegedly false statements that disparage a company's product or service. Such "disparagement" actions rest on the premise that the defendant's falsehood harmed plaintiff's economic interest in the sale of its product or service. See, e.g., *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 491 n.7 (1984); *Unelko Corp.*, 912 F.2d at 1051-52; *Angio-Medical Corp. v. Eli Lilly & Co.*, 720 F. Supp. 269, 271 (S.D.N.Y. 1989); *Cumberland Farms, Inc. v. Everett*, 600 A.2d 398 (Me. 1991); *J.Q. Office Equip. of Omaha, Inc. v. Sullivan*, 432 N.W.2d 211 (Neb. 1988). For a more detailed discussion of injurious falsehood claims and the economic interests that may give rise to them, see Arlen W. Langvardt, *Free Speech Versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood*, 62 TEMP. L. REV. 903, 913-23 (1989).

or spoken expression. As a result of this focus on expression, these common law doctrines may be at cross-purposes with the First Amendment<sup>4</sup> guarantees of freedom of speech and press.<sup>5</sup> Although courts long seemed oblivious to the First Amendment implications of these doctrines,<sup>6</sup> the past three decades have witnessed judicial development of various proof requirements designed to reconcile defamation and injurious falsehood law with the First Amendment.<sup>7</sup>

Federal law, most notably the recently amended section 43(a) of the Lanham Act,<sup>8</sup> also contemplates liability for makers of certain false statements about products, services, or other commercial matters. Even before Congress amended it, commentators had come to view section 43(a) as a versatile provision whose various potential uses included providing a basis for commercial plaintiffs' false advertising claims against other business entities.<sup>9</sup> The present version of section 43(a), how-

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4. First Amendment rights of free speech and a free press of course have not been violated unless government action restricted speech or press. U.S. CONST. amend. I. Judicial enforcement of rules of law that adversely affect rights of expression provides sufficient government action to trigger First Amendment analysis. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1968). The Fourteenth Amendment restricts certain actions by state governments. U.S. CONST. amend. XIV. Courts have consistently interpreted the latter amendment's guarantee of due process rights as encompassing the protections afforded by the First Amendment. *E.g.*, *Gitlow v. New York*, 268 U.S. 652, 666 (1925). Thus, Courts view the First and Fourteenth Amendments as extending the same freedom of expression rights. *Id.* For purposes of convenience, this article will generally refer to "the First Amendment," or to "First Amendment" rights or guarantees, even when a reference to the Fourteenth Amendment would be technically accurate.

5. *See, e.g.*, *Bose Corp.* 466 U.S. at 503-11; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times*, 376 U.S. 254. The Supreme Court has recognized that in order to further First Amendment rights to engage in truthful expression, it may sometimes be necessary to allow defendants to escape liability for certain false statements. *Gertz*, 418 U.S. at 340-41; *New York Times*, 376 U.S. at 271-72. For additional discussion of the Supreme Court's treatment of freedom of expression interests in defamation and injurious falsehood cases, see *infra* text accompanying notes 154-289.

6. *See, e.g.*, *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952).

7. The "constitutionalization" of defamation law began in 1964 with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). For discussion of *New York Times* and its progeny, see *infra* text accompanying notes 154-207.

8. 15 U.S.C. § 1125(a) (1988). The amendment to § 43(a) took effect on Nov. 16, 1989. *Id.* Although the Lanham Act, *id.* at §§ 1051-1128, deals primarily with trademark rights, § 43(a) is a versatile provision that may be applied both inside and outside the trademark rights setting. *See infra* text accompanying notes 20-79.

9. *See generally* Arthur Best, *Monetary Damages for False Advertising*, 49 U. PRR. L. REV. 1 (1987) (discussing § 43(a) as a vehicle for false advertising claims); Lillian R. BeVier, *Competitor Suits for False Advertising Under Section*

ever, sweeps even more broadly. In the false advertising context, the defendant's false statements violated "old" section 43(a) only when made about the *defendant's* goods or services.<sup>10</sup> The "new" section 43(a) not only allows for liability in this situation, but also makes actionable certain false or misleading statements by the defendant regarding the *plaintiff's* "goods, services, or commercial activities,"<sup>11</sup> when made in the context of "commercial advertising or promotion."<sup>12</sup>

The amendment is significant because many business related suits over falsehoods, formerly actionable only on common law defamation or injurious falsehood grounds because they involved the defendant's statements about the plaintiff or the plaintiff's economic interests, may now be statutory causes of action.<sup>13</sup> Assume, for illustrative purposes, that in an advertisement for the aspirin it manufactures, XYZ Corp. alleges that

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*43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1 (1992) (same); Ross D. Petty, *Supplanting Government Regulation With Competitor Lawsuits: The Case of Controlling False Advertising*, 25 IND. L. REV. 351 (1991) (same); Roger E. Schechter, *Additional Pieces of the Deception Puzzle: Some Reactions to Professor BeVier*, 78 VA. L. REV. 57 (1992) (same). For further discussion of this use of § 43(a), see *infra* text accompanying notes 26-43, 65-80.

10. The former version of § 43(a) prohibited the use, in connection with the providing of goods or services, of "false designation[s] of origin," and "any false description or representation, including words or other symbols tending falsely to describe or represent the same." 15 U.S.C. § 1125(a) (1982), *amended by* 15 U.S.C. § 1125(a) (1988). Courts consistently interpreted this language as contemplating liability only when the defendant's designations, descriptions, or representations pertained to the defendant's own product or service. *E.g.*, *Bernard Food Indus. v. Dietene Co.*, 415 F.2d 1279, 1283-84 (7th Cir. 1969) (citing cases), *cert. denied*, 397 U.S. 912 (1970). In amending § 43(a), Congress overturned this interpretation. S. REP. NO. 515, 100th Cong., 2d Sess. 40 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5603.

11. The present version of § 43(a) provides liability when the defendant, "in commercial advertising or promotion," makes false or misleading representations regarding the "nature, characteristics, [or] qualities . . . of *his or her or another person's* goods, services, or commercial activities." 15 U.S.C. § 1125(a) (1988) (emphasis added). The plaintiff would logically be "another person" for purposes of the statute. *See* S. REP. NO. 515, 100th Cong., 2d Sess. 40 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5603.

12. 15 U.S.C. § 1125(a) (1988).

13. Not all defamation and injurious falsehood claims fall within the new § 43(a)'s scope, however, given the statute's "commercial advertising or promotion" limitation. *See id.*; *see also* *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130, 141-42 (S.D.N.Y. 1990) (criticism of another's product by one not engaged in providing goods or services falls outside "commercial advertising or promotion" section of statute and is actionable, if at all, only on defamation grounds). For additional discussion of defamation and injurious falsehood claims not covered by the new § 43(a), *see infra* notes 78-79 and accompanying text.

ABC Co.'s non-aspirin pain reliever causes certain harmful side effects which ABC has concealed from the public. Also assume that ABC regards this allegation as untrue and therefore plans to sue XYZ.<sup>14</sup> ABC may find a suit under the new section 43(a) more desirable than traditional defamation or injurious falsehood claims,<sup>15</sup> because the latter impose stern proof requirements that section 43(a) does not by its terms mandate.<sup>16</sup> Although the new section 43(a) is of fairly recent vintage, there are already signs that business plaintiffs will seek to employ the statute as a vehicle for bypassing these "troublesome" requirements by recasting what formerly would have been a defamation or injurious falsehood claim as a section 43(a) claim.<sup>17</sup>

This may seem innocuous enough at first glance. After all, if Congress or a state legislature enacts a statute that liberalizes a strict common law rule, plaintiffs are entitled to take advantage of the liberalization. Replacing the common law causes of action with a section 43(a) cause of action raises a significant problem, however. Some of the stern defamation and injurious falsehood requirements that plaintiffs might evade by filing suit under the new section 43(a) are not mere common law rules. Instead, they are constitutional rules which courts have imposed in an effort to be faithful to the First Amendment.<sup>18</sup> The ques-

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14. This hypothetical does not strain the imagination; competing pain reliever manufacturers have staged various false advertising battles under § 43(a). See, e.g., *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544 (2d Cir. 1991); *McNeilab, Inc. v. American Home Prods. Corp.*, 848 F.2d 34 (2d Cir. 1988); *American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160 (2d Cir. 1978).

15. The "side effects" allegation adversely portrays the would-be plaintiff's goods, as do some statements giving rise to injurious falsehood claims. The concealment allegation is one of the improper commercial activities—the sort of allegation that may trigger a defamation claim. See *infra* text accompanying notes 101-144.

16. These stern requirements include fault elements among others. See *infra* text accompanying notes 116-124, 159-186, 199-220. Section 43(a), however, appears to contemplate a strict liability regime. See 15 U.S.C. § 1125(a) (1988) (no mention of fault requirement of sorts found in defamation and injurious falsehood). See *infra* text accompanying notes 37-41.

17. See, e.g., *McNeil-P.C.C.*, 938 F.2d 1544; *Nat'l Artists Management Co. v. Weaving*, 769 F. Supp. 1224 (S.D.N.Y. 1991); *Energy Four, Inc. v. Dornier Med. Sys.*, 765 F. Supp. 724 (N.D. Ga. 1991); *Janda v. Riley-Meggs Indus.*, 764 F. Supp. 1223 (E.D. Mich. 1991); *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259 (S.D.N.Y. 1990).

18. See discussion *supra* note 5 and accompanying text. This is particularly true of defamation, where the Supreme Court has crafted various First Amendment-based rules. See *infra* text accompanying notes 154-276. The Court has been less explicit regarding the First Amendment aspects of injurious falsehood, although it has strongly hinted that freedom of expression con-

tion then becomes whether constitutionally mandated elements of defamation and injurious falsehood may be evaded by the simple expedient of bringing suit under section 43(a), or whether courts should stop this end-run by imposing First Amendment-based proof requirements on plaintiffs in section 43(a) suits that are disguised "defamation" or "injurious falsehood" claims. So far, courts deciding cases under the new section 43(a) have either avoided this troublesome question or answered it unsatisfactorily.<sup>19</sup> This article takes up the question and offers a framework to reconcile section 43(a) with the First Amendment.

Section II provides essential background on section 43(a) and its use in the context of commercial falsehood. Section III discusses defamation and injurious falsehood claims, the traditional avenues of judicial recourse for speech-caused harm to corporate reputational and economic interests. Section IV focuses on the "constitutionalization" that has recently dominated defamation law, and to a lesser extent, injurious falsehood law. In addition, Section IV examines the development and status of the public concern doctrine, which, despite its lack of clarity, has become a mainstay of First Amendment jurisprudence. Section V sets out the commercial speech doctrine. Although applied outside the defamation and injurious falsehood contexts, this doctrine bears certain features that aid a proper resolution of the section 43(a) issues considered here.

After Section VI explores the inadequate judicial treatment of the freedom of expression implications of section 43(a) "defamation" and "injurious falsehood" cases, Section VII explains why courts must develop First Amendment-based proof requirements for such cases. Section VII then focuses on the proper

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cerns must be accommodated in injurious falsehood cases. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). For additional discussion of *Bose* and the probable constitutional components of injurious falsehood, see *infra* text accompanying notes 268-287. Some of the other stern aspects of injurious falsehood have long existed as common law elements of the tort. See *infra* text accompanying notes 116-124.

19. Courts have avoided or ignored the question in several cases. See *McNeil-P.C.C.*, 938 F.2d 1544; *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958 (D.C. Cir. 1990); *American Express Travel Related Services Co. v. Mastercard Int'l, Inc.*, 776 F. Supp. 787 (S.D.N.Y. 1991); *Nat'l Artists Management*, 769 F. Supp. 1224; *Janda*, 764 F. Supp. 1223; *Weight Watchers Int'l*, F. Supp. 1259. Other courts have unsatisfactorily dealt with the issue. See *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 930-39 (3d Cir.), *cert. denied*, 111 S. Ct. 58 (1990); *Energy Four*, 765 F. Supp. at 733. For discussion of *U.S. Healthcare* and *Energy Four*, see *infra* text accompanying notes 350-394. Congress erroneously thought that it avoided creating First Amendment problems when it amended § 43(a). See *infra* text accompanying notes 93-98.

content of those requirements. The article rejects, as unsatisfactory, the uncomplicated solution of judicially engrafting upon section 43(a) the same First Amendment-based scheme imposed on the common law of defamation. Instead, the article proposes different constitutional rules, which, given the commercial context of section 43(a) cases, more suitably strike the balance between plaintiffs' economic and reputational interests and defendants' contrasting expressive interests.

## II. SECTION 43(a): AN EVOLVING STATUTORY FRAMEWORK

The Lanham Act's<sup>20</sup> provisions deal mostly with federally registered trademarks, governing registration, the rights acquired by a registered mark's owner, and the infringement of registered marks.<sup>21</sup> Since its enactment in 1946, however, the Lanham Act has also contained a provision, section 43(a), the language of which invites application outside the registered mark setting.

### A. THE "OLD" SECTION 43(a)

Prior to November 16, 1989,<sup>22</sup> section 43(a) read, in pertinent part, as follows:

Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, . . . shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or

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20. 15 U.S.C. §§ 1051-1128 (1988).

21. See *id.* §§ 1052-53 (registration of trademarks and service marks on Principal Register), 1065 (incontestability of mark after five years of registration on Principal Register), 1072 (registration on Principal Register providing nationwide constructive notice of ownership), 1114 (infringement). For more detailed discussion of trademark rights and infringement suits under the Lanham Act, state statutes, and the common law, see Arlen W. Langvardt, *Protected Marks and Protected Speech: Establishing the First Amendment Boundaries in Trademark Parody Cases*, 36 VILL. L. REV. 1, 7-39 (1991).

22. The Trademark Law Revision Act of 1988 ("TLRA"), which amended various Lanham Act provisions, took effect on November 16, 1989. See 15 U.S.C. §§ 1051-1128 (1988). The amended provisions included Section 43(a). *Id.* § 1125(a). This article's periodic references to the "old" § 43(a) and the "new" § 43(a) refer, respectively, to the pre-TLRA version and post-TLRA versions of the statute.



representation.<sup>23</sup>

Because of the statute's references to "any goods or services," "a false designation of origin," and any "false description or representation," and the lack of an express limitation to registered marks, courts consistently viewed the former section 43(a) as authorizing infringement claims regarding unregistered, as well as registered, marks.<sup>24</sup> Early interpretations concluded that section 43(a) also encompassed tort claims for "passing off," when the defendant makes representations or engages in conduct designed to have the public mistake the defendant's goods for those of the plaintiff.<sup>25</sup>

Not until the mid-1950s, however, did courts interpret section 43(a) in a way that exploited the possibilities inherent in the broad statutory language. In *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*,<sup>26</sup> the plaintiff dress manufacturer alleged, in essence, that the defendant's advertisement falsely represented the quality and appearance of a dress which the defendant sold at retail. After the district court's dismissal for failure to state a legal claim, the Third Circuit Court of Appeals reversed, approving a commercial party's use of section 43(a) to obtain relief for another's false advertising.<sup>27</sup> The significance of the Third Circuit's treatment of section 43(a) lies in its holding that section 43(a) could be used to challenge false advertising even if it did not involve "passing off."<sup>28</sup>

For a number of years after *L'Aiglon*, however, commercial plaintiffs only rarely filed false advertising suits based on section 43(a). Beginning in the late 1970s, the raising of false advertising claims under section 43(a) ceased to be a novel use of the statute.<sup>29</sup> The past fifteen years have witnessed numerous

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23. *Id.* § 1125(a).

24. *See id.* (1982), amended by 15 U.S.C. § 1125(a) (1988); 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, 685-86 & nn.61-64 (1984) (discussing use of § 43(a) as basis for infringement suits involving unregistered marks).

25. *E.g.*, *Dad's Root Beer Co. v. Doc's Beverages*, 193 F.2d 77, 80-81 (2d Cir. 1951); *Samson Crane Co. v. Union Nat'l Sales, Inc.*, 87 F. Supp. 218, 222 (D. Mass. 1949), *aff'd*, 180 F.2d 896 (1st Cir. 1950) (per curiam).

26. 214 F.2d 649 (3d Cir. 1954).

27. *Id.* at 650.

28. *Id.* at 651. Noting that some courts had read a passing off limitation into section 43(a), the Third Circuit preferred not to do so in the absence of statutory language suggesting the appropriateness of such a limitation. *Id.*

29. *See Bauer, supra* note 24, at 691-92 (discussing current prevalence of false advertising litigation under § 43(a)); *BeVier, supra* note 9, at 1-3 (same); *Petty, supra* note 9, at 351-52 (same).

section 43(a) cases involving allegedly untrue advertising claims about, for example, pain relievers' effectiveness, performance capabilities and side effects.<sup>30</sup> Other such cases alleged false promotional pitches for products that run the gamut from orange juice to shampoo to dog food to rental trucks.<sup>31</sup> Whether prompted by a desire to preserve or develop market share,<sup>32</sup> the advent of large damages awards,<sup>33</sup> or some other factor,<sup>34</sup> com-

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30. *E.g.*, *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544 (2d Cir. 1991); *McNeilab, Inc. v. American Home Prods. Corp.*, 848 F.2d 34 (2d Cir. 1988); *American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160 (2d Cir. 1978).

31. *See, e.g.*, *Coca-Cola Co. v. Tropicana Prods.*, 690 F.2d 312 (2d Cir. 1982) (orange juice); *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272 (2d Cir. 1981) (shampoo); *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958 (D.C. Cir. 1990) (dog food); *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034 (9th Cir. 1986) (rental trucks).

32. The ongoing saga of suits involving producers of pain relievers, *see, e.g., supra* note 30 (citing cases), suggests that such a motivation may be at work. *See also* *BeVier, supra* note 9, at 24-25 n.70 (describing the pain reliever cases as a "seemingly endless stream"). According to the Second Circuit, "[t]he competitive battlefield has shifted from the shelves of supermarkets and drugstores to the courtroom." *McNeilab, Inc.*, 848 F.2d at 35 (2d Cir. 1988).

33. *E.g.*, *U-Haul Int'l*, 793 F.2d at 1035-36 (affirming \$40 million award to U-Haul); *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 778 F.Supp. 555 (D.D.C.), *aff'd in part, rev'd in part*, 997 F.2d 949 (D.C. Cir. 1993) (\$12.1 million award). It should be noted that the large awards in *U-Haul* and *ALPO* are atypical. *See, e.g., infra* note 53 (citing cases).

With regard to remedies, § 35(a) of the Lanham Act authorizes both injunctive relief and damages, including an award of the defendant's profits (attributable to the behavior violating § 43(a)) in appropriate cases. 15 U.S.C. § 1117(a) (1988). Courts often require the plaintiff to demonstrate willfulness or bad faith on the part of the defendant as a prerequisite to recovery of the defendant's profits. *E.g.*, *ALPO Petfoods v. Ralston Purina Co.*, 913 F.2d 958, 961, 968 (D.C. Cir. 1990). In addition, § 35(a) grants courts the discretion to increase damage awards up to three times the amount of actual proven damages, so long as the increase is compensatory rather than punitive in nature. 15 U.S.C. § 1117(a). *See ALPO Petfoods*, 913 F.2d at 969-70 (discussing such exercises of judicial discretion). Attorney's fees may also be awarded in exceptional cases, 15 U.S.C. § 1117(a), such as when the losing party acted in bad faith. *ALPO*, 913 F.2d at 961. Prior to the TLRA's amendments to the Lanham Act, § 35(a)'s monetary remedies expressly extended only to cases involving infringement of registered trademarks and service marks. 15 U.S.C. § 1117(a) (1982), *amended* by 15 U.S.C. § 1117(a) (1988). Courts generally concluded, however, that such remedies were nonetheless available in § 43(a) cases as well. *See, e.g., U-Haul Int'l*, 793 F.2d at 1042. Congress legislatively affirmed that conclusion in the enactment of the TLRA by expressly making all of § 35(a)'s remedies applicable to § 43(a) cases. 15 U.S.C. § 1117(a) (1988). For additional discussion of what the plaintiff must prove in order to obtain injunctive and monetary relief, see *infra* notes 51-53 and accompanying text.

34. In theory, the desire to promote consumer welfare might provide a motivating factor. Even though commercial parties (rather than consumers) are proper § 43(a) plaintiffs, *see infra* note 35, protecting consumers from confusion

mercial plaintiffs' resort to section 43(a) as a private remedy for false advertising<sup>35</sup> has emerged as a commonplace use of the statute.<sup>36</sup>

Another notable aspect of false advertising claims under the previous version of section 43(a) was the statute's strict liability regime.<sup>37</sup> The old section 43(a) contained no knowledge component or "fault" requirement<sup>38</sup> of the sort encountered in defama-

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or deception is considered a major purpose underlying § 43(a), BeVier, *supra* note 9, at 16. It does not seem too cynical to assert, however, that such motivations are clearly secondary to § 43(a) plaintiffs' desires to safeguard their own economic interests. *See id.* at 16-18.

35. Courts have generally concluded that commercial plaintiffs may invoke § 43(a) but that consumer plaintiffs may not. *See, e.g.,* Colligan v. Activities Club, Ltd., 442 F.2d 686, 691 (2d Cir.) *cert. denied*, 404 U.S. 1004 (1971). In order to have standing in a given case, the commercial plaintiff must be a party that "is or is likely to be damaged" by the defendant's statements or conduct. 15 U.S.C. § 1125(a) (1988); *see also* 15 U.S.C. § 1125(a) (1982) (superseded version containing same quoted language). Because both contain the same "is or is likely to be damaged" language, it is likely that courts will continue to follow their prior interpretations denying consumer standing. For discussion of whether consumers should be allowed to sue under § 43(a), *see* Scott E. Thompson, *Consumer Standing Under Section 43(a): More Legislative History, More Confusion*, 79 TRADEMARK REP. 341 (1989).

36. *See* Charles J. Walsh & Marc S. Klein, *From Dog Food to Prescription Drug Advertising: Litigating False Scientific Establishment Claims Under the Lanham Act*, 22 SETON HALL L. REV. 389, 394, 408-09 (1992). Section 43(a) of course remains available for various purposes other than attacking false advertising. As noted earlier, plaintiffs may bring trademark infringement cases and passing off claims under § 43(a). *See* discussion *supra* notes 24-25 and accompanying text. The Supreme Court recently decided a § 43(a) case involving alleged trade dress infringement by one restaurant against another. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 112 S. Ct. 2753 (1992). Other recent cases demonstrating the versatility of § 43(a) include those in which the plaintiff claimed that his or her right of publicity was violated. *See* *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989); *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360 (S.D.N.Y. 1988).

37. BeVier, *supra* note 9, at 30-31; Sherry Gunn, Note, *Lanham Act Revision Provides Relief for Misleading Comparative Advertisements: Does It Go Too Far?*, 68 WASH. U. L.Q. 707, 721-22 (1990); Jeffrey P. Singdahlsen, Note, *The Risk of Chill: A Cost of the Standards Governing the Regulation of False Advertising Under Section 43(a) of the Lanham Act*, 77 VA. L. REV. 339, 341-42 (1991).

38. *See* 15 U.S.C. § 1125(a) (1982) (no statutory language requiring knowledge of falsity, negligent failure to ascertain truth, or similar fault requirement), *amended by* 15 U.S.C. § 1125(a) (1988). The former version of § 43(a) did contain a provision indicating that a mere transporter of goods bearing a false designation or representation could not be held liable under the statute unless the transporter had knowledge of the falsity. *Id.* That narrow provision obviously distinguished between makers of false representations and mere transporters of goods bearing false designations or representations, and applied the knowledge component as an element of proof only in a claim against a transporter. *See id.* The statement in this Article's text regarding a lack of a fault

tion law, where the defendant's knowing, reckless, or negligent falsehoods furnish the basis of the plaintiff's claim.<sup>39</sup> A defendant found to have made false representations about its product or service faced liability under the old section 43(a) to an appropriate plaintiff, regardless of whether the defendant knew or had reason to know of the representations' falsity.<sup>40</sup> In other words, even if the defendant had a good-faith belief that the representations were true, their falsity nonetheless made the defendant liable. The language of the present section 43(a) apparently maintains this strict liability regime.<sup>41</sup>

Consistent judicial interpretations of the old section 43(a) limited its applicability to false advertising cases in which the defendant's false representations referred to the *defendant's* own goods or services. The defendant's false assertions about the plaintiff's products or business activities were not actionable under the statute.<sup>42</sup> The new, significantly broader section 43(a) repudiates this constraint and thus fulfills a major congressional objective underlying the amended version of section 43(a).<sup>43</sup>

## B. THE "NEW" SECTION 43(A)

On November 16, 1989, the Trademark Law Revision Act of 1988 (TLRA),<sup>44</sup> the first significant revision of the Lanham Act since its enactment, took effect. Although the TLRA did not create an entirely new statutory scheme, it revised various provisions and substantially altered certain fundamental aspects of

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requirement is intended to mean that in run-of-the-mill § 43(a) false advertising claims—those against the alleged makers of false representations—courts did not require plaintiffs to prove fault.

39. For detailed discussion of the fault requirements in different configurations of defamation cases, see *infra* text accompanying notes 159-254.

40. See, e.g., *Skil Corp. v. Rockwell Int'l, Corp.*, 375 F. Supp. 777, 783 (N.D. Ill. 1974). For discussion of what courts have traditionally required of plaintiffs in order to grant injunctive and monetary relief in § 43(a) false advertising cases, see *infra* notes 52-53.

41. See 15 U.S.C. § 1125(a) (1988). Of course, the absence of language creating a fault requirement in § 43(a) cases does not end the constitutional inquiry. See *infra* text accompanying notes 85-100.

42. E.g., *Bernard Food Indus. v. Dietene Co.*, 415 F.2d 1279, 1283-84 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970). This meant that statements about the plaintiff's product, service, or business were actionable, if at all, only under the common law of defamation and injurious falsehood. See *infra* text accompanying notes 101-145.

43. S. Rep. No. 515, 100th Cong., 2d Sess. 40 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5603.

44. 15 U.S.C. §§ 1051-1128 (1988).

trademark law.<sup>45</sup> In addition, the TLRA included the new version of section 43(a), which provides:

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—

(1) 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

(2) 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.<sup>46</sup>

Analysis of this new section reveals that it is quite similar to, yet markedly different from, its predecessor. Most of the similarities appear in the new section 43(a)'s introductory and concluding language, as well as in subsection (1). The present version's subsection (2), discussed below, provides the major area of difference.

#### 1. Introductory Language, Concluding Language, and Subsection (1): Minimal Change

Certain provisions of section 43(a) survived the amendment process. Analysis of these similarities should begin by examining the enforcement mechanism the statute's concluding language sets forth. In authorizing civil suits by "any person who believes that he or she is or is likely to be damaged" by an act or statement prohibited by the statute, the new section 43(a) uses language that is virtually identical to the former version.<sup>47</sup> Thus, it is logical to assume that courts will perpetuate the "commercial plaintiffs only" construction given to the old section 43(a).<sup>48</sup> Not surprisingly, early cases under the new statute have largely been limited to such plaintiffs.<sup>49</sup> In addition, the

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45. For an overview of the TLRA's major effects (other than its modification of § 43(a) on federal trademark law, see Marianne Lavelle, *What's in a Name? New Law Explains*, NAT'L L.J., March 6, 1989, at 1, 50.

46. 15 U.S.C. § 1125(a) (1988).

47. Compare *id.* ("any person who believes that he or she is or is likely to be damaged") with 15 U.S.C. § 1125(a) (1982) (same language in previous version, except for words "or she").

48. For discussion of the prevailing judicial view that only commercial parties and not consumers may bring § 43(a) claims, see *supra* note 35.

49. *E.g.*, *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir. 1992); *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544 (2d Cir.

continued presence of the same "likely to be damaged" language<sup>50</sup> probably means—to the dismay of some commentators<sup>51</sup>—that courts will maintain their previous approaches to granting injunctions<sup>52</sup> and awarding damages and other mone-

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1991); *W. L. Gore & Associates, Inc. v. Totes Inc.*, 788 F. Supp. 800 (D. Del. 1992); *Nat'l Artists Management Co. v. Weaving*, 769 F. Supp. 1224 (S.D.N.Y. 1991); *Energy Four, Inc. v. Dornier Med. Sys.*, 765 F. Supp. 724 (N.D. Ga. 1991); *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259 (S.D.N.Y. 1990).

50. See *supra* note 47.

51. Various commentators have devoted considerable attention to discussion, analysis, and criticism of the remedies for violations of § 43(a). See, e.g., Best, *supra* note 9; BeVier, *supra* note 9; Paul D. Frederickson, *Recovery for False Advertising Under the Revised Lanham Act: A Methodology for the Computation of Damages*, 29 AM. BUS. L.J. 585 (1992); Paul Heald, *Monetary Damages and Corrective Advertising: An Economic Analysis*, 55 U. CHI. L. REV. 629 (1988); Petty, *supra* note 9; Schechter, *supra* note 9; Singdahlsen, *supra* note 37; Garrett J. Waltzer, *Monetary Relief for False Advertising Claims Arising Under Section 43(a) of the Lanham Act*, 34 UCLA L. REV. 953 (1987).

Professor BeVier, for instance, criticizes the approach courts take to granting of injunctions in § 43(a) false advertising cases. BeVier, *supra* note 9, at 27-30. She contends that courts too readily presume likelihood of harm in false advertising cases, make it too easy for plaintiffs to prove likely injury when it is not presumed, pay insufficient attention to the requirement that the defendant's statement pertained to a material matter, and too lightly assume the existence of a causal connection between the alleged falsehood and the plaintiff's probable harm. *Id.* Professor Schechter, however, disagrees with Professor BeVier's view that courts often are too easy on plaintiffs in § 43(a) false advertising cases. See Schechter, *supra* note 9, at 63. As for dissatisfaction with the prevailing approaches to awards of monetary remedies under § 43(a), compare Frederickson, *supra*, at 602-04 (contending that new method of damage calculation is necessary because prevailing rules are too restrictive of plaintiffs' ability to recover) with Singdahlsen, *supra* note 37, at 364-65, 393-94 (some courts' apparent liberalization of damages rules amount to undesirable policy). See also Best, *supra* note 9; Heald, *supra* (proposing different measure of damages for false advertising cases). For additional discussion of what plaintiffs must prove in order to obtain injunctive relief and monetary recovery in § 43(a) cases, see *infra* notes 52-53.

52. To obtain an injunction in a § 43(a) false advertising case, the plaintiff must normally prove that the defendant's false statements about material product or service-related matters actually deceived, or had a tendency to deceive, a significant portion of the defendant's audience. E.g., *Skil Corp. v. Rockwell Int'l, Inc.*, 375 F. Supp. 777, 783 (N.D. Ill. 1974). The plaintiff must also prove that it was therefore likely to be damaged in some economic sense, such as loss of sales. *Id.* Proof of actual—rather than merely likely—economic harm is necessary only if the plaintiff seeks damages. *Id.* The notion of likelihood of harm comes from § 43(a)'s language, which, in both its present and former incarnations, speaks of a plaintiff "likely to be damaged." 15 U.S.C. § 1125(a) (1982), amended by 15 U.S.C. § 1125(a) (1988). When a plaintiff seeks an injunction, courts effectively presume the requisite likelihood of harm if the defendant's advertisement compared the plaintiff's and defendant's products or services. Petty, *supra* note 9, at 371; BeVier, *supra* note 9, at 28-29. When the advertisement was not of a comparative nature, the plaintiff proves likelihood of harm by

tary relief.<sup>53</sup>

establishing the existence of a competitive relationship between the plaintiff and the defendant. Petty, *supra* note 9, at 371; BeVier, *supra* note 9, at 28-29.

53. Plaintiffs in § 43(a) cases normally seek injunctive relief but have recently also more aggressively sought damages. See BeVier, *supra* note 9, at 1, 26. In order to recover damages, plaintiffs must prove actual harm of an economic nature. *Skil Corp.*, 375 F. Supp. at 783. Ordinarily, this rule requires the plaintiff to prove lost sales traceable to the defendant's falsehood. *E.g.*, *Coca-Cola Co. v. Tropicana Prods.*, 690 F.2d 312, 316-17 (2d Cir. 1982); *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 191 (2d Cir. 1980). Doing so sometimes presents a considerable obstacle for the plaintiff. See, e.g., *Can-Am Eng'g Co. v. Henderson Glass, Inc.*, 814 F.2d 253, 257-58 (6th Cir. 1987); *Don-sco, Inc. v. Casper Corp.*, 587 F.2d 602, 607 (3d Cir. 1978); see also Petty, *supra* note 9, at 372 (commenting on the difficulty of proving lost sales).

Some courts, however, allow greater flexibility regarding proof of damages. For instance, in *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1037 (9th Cir. 1986), the Ninth Circuit allowed the plaintiff to recover damages for the \$13.6 million expense U-Haul incurred for an advertising campaign designed to correct the erroneous statements made in its competitor's advertisements. U-Haul's total recovery amounted to \$40 million, which reflected the \$13.6 million just noted, an award of the defendant's attributable profits, and the court's discretionary doubling of the amounts proven. *Id.* at 1037, 1042. The court held the defendant Jartran, Inc.'s advertisements to be deliberate attempts at consumer deception. *Id.* at 1041, 1044. According to the court, this fact justified not only an award of profits to U-Haul but also a presumption that the advertisements actually deceived customers. *Id.* at 1041. This supposed deception evidently warranted U-Haul's attempts to correct the record by way of advertisements, the cost of which constituted recoverable items of damages. See *id.*

In *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 720 F. Supp. 194, 212-16 (D.D.C. 1989), *vacated and remanded as to remedies*, 913 F.2d 958 (D.C. Cir. 1990), the district court initially awarded ALPO \$10.4 million as a result of Ralston Purina's false advertisements indicating that its dog food would reduce the severity of canine hip dysplasia. The court arrived at this amount by doubling the \$5.2 million spent by Ralston Purina on the advertising campaign. *ALPO Petfoods*, 720 F. Supp. at 215. On appeal, the D.C. Circuit reversed and remanded as to the damages issue. *ALPO Petfoods*, 913 F.2d at 967-970. It held that the award to ALPO actually constituted an award of Ralston Purina's profits, which was improper without a finding that Ralston Purina had acted with willfulness or in bad faith. *Id.* at 967-68. The appellate court held, however, that recoverable damages could include:

profits lost by the plaintiff on sales actually diverted to the false advertiser, . . . profits lost by the plaintiff on sales made at prices reduced as a demonstrated result of the false advertising, . . . the costs of any completed advertising that actually and reasonably responds to the defendant's offending ads, . . . and . . . quantifiable harm to the plaintiff's good will, to the extent that completed corrective advertising has not repaired that harm.

*Id.* at 969 (citations omitted). This approach clearly does not restrict false advertising plaintiffs to recovery for proven lost sales.

On remand, the district court awarded ALPO \$12.1 million in damages. *ALPO Petfoods*, 778 F. Supp. 555, 566 (D.D.C. 1991), *aff'd in part, rev'd in part*, 997 F.2d 949 (D.C. Cir. 1993). None of that amount represented lost profits, because the court concluded that ALPO had not adequately demonstrated lost profits. *Id.* at 560-61. The \$12.1 million award included an allowance of ap-

Civil claims under the new section 43(a) arise from a variety of acts or statements. The statute's introductory language proscribes the use, in connection with goods, services, or containers for goods, of "any word, term, name, symbol, or device, or any combination thereof" that meets either of the tests set forth in subsections (1) and (2).<sup>54</sup> The introductory language also prohibits "false designation[s] of origin, false or misleading description[s] of fact, or false or misleading representation[s] of fact," if their use meets either subsection's test.<sup>55</sup> The old section 43(a) prohibited "false" designations, descriptions and representations, but neither mentioned "misleading" statements nor expressly required that statements be "of fact" in order to be actionable.<sup>56</sup> The new section 43(a)'s inclusion of these references should not result in significant changes, however. Common judicial interpretations of the previous version held that it also proscribed misleading statements,<sup>57</sup> and that offending

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proximately \$3.5 million for advertising and promotional expenses that ALPO appropriated as a result of Ralston Purina's false claims that its puppy food would help prevent canine hip dysplasia. *Id.* at 561-62. The court's award to ALPO also included approximately \$4.5 million for income lost by ALPO due to a five-year delay in expanding the market for its puppy food to the entire nation. *Id.* at 562-64. This delay resulted from the competition created by Ralston Purina's false advertising campaign. *Id.* The court added the \$3.5 million and \$4.5 million items, and then enhanced the total by 50% pursuant to its statutory authority. *Id.* at 564-66. Such an enhancement was warranted, according to the court, because the harm done to ALPO undoubtedly exceeded the damage that was readily quantifiable. *Id.* Finally, the court awarded approximately \$850,000—most of it attorneys' fees—to Ralston Purina because ALPO's advertisements had contained false statements regarding veterinarians' supposed preferences for the formula used in ALPO's puppy food. *Id.* at 561, 566-67.

The *ALPO* saga, however, lives on. The D.C. Circuit recently ordered the district court to reconsider ALPO's responsive advertising award. *ALPO Petfoods, Inc.*, 997 F.2d 949, 953 (D.C. Cir. 1993). Specifically, the district court must determine exactly what percentage of ALPO's advertising did in fact respond to the misleading advertisements, and then reduce the award accordingly. *Id.* Moreover, with respect to ALPO's lost earnings, the D.C. Circuit ordered the district court to "reduce the award for deferral of ALPO's future income stream." *Id.* at 954. Lastly, because of these adjustments, the court instructed the district court to recalculate the enhancement percentage and adjust the overall award for inflation. *Id.* at 955.

54. 15 U.S.C. § 1125(a) (1988). Logically, some statements would be covered by this language (uses of a "word, term, [or] name"), as would some acts (uses of a "symbol" or a "device"). The tests set forth in subsections (1) and (2) of the statute will be discussed at *infra* text accompanying notes 59-80.

55. *Id.* In order to come within the statute, the designations, descriptions, or representations must have occurred in connection with goods or services, or containers for goods. *Id.*

56. See *supra* text accompanying note 23 (providing former language of § 43(a)).

57. *E.g.*, *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 277 (2d Cir.



statements were not actionable unless they were "of fact."<sup>58</sup>

Under subsection (1) of the new section 43(a), an act or statement of a type specified in the introductory language violates the statute if it is "likely to cause confusion" regarding the "origin, sponsorship, or approval" of the defendant's "goods, services, or commercial activities," or regarding an "affiliation, connection, or association" between the defendant and "another person."<sup>59</sup> This test, when coupled with the statute's introductory language, logically sweeps in the trademark infringement, passing off and other unfair competition claims held actionable under the prior version.<sup>60</sup> Subsection (1)'s requirements<sup>61</sup> effectively restate the "likelihood of confusion" element required in actions for infringement of registered marks or marks protected by the common law.<sup>62</sup> Although the old section 43(a) did not

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1981); *American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978).

58. See, e.g., *Vidal Sassoon*, 661 F.2d at 277; *American Home Prods.*, 577 F.2d at 165. The "of fact" requirement reinforces the notion that an allegedly false or misleading statement is actionable only if it is demonstrably false despite reasonably appearing to be an accurate statement of fact. Cf. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (applying concept of demonstrable falsity to case involving attempt to impose liability on defamation and intentional infliction of emotional distress claims). Logically, the "of fact" requirement would seem to track defamation law's requirement that an actionable statement be demonstrably false (or, under § 43(a), misleading) rather than solely a statement of view or preference. For discussion of such issues in defamation law, see *infra* note 104.

59. 15 U.S.C. § 1125(a) (1988). In view of subsection (1)'s "likelihood of confusion" requirement, the sorts of false descriptions or representations allegedly constituting false advertising under the former version of § 43(a) are probably restricted to actionability under the new version's subsection (2). The latter subsection contains specific language referring to falsities having to do with the "nature, characteristics, [or] qualities" of "goods, services, or commercial activities." *Id.* For additional discussion of claims under new subsection (2), see *infra* text accompanying notes 65-100.

60. See *supra* text accompanying notes 24-25. For discussion of other sorts of claims actionable under the statute, see *supra* note 36.

61. Somewhat curiously, however, Congress placed the statute's reference to false or misleading statements of "geographic origin" of goods or services in subsection (2), which does not contain a likelihood of confusion requirement. 15 U.S.C. § 1125(a) (1988). The "geographic origin" reference fits more gracefully in subsection (1). See *id.*

62. See *id.*; see also *id.* § 1114(1) (setting forth standard for infringement of registered marks); 1 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 24:3(B)-(C) (2d ed. 1984) (discussing likelihood of confusion as to source, origin, affiliation, and the like). For additional discussion of the likelihood of confusion element in trademark infringement cases, see Langvardt, *supra* note 21, at 7-29.

contain such language,<sup>63</sup> courts consistently required a likelihood of confusion element when the plaintiff brought a section 43(a) action for trademark infringement or a similar claim.<sup>64</sup>

## 2. Subsection (2): Substantial Broadening of Allowable False Advertising Claims

The current subsection (2), while preserving the types of false advertising claims actionable under the superseded version, does not stop there. The substantially broadened range of actionable false advertising claims contemplated by subsection (2) constitutes the major difference between the two versions. Under subsection (2), a defendant's statement, when of a type specified by section 43(a)'s introductory language,<sup>65</sup> creates a statutory cause of action if it occurs "in commercial advertising or promotion" and "misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities."<sup>66</sup>

Insofar as it proscribes advertising-related<sup>67</sup> statements that misstate "the nature, characteristics, [or] qualities . . . of his or her . . . goods [or] services," subsection (2) does not significantly depart from prior law.<sup>68</sup> As previously noted, courts consistently construed old section 43(a) as reaching false advertising cases involving the defendant's false statements

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63. See *supra* text accompanying note 23 (providing former language of § 43(a)).

64. See Langvardt, *supra* note 21, at 26-27. The text's reference to claims similar to trademark infringement would include trade dress cases, see *Two Pesos, Inc. v. Taco Cabana, Inc.*, 112 S. Ct. 2753 (1992) (applying former § 43(a)), and right of publicity-oriented claims; see *Rogers v. Grimaldi*, 875 F.2d 994, 1000-02 (2d Cir. 1989); *Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360, 368 (S.D.N.Y. 1988).

65. See *supra* text accompanying note 46 (setting forth current language of § 43(a)).

66. 15 U.S.C. § 1125(a) (1988).

67. Even though the old § 43(a) did not contain the "commercial advertising or promotion" language of the current version, *id.*, the former version's references to "goods or services," "containers," and use in "commerce," see *supra* text accompanying note 23, effectively created a promotional setting limitation for false advertising cases; see, e.g., *Coca-Cola Co. v. Tropicana Prods.*, 690 F.2d 312 (2d Cir. 1982); *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272 (2d Cir. 1981); *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034 (9th Cir. 1986).

68. See 15 U.S.C. § 1125(a) (1988). The statute's present version also covers allegedly false or misleading representations about "commercial activities." *Id.* The major significance of this language is that it may sweep in certain defamation-like claims where the defendant's statement relate to the plaintiff's commercial activities. See *infra* text accompanying notes 71-80.

about its own products or services.<sup>69</sup> Moreover, even though the superseded version did not contain the present references to "nature, characteristics, [or] qualities" of goods or services, the false advertising cases brought under the former version routinely involved such matters.<sup>70</sup>

Subsection (2) departs dramatically from prior law, however, by authorizing a section 43(a) claim when the defendant falsely or misleadingly represented the *plaintiff's* goods, services, or business activities. The plaintiff obviously would be "another person" within subsection (2), which encompasses statements about "another person's goods, services, or commercial activities."<sup>71</sup> The TLRA's legislative history reveals that a major purpose underlying the amended version of section 43(a) was legislatively to overrule cases holding that section 43(a) applied to false advertising claims only when the defendant's falsehoods pertained to the defendant's products or services.<sup>72</sup> Envisioning the new section 43(a) as recognizing a cause of action for "commercial defamation,"<sup>73</sup> Congress plainly set out to

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69. See *supra* text accompanying note 42.

70. See 15 U.S.C. § 1125(a) (1982), amended by 15 U.S.C. § 1125(a) (1988). Many cases under old § 43(a) dealt with false representation about the nature, quality, or characteristics of a product or services. See, e.g., *Coca-Cola*, 690 F.2d 312; *Vidal Sassoon*, 661 F.2d 272; *U-Haul Int'l*, 793 F.2d 1034.

71. 15 U.S.C. § 1125(a) (1988). For purposes of the statute's reference to "another person's goods, services, or commercial activities," one would expect that normally the plaintiff and "another person" would be one and the same. That has been the experience so far in cases brought under the new § 43(a). See, e.g., *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544 (2d Cir. 1991) (plaintiff was party whose goods, services, or commercial activities were subject of defendant's statements); *Nat'l Artists Management Co. v. Weaving*, 769 F. Supp. 1224 (S.D.N.Y. 1991) (same); *Energy Four, Inc. v. Dornier Med. Sys.*, 765 F. Supp. 724 (N.D. Ga. 1991) (same); *Janda v. Riley-Meggs Indus.*, 764 F. Supp. 1223 (E.D. Mich. 1991) (same); *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259 (S.D.N.Y. 1990) (same). One may envision the bringing of a § 43(a) claim in which A (a competitor of B and C in the sale of a given product) sues B over B's allegedly false or misleading statements about C's product. It should be noted, however, that in such a case, A could have considerable difficulty meeting the "is or is likely to be damaged" test for whether standing to sue exists. See 15 U.S.C. § 1125(a) (1988); *supra* note 52. An actual case consistent with this hypothetical has not been reported.

72. S. Rep. No. 515, 100th Cong., 2d Sess. 40 (1988), reprinted in 1988 U.S.C.C.A.N. 5577, 5603.

73. See 134 CONG. REC. H10430 (daily ed. Oct. 19, 1988) (remarks of Rep. Kastenmeier). Even though the "commercial defamation" term used by Rep. Kastenmeier seems simple enough at first glance, it is not entirely clear whether it truly contemplates *defamation* claims, or only *injurious falsehood* (sometimes referred to as "trade libel") claims. Moreover, even if Congress contemplated only injurious falsehood claims arising from a commercial setting, § 43(a)'s new language is virtually certain to precipitate the filing of defamation

make the defendant's advertising-related falsehoods actionable regardless of whether they related to the defendant's goods, services, or business, or to the plaintiff's.<sup>74</sup>

The major new effect of subsection (2) is to make section 43(a) an alternative basis for certain claims that plaintiffs could formerly only bring on defamation or injurious falsehood grounds. As will be seen, the defendant's false statement about the plaintiff's "goods" or "services"—now covered by section 43(a) in some instances—previously were actionable, if at all, only on injurious falsehood grounds.<sup>75</sup> False statements about the plaintiff's "commercial activities" formerly would have given the plaintiff some freedom to choose between defamation and injurious falsehood,<sup>76</sup> but usually only those two claims.<sup>77</sup> Now, however, such a statement may fall under section 43(a) as well, providing the plaintiff with a third option in appropriate circumstances.

It is important to note that the new section 43(a) does not reach all cases of defamation or injurious falsehood. Subsection (2) specifies that the statute applies to statements made in "commercial advertising or promotion."<sup>78</sup> Not every defamation or

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claims under § 43(a) as well. For additional discussion of the effect of the new statutory language, see *infra* text accompanying notes 75-100. Background discussion of the elements of defamation and injurious falsehood claims appears *infra* text accompanying notes 101-145.

74. S. REP. NO. 515, 100th Cong., 2d Sess. 40 (1988), reprinted in 1988 U.S.C.C.A.N. 5577, 5603.

75. See *infra* text accompanying notes 116-124, 134-140. A defamation claim would not normally arise in such circumstances. A defamation claim would be appropriate only if the defendant's statement tended to harm the plaintiff's overall reputation, as opposed merely to the plaintiff's economic interests. See *infra* text accompanying notes 125-144.

76. The plaintiff's freedom to choose between the two claims would depend on how close to the line the reputation versus economic interests question would be in the case at issue. See *infra* text accompanying notes 125-144.

77. In appropriate instances, a claim such as interference with contractual relations or prospective advantage could also apply. See, e.g., *Blatty v. New York Times Co.*, 728 P.2d 1177, 1178 (Cal. 1986), cert. denied, 485 U.S. 934 (1988). Where the defendant's allegedly improper interference consisted of false representations, however, the court will effectively treat the interference claim as an injurious falsehood claim. See *id.*

78. 15 U.S.C. § 1125(a) (1988). The meaning of "commercial advertising" is relatively clear. The term logically covers the standard fare of printed fliers, newspaper ads, television or radio commercials, and other uses of written or verbal statements (including visual representations) whose underlying objective is the sale of the advertiser's goods or services or the advancement of the advertiser's business interests. See 134 CONG. REC. H10420-21 (daily ed. Oct. 19, 1988) (remarks of Rep. Kastenmeier); *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130, 141-42 (S.D.N.Y. 1990); Paul A. Batista, *Lanham Act*

*Revision May Spur Commercial Defamation Claims*, NAT'L L.J., Sept. 30, 1991, at 42, 43-44; James B. Kobak Jr. & Mary K. Fleck, *Commercial Defamation Claim Added to Revised Lanham Act*, NAT'L L.J., Oct. 30, 1989, at 33. For purposes of First Amendment analysis in the direct government regulation context, the Supreme Court has defined "commercial speech" as speech that does "no more than propose a commercial transaction." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (citations omitted). Discussion of the "direct government regulation" setting appears *infra* at text accompanying notes 408-420. The Supreme Court's commercial speech decisions have consistently involved commercial advertising; the same sort of standard fare referred to above. See *infra* text accompanying notes 303-316. The legislative history of the new § 43(a) indicates that Congress designed the statute to apply to commercial expression of the kind addressed in the Supreme Court's commercial speech decisions but not to political expression or its noncommercial equivalents. See 134 CONG. REC. H10420-21 (daily ed. Oct. 19, 1988) (remarks of Rep. Kastenmeier); 134 CONG. REC. S16973 (daily ed. Oct. 20, 1988) (remarks of Sen. DeConcini). The "commercial advertising" limitation of § 43(a) may sometimes generate close questions. For example, when the defendant's statements seem partly commercially motivated and partly noncommercial in nature, application of the "commercial advertising" limitation may be unclear. See Batista, *supra*, at 44-45. Cf. *Bolger*, 463 U.S. at 68 (determining that even though advertising fliers for contraceptives sold by advertiser contained some noncommercial expression on social issues, advertisements were predominantly motivated by commercial concerns and were therefore classifiable as commercial speech for purposes of First Amendment analysis).

The meaning of "promotion," as used in the new § 43(a), is somewhat less clear. It must be applied in light of the commercial thrust of the statute. Given the congressional concern about restricting the statute to instances of commercially motivated falsehoods, see 134 CONG. REC. H10420-21 (daily ed. Oct. 19, 1988) (remarks of Rep. Kastenmeier), and the congressional desire to create a cause of action for "commercial defamation," *id.* at 10430, it seems reasonable to conclude that "promotion" contemplates commercially motivated statements made outside the context of conventional commercial advertising. For instance, if a commercial party, while making in-person or telephoned sales calls on customers, makes false statements about a competitor's products, services, or commercial activities, the statements should be seen as statements of "promotion." In such a setting, the statements are commercially motivated, just as conventional advertisements would be, even though the statements were not printed in a flier or newspaper ad and were not aired in a television or radio commercial. See *National Artists Management Co. v. Weaving*, 769 F. Supp. 1224, 1232-36 (S.D.N.Y. 1991) (holding that alleged statements by defendants about plaintiff booking agency with which they were affiliated were sufficiently commercial or promotional for purposes of § 43(a) when made in context of calls to solicit customers for new booking agency they intended to open, even though calls were also partly informational or social in nature). The "promotion" classification could also be broad enough to sweep in other settings, such as press conferences or television interviews in which a commercial party states falsehoods about a competitor's business. The key seems to be whether the statements may credibly be regarded as primarily prompted by commercial concerns, or whether there are sufficient noncommercial motivations (such as informing the public of a safety problem) present to make § 43(a) inapplicable. See *id.* at 1232-36. See also Batista, *supra*, at 44 (asserting that presence of meaningful noncommercial motivations may remove statements from scope of § 43(a), notwithstanding simultaneous presence of arguable commercial moti-

injurious falsehood case—not even every such case involving statements about the plaintiff's "goods, services, or commercial activities"—arises from "commercial advertising or promotion."<sup>79</sup> Defamation and injurious falsehood cases not arising in this setting continue to be actionable only under the common law, and not under section 43(a).<sup>80</sup>

When the section 43(a) route is available, however, the commercial plaintiff will likely find it more attractive than the defamation or injurious falsehood avenues. The main reason for section 43(a)'s greater attractiveness to plaintiffs is that defamation and injurious falsehood contain strict elements, proof requirements and limitations that section 43(a) does not impose.<sup>81</sup>

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ations). *Cf. infra* note 79 (noting Sen. DeConcini's statements that purport to ascribe a broader scope to § 43(a) than the statutory language and constitutional considerations would credibly seem to allow).

79. For example, if *Consumer Reports* magazine printed an article that critically evaluated the plaintiff's product but allegedly made false statements about the product, the plaintiff would not have a § 43(a) claim against the magazine or the reporter because neither could be credibly regarded as having engaged in commercial advertising or promotion. See 134 CONG. REC. H10420-21 (daily ed. Oct. 19, 1988) (remarks of Rep. Kastenmeier) (specifically noting example set forth above); *National Artists Management*, 769 F. Supp. at 1232; see also *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130, 141-42 (S.D.N.Y. 1990) (noting that § 43(a) was neither meant to be used as a means of stifling criticism, nor appropriate for use against distributor of noncommercial pamphlet that criticized government funding of arts projects and allegedly made false representations about plaintiff's works of art).

Taking a broader view of § 43(a)'s scope, Sen. DeConcini asserted during the Senate's deliberations that even though the statute could not reach political speech, it would apply "any time there is a misrepresentation relating to goods or services." 134 CONG. REC. S16973 (daily ed. Oct. 20, 1988). He also asserted that even nonprofit organizations' representations relating to goods or services would be actionable under § 43(a). *Id.* The senator's view, if taken literally, would allow a § 43(a) claim against *Consumer Reports* in the above example. Such a view is unsound for two primary reasons. First, it is textually insupportable, given the statute's "commercial advertising and promotion" limitation. 15 U.S.C. § 1125(a) (1988). Second, magazines and similar periodicals are customarily classified as primarily noncommercial and therefore entitled to full First Amendment protection. See Langvardt, *supra* note 21, at 49-50, 53-54 & nn.257-60. For additional discussion of full First Amendment protection for noncommercial expression, see *infra* text accompanying notes 293-300. See also *National Artists Management*, 769 F. Supp. at 1232-33 (rejecting Sen. DeConcini's apparent view of statute's scope as overly broad).

80. Notwithstanding expressions of apparent sentiments in favor of a broader scope for § 43(a), the statutory language and constitutional considerations foreclose any other conclusion. See *supra* note 79; see also *Janda v. Riley-Meggs Indus.*, 764 F. Supp. 1223, 1228 (E.D. Mich. 1991) (erroneously asserting that § 43(a) "creates a cause of action for any false description or representation of a product").

81. The proof of fault requirement is the most notable of the stern defamation and injurious falsehood elements. For discussion of the common law and

By restyling a suitable "defamation" or "injurious falsehood" claim as a section 43(a) claim, the plaintiff might evade the "troublesome," recovery-impeding aspects of defamation and injurious falsehood. To the extent that this evasion enjoys Congressional blessing,<sup>82</sup> it would seem, at first glance, to merit little concern. Congress, after all, sought to authorize a "commercial defamation" claim when it revamped section 43(a).<sup>83</sup> If Congress chose to give commercial plaintiffs a basis for claiming federal question jurisdiction in such cases,<sup>84</sup> it merely acted on a matter committed to its sound discretion—or so the argument goes.

### C. SECTION 43(a)'S "COMMERCIAL DEFAMATION" CLAIM: CONSTITUTIONAL QUESTIONS

More careful attention to the interests at stake, however, reveals the fallacy of the argument set forth in the preceding paragraph. Most of the elements, requirements, and limitations that plaintiffs find troublesome in defamation law owe their existence to the Constitution. The Supreme Court has engrafted

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constitutional components of the two torts, see *infra* text accompanying notes 102-124, 154-287.

82. The enactment of § 43(a) without the inclusion of a fault requirement similar to that found in defamation and injurious falsehood supplies this "Congressional blessing." See 15 U.S.C. § 1125(a) (1988); *infra* text accompanying notes 85-100. A narrow provision in the TLRA applies to media defendants, such as newspapers and magazines, whose sole involvement with false or misleading advertising is the publication of such an advertisement for another party. In such a case, the statute only subjects an "innocent" media defendant (presumably one lacking knowledge of the false or misleading content of the advertisement) to an injunction; damages are allowed only if the media defendant knew of the falsity. See 15 U.S.C. § 1114(2) (1988). Because the usual § 43(a) defendant would be the advertiser, not the media defendant in whose publication the advertisement appeared, the provision is of limited applicability. This "innocent violation" defense is thus a far cry from the fault requirements that have sweeping applicability in defamation and injurious falsehood cases. See *infra* text accompanying notes 154-207.

83. See 134 CONG. REC. H10430 (daily ed. Oct. 19, 1988) (remarks of Rep. Kastenmeier).

84. Federal question jurisdiction applies when the plaintiff's claim arises under the U.S. Constitution or a federal statute or treaty and allows a plaintiff to properly bring suit in federal court. 28 U.S.C. § 1331 (1988). A specific jurisdictional statute gives the federal courts jurisdiction over suits arising under the federal patent, copyright, and trademark statutes and over claims of unfair competition when joined with claims for violations of the patent, copyright, or trademark statutes. 28 U.S.C. § 1338. Absent the federal question jurisdiction contemplated by these statutes and § 43(a), a plaintiff would have to raise its "defamation" and "injurious falsehood" claims in state court unless the plaintiff met the requirements for diversity jurisdiction. See *id.* § 1332.

First Amendment-based rules upon the common law of defamation in order to protect defendants' interests in freedom of expression. Moreover, in the injurious falsehood context, defendants' First Amendment rights have provided justification for certain legal features that make such cases difficult for plaintiffs to win.<sup>85</sup>

The new section 43(a) does not by its terms impose defamation law's most notable constitutional feature: the requirement that the plaintiff prove fault on the defendant's part.<sup>86</sup> In amending the statute to provide the desired "commercial defamation" claim,<sup>87</sup> Congress preserved the strict liability approach of the old section 43(a).<sup>88</sup> In other words, section 43(a)'s new language would allow the plaintiff to establish liability without proving that the defendant knew of the contested statement's falsity, displayed reckless disregard for the truth, or failed to use reasonable care to ascertain the truth.<sup>89</sup> As later discussion will reveal, at least one such fault element almost certainly would be required in a defamation action, and probably would be necessary in an injurious falsehood case.<sup>90</sup>

A fundamental issue thus arises: whether plaintiffs who would be subject to First Amendment-mandated proof requirements in a suit brought on defamation or injurious falsehood grounds, may evade those same strictures by bringing the same claim under section 43(a). When viewed in this manner, the issue must be answered in the negative<sup>91</sup> even when the at-

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85. For a detailed discussion of the First Amendment aspects of defamation and injurious falsehood, see *infra* text accompanying notes 154-207.

86. The defamation fault requirement varies in intensity depending upon the plaintiff's status. The requirement focuses on what the defendant knew or should have known about the falsity of the statement giving rise to the suit, as well as on the defendant's efforts to determine the statement's truth or falsity. See *infra* text accompanying notes 154-277.

87. See 134 CONG. REC. H10430 (daily ed. Oct. 19, 1988) (remarks of Rep. Kastenmeier).

88. See 15 U.S.C. § 1125(a) (1988) (absence of language requiring proof of fault); see also BeVier, *supra* note 9, at 30-31 (noting strict liability approaches of former and present versions of § 43(a)); Gunn, *supra* note 37, at 714, 721 (same); Singdahlsen, *supra* note 37, at 339, 341-42 (same).

89. No such language appears in § 43(a). See 15 U.S.C. § 1125(a) (1988). This seems to mean that even a defendant with a good-faith belief in its statement's truth (based on reasonable evidence) could face liability under the statute if the plaintiff proved the statement was actually false. Whether the First Amendment allows such a result, of course, presents another question. See *infra* text accompanying notes 163-167, 201-204.

90. See *infra* text accompanying notes 168-173, 177-178, 201-207, 282-289.

91. A negative answer does not automatically translate into a statement that courts should impose the identical First Amendment-based requirements



tempted evasion apparently conforms with the language Congress used—or did not use.<sup>92</sup> Federal statutes are no less subject to the Constitution than is the common law.

To its credit, Congress did show some concern about First Amendment values when enacting the TLRA. The legislative history reveals that Congress deleted certain proposed provisions based at least in part on the First Amendment.<sup>93</sup> In addition, the “commercial advertising or promotion” limitation in subsection (2) resulted from a desire to safeguard First Amendment interests. One of the legislation’s chief sponsors stated that Congress designed the quoted limitation to restrict subsection (2)’s applicability to instances of false or misleading “commercial speech,” as defined in Supreme Court decisions.<sup>94</sup> Those decisions, discussed below,<sup>95</sup> indicate that although commercial speech receives an intermediate level of First Amendment protection, misleading commercial speech merits no protection. As will be seen, however, the Supreme Court’s commercial speech cases arose in the context of direct government restrictions on speech,<sup>96</sup> rather than in the defamation-like context of suits for damages. In the latter setting, the Court has consistently found it necessary to insulate some false statements from liability in order to protect “speech that matters.”<sup>97</sup> The importance of recognizing commercial expression as “speech that matters” com-

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of defamation and injurious falsehood in § 43(a) cases. As phrased, the issue speaks of “evad[ing] the First Amendment’s strictures” by suing under § 43(a). These “strictures,” as applied to § 43(a) cases, may differ from those imposed in defamation and injurious falsehood actions. One may therefore answer the question with a “no” and still take the position, as this article does later, that the proper First Amendment-based requirements for § 43(a) cases do not correspond exactly to those of defamation and injurious falsehood. See *infra* text accompanying notes 399-407, 421-461.

92. Even though it sought to create a “commercial defamation” cause of action, see 134 CONG. REC. H10420 (daily ed. Oct. 19, 1988) (remarks of Rep. Kastenmeier), Congress did not include a fault requirement in the language of § 43(a), see 15 U.S.C. § 1125(a) (1988).

93. Prior to the TLRA’s passage, the drafters deleted proposals to allow causes of action for trademark tarnishment and trademark disparagement, at least in part due to First Amendment concerns. S. REP. NO. 515, 100th Cong., 2d Sess. 40 (1988), reprinted in 1988 U.S.C.C.A.N. 5579, 5604; Hearing on H.R. 4156, Subcomm. on Courts, Civil Liberties, and Admin. of Justice, Comm. on the Judiciary, H.R., 100th Cong., 2d Sess. 79 (Sept. 8, 1988).

94. See 134 CONG. REC. H10420-21 (daily ed. Oct. 19, 1988) (remarks of Rep. Kastenmeier); 134 CONG. REC. S16973 (daily ed. Oct. 20, 1988) (remarks of Sen. DeConcini). But see *supra* notes 78-79 (discussing difficulty of determining statute’s scope, notwithstanding supposed “commercial speech” limitation).

95. See *infra* text accompanying notes 301-345.

96. See *infra* text accompanying notes 408-413.

97. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). For discussion of

pels the conclusion that section 43(a)(2) creates significant First Amendment problems—notwithstanding Congress's seemingly well-intentioned attempt to head off such problems by limiting the statute to the commercial setting.

Thus, Congress erred when it enacted the "commercial defamation" component of section 43(a), by not adequately accounting for the First Amendment interests at stake for speakers and their audience.<sup>98</sup> Courts should not repeat the mistake when they decide "defamation" and "injurious falsehood" cases brought under section 43(a). Unfortunately, however, some courts have made precisely this error.<sup>99</sup> Freedom of expression-based requirements must be read into subsection (2) to harmonize it with the First Amendment. In order to properly formulate those requirements,<sup>100</sup> it is necessary to examine defamation and injurious falsehood law, their constitutional components, and other relevant aspects of First Amendment jurisprudence.

### III. DEFAMATION AND INJURIOUS FALSEHOOD: THE COMMON LAW FRAMEWORK

Defamation and injurious falsehood claims serve as tort law's traditional avenues of recovery for the consequences of another's false statements. Their common law elements and conceptual underpinnings reflect both similarities and differences.

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the Supreme Court's major defamation decisions, see *infra* text accompanying notes 154-276.

98. Consumers' rights to receive commercial information provide much of the foundation for the notion that courts should grant commercial speakers some degree of First Amendment protection. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-64 (1976). See *infra* text accompanying notes 308-314.

99. See, e.g., *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544 (2d Cir. 1991); *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958 (D.C. Cir. 1990); *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914 (3d Cir.), *cert. denied*, 111 S. Ct. 58 (1990); *American Express Travel Related Services Co. v. Mastercard Int'l, Inc.*, 776 F. Supp. 787 (S.D.N.Y. 1991); *Nat'l Artists Management Co. v. Weaving*, 769 F. Supp. 1224 (S.D.N.Y. 1991); *Energy Four, Inc. v. Dornier Med. Sys.*, 765 F. Supp. 724 (N.D. Ga. 1991); *Janda v. Riley-Meggs Indus.*, 764 F. Supp. 1223 (E.D. Mich. 1991); *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 744 F. Supp. 1259 (S.D.N.Y. 1990). In most of the cases just cited, the court avoided or ignored the First Amendment implications of § 43(a). In *U.S. Healthcare* and *Energy Four*, the courts touched upon First Amendment questions but dealt with them unsatisfactorily. For discussion of *U.S. Healthcare* and *Energy Four*, see *infra* text accompanying notes 350-394.

100. For the content and form of these requirements see *infra* text accompanying notes 421-461.

## A. THE ELEMENTS OF DEFAMATION

The common law defines defamation as the publication of a false and defamatory statement about the plaintiff.<sup>101</sup> Defamatory statements, by definition, tend to harm the plaintiff's reputation.<sup>102</sup> Defamation's focus on reputation receives greater attention below, because it is the major concept separating defamation from injurious falsehood.<sup>103</sup> For present purposes, it is worth emphasizing that even though some true statements may tend to harm reputation (and hence are defamatory), only those statements which are both false<sup>104</sup> and defamatory give rise to a valid defamation claim.<sup>105</sup>

The publication element of defamation requires that the false statement have been communicated to at least one person

101. RESTATEMENT (SECOND) OF TORTS § 558 (1977). Defamation comes in two varieties: libel (defamation by written or printed word) and slander (defamation by oral statement). *Id.* § 568. Libel and slander receive essentially identical common law treatment—except for somewhat different damages rules—and are subject to the same First Amendment requirements. *See id.* §§ 558, 568 & cmt. c, 569-70, 575. This article will generally use the broader term "defamation."

102. *Id.* § 559. The RESTATEMENT labels a statement as defamatory "if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.*

103. *See infra* text accompanying notes 125-133.

104. RESTATEMENT (SECOND) OF TORTS § 558 (1977). In order for a statement to be actionable, it must be one of "fact." This means that the statement must be demonstrably false despite reasonably appearing to be an accurate statement of fact. *Cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (applying concept of demonstrable falsity to case involving attempt to impose liability on defamation and intentional infliction of emotional distress grounds). Pure opinions are not statements of "fact" because they simply express a view or preference that does not contain demonstrably true or false components. The lack of demonstrable falsity in pure opinions renders them generally non-actionable under defamation law. The same cannot be said, however, of statements cast in the form of opinions which contain express or implied components that are arguably factual and therefore capable of being shown to be true or false. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19, 21 (1990); RESTATEMENT (SECOND) OF TORTS § 566 & cmts. b, c. If a statement is not put forth as a fact and reasonable hearers or readers would not interpret it as stating an actual fact about the plaintiff, the statement is non-actionable even though at some level it might literally be false. *See Hustler Magazine*, 485 U.S. at 56 (allegations of certain actions not actually taken by plaintiff were non-actionable when put forth in context of what public would perceive as attempt at humor rather than attempt to state actual facts about plaintiff).

105. The requirement that a statement be both defamatory and false in order to be actionable also has First Amendment underpinnings. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-41 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 271, 279 (1964).

other than the immediate parties.<sup>106</sup> The requirement that the statement be about the plaintiff—the “of and concerning” requirement<sup>107</sup>—is satisfied if the defendant’s statement names, refers to, identifies, or describes the plaintiff in such a way that a reasonable reader or hearer would regard the statement as being about the plaintiff.<sup>108</sup>

Two other common law aspects of defamation are noteworthy, not because of what they require plaintiffs to prove but, in contrast, because of what they *do not* require.<sup>109</sup> First, the common law takes a strict liability approach that does not require the plaintiff to prove the defendant’s fault.<sup>110</sup> Even a defendant

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106. RESTATEMENT (SECOND) OF TORTS § 577 (1977). Usually, it must be the defendant or the defendant’s agent, and not the plaintiff, who has made the communication to the third party or parties in order to satisfy the publication element. *Id.* & cmts. f, k.

107. *See id.* § 564 & cmts. a, b, d, g.

108. *Id.* This means that a statement about a group (other than perhaps a very small group) generally cannot serve as a valid basis for a defamation claim by an individual member of the group. *See id.* It should also be noted that the Supreme Court appears to have given the “of and concerning” element constitutional status. *See New York Times*, 376 U.S. at 288-92 (1964).

109. In addition to the two aspects discussed in the text, common law defamation contained a third feature that relieved the plaintiff of proving a fundamental element of a defamation claim: it did not require the defamation plaintiff to prove the falsity of the defendant’s statement. Instead, the common law recognized a presumption of falsity, and expected the defendant to carry the burden of proving the statement’s truth if she hoped to escape liability on that basis. KEETON et al., *supra* note 2, § 116, at 839. The presumption of falsity has been almost entirely, if not entirely, overridden by defamation’s constitutional components. *See infra* notes 174, 206.

110. KEETON et al., *supra* note 2, § 113, at 804. As used in the text, “fault” contemplates notions such as knowledge of falsity, lack of reasonable attempts to ascertain the truth, and the like— notions that went unaccounted for in the common law’s strict liability approach. The question of fault, however, lies at the heart of defamation’s constitutionalization. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346-48 (1974) (noting the First Amendment problems created by common law’s strict liability approach). For discussion of the constitutional aspects of defamation law, see *infra* text accompanying notes 154-207. The common law’s strict liability approach is consistent with § 43(a)’s literal content, which does not require fault. *See supra* text accompanying notes 81-100.

Although the common law did not require proof of fault as an element of the plaintiff’s case-in-chief, it historically recognized (and continues to recognize) the existence of absolute and conditional privilege defenses in certain settings involving the communication of false and defamatory statements. For discussion of such privileges, the contexts in which they arise and the ability of plaintiffs to defeat a conditional privilege defense by proving such facts as the defendant’s knowledge of the falsity of his statement, see KEETON et al., *supra* note 2, § 115; Langvardt, *supra* note 3, at 911-13. The common law’s limited use of fault notions to defeat sometimes-applicable conditional privilege defenses meant that such notions arose only in a limited range and number of

who possesses a well-founded belief in a statement's truth faces liability if the statement is actually proved false.

Second, the common law does not require the plaintiff to prove reputational injury in most defamation cases. Instead, the common law generally allows presumed damages if the defendant's false statement appears to be the sort that tends to harm reputation.<sup>111</sup> Presumed damages are ostensibly compensatory in nature because they are awarded for a supposed reputational injury.<sup>112</sup> An "oddity of tort law,"<sup>113</sup> they allow compensation for harm whose very existence and extent need not be demonstrated. Although concerns about potentially undesirable effects of presumed damages have caused the Supreme Court to constitutionally limit their applicability,<sup>114</sup> presumed damages remain available in some instances.<sup>115</sup>

## B. THE ELEMENTS OF INJURIOUS FALSEHOOD

Some of the common law elements of injurious falsehood resemble or mirror those of defamation. Injurious falsehood is the publication, with fault, of a false statement about the plaintiff's business, business practices, product, service, property, or property rights, which results in harm, measured by proven special damages, to the plaintiff's economic interest.<sup>116</sup> The falsity and

cases. Such an approach fell far short of what the constitutional aspects of defamation law contemplate: proof of fault as an element of the plaintiff's case-in-chief in nearly all cases. See *infra* text accompanying notes 154-276.

111. RESTATEMENT (SECOND) OF TORTS §§ 569, 570, 575, 622 cmt. a (1977). The common law allowed presumed damages in all cases of libel but not in slander cases unless they involved slander per se. *Id.* §§ 569, 570, 575. Slander cases not involving slander per se required proof of special damages. *Id.* § 575. One of the types of statements considered slander per se was the falsehood that would tend to harm the plaintiff in his, her, or its business, occupation, or profession. See *id.* §§ 570, 574. Many of the commercial falsehoods giving rise to the types of cases dealt with in this article would therefore qualify as libel or as slander per se. Thus, if the common law of defamation controlled, presumed damages would be available. Of course, even when the law allows presumed damages, the plaintiff may attempt to prove actual damages in an effort to augment recovery. See *id.* § 623 cmt. a.

112. See *id.* § 621 cmt. a.

113. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). *Gertz* placed First Amendment-based limitations on the common law's allowance of presumed and punitive damages, but did not eliminate such damages. See *id.* at 349-50; *infra* text accompanying notes 201-212.

114. See, e.g., *Gertz*, 418 U.S. at 349-50.

115. For discussion of the decisions in which First Amendment considerations caused the Supreme Court to limit, though not eliminate, the availability of presumed and punitive damages, see *infra* text accompanying notes 159-276.

116. *KEERON et al.*, *supra* note 2, § 128, at 967. Courts sometimes refer to certain variations of injurious falsehood claims as "slander of title," "product

publication requirements comprise the major elements common to defamation and injurious falsehood.<sup>117</sup>

Injurious falsehood's common law elements differ markedly, however, from those of defamation in other respects. Injurious falsehood plaintiffs must prove the defendant's fault, although the applicable standard varies by jurisdiction.<sup>118</sup> Some states require proof that the defendant made the statement with knowledge of its falsity or with reckless disregard for the truth,<sup>119</sup> others that the defendant possessed ill will or malice toward the plaintiff.<sup>120</sup> Still others require a showing that the defendant intended to inflict economic harm on the plaintiff.<sup>121</sup>

In addition, plaintiffs in injurious falsehood cases must prove special damages in the form of economic loss stemming from the false statements at issue. Presumed damages are not available.<sup>122</sup> Moreover, the special damages requirement exists as an essential element of the plaintiff's case, rather than as a prerequisite to recovery beyond nominal damages. If the plaintiff cannot demonstrate special damages,<sup>123</sup> the court will grant

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disparagement," or "trade libel" claims. *See id.* at 962-63. For additional background on injurious falsehood claims and the settings in which they may arise, see Langvardt, *supra* note 3, at 913-23.

117. *See* RESTATEMENT (SECOND) OF TORTS §§ 558, 623A (1977). Injurious falsehood's falsity element includes the "of fact" requirement found in defamation law, and reflects a similar approach to the treatment of statements of opinion. *See id.* §§ 623A cmt. e, 634 & cmt. c; *supra* note 104. Injurious falsehood law tends to allow privilege defenses on grounds similar to those found in defamation law. *See id.* § 646A; *supra* note 110; Langvardt, *supra* note 3, at 915-16.

118. *See* KEETON et al., *supra* note 2, § 128, at 969. For additional discussion of the variations of the fault requirement in injurious falsehood cases, see Langvardt, *supra* note 3, at 916-18.

119. *See, e.g.,* Simmons Ford, Inc. v. Consumers Union of United States, Inc., 516 F. Supp. 742, 744 (S.D.N.Y. 1981); General Prods. Co. v. Meredith Corp., 526 F. Supp. 546, 553 (E.D. Va. 1981). The fault standard is the same as the actual malice requirement established in the constitutional law of defamation, *see infra* text accompanying notes 168-173, 177-178, but it is applied here as a common law matter. The *Restatement* calls for the actual malice requirement in all injurious falsehood cases, but does so on First Amendment grounds. RESTATEMENT (SECOND) OF TORTS § 623A & cmt. c (1977).

120. *See, e.g.,* Systems Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1140 (3d Cir. 1977). Such a fault requirement is sometimes known as common law malice. *See* Rodney Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 65 n.308 (1983).

121. *See* RESTATEMENT (SECOND) OF TORTS § 623A caveats (1), (2) (1977). Still other states require varying combinations of the fault requirements set forth at *supra* text accompanying notes 119-121, or allow choices between or among them. *See, e.g.,* Annbar Assocs. v. American Express Co., 565 S.W.2d 701 (Mo. App. 1978).

122. KEETON et al., *supra* note 2, § 128, at 967, 970-71.

123. The necessary special damages consist of economic loss directly tracea-

neither nominal damages nor any other relief.<sup>124</sup>

### C. THE REPUTATION-ECONOMIC INTEREST DISTINCTION

#### 1. Defamation's Focus on Protection of Reputation

The conceptual difference between defamation and injurious falsehood lies in the respective interest each safeguards. Defamation law protects the plaintiff's reputational interests. For purposes of defamation actions, an individual's reputation encompasses notions of honesty, ethics, morality and professional competence.<sup>125</sup>

Courts also regard corporations and similar entities as permissible defamation plaintiffs.<sup>126</sup> Their reputational interests likewise depend upon notions of integrity and professional competence.<sup>127</sup> Solvency also comprises a fundamental part of the corporate reputational interest, due to the business-oriented reputation of corporations and other profit driven entities.<sup>128</sup> Corporate and human plaintiffs do not, however, share all of the elements of potential recovery in a defamation case. Their obvious differences require that only human plaintiffs may recover damages for emotional distress, humiliation and the like, resulting from the defendant's false statement.<sup>129</sup>

ble to the defendant's false statement. RESTATEMENT (SECOND) OF TORTS §§ 623A, 633 (1977). Injurious falsehood's traditional approach to proving special damages required the plaintiff to identify specific lost customers and the like. In recent years, however, courts have become increasingly flexible regarding acceptable means of proof, allowing circumstantial proof in appropriate instances. *See, e.g.* Charles Atlas, Ltd. v. Time-Life Books, Inc., 570 F. Supp. 150 (S.D.N.Y. 1983).

124. KEETON et al., *supra* note 2, § 128, at 970-71; RESTATEMENT (SECOND) OF TORTS §§ 623A, 633, 651 (1977). A failure to prove special damages would mean, therefore, that the court could not issue an injunction. *See id.* Injurious falsehood law thus differs from § 43(a), which courts generally construe not to require proof of actual damages as a prerequisite to injunctive relief. *See supra* note 52.

125. *See* RESTATEMENT (SECOND) OF TORTS §§ 558, 559, 569, 571 (1977).

126. KEETON et al., *supra* note 2, § 111, at 779; RESTATEMENT (SECOND) OF TORTS § 561 & cmt. b (1977).

127. *E.g.*, Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1122-25, 1137-38 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988). *See* RESTATEMENT (SECOND) OF TORTS § 561 cmt. b (1977).

128. *E.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); RESTATEMENT (SECOND) OF TORTS § 561 cmt. b (1977).

129. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). Corporations, being artificial "persons" that are incapable of experiencing feelings, logically cannot recover for humiliation and other emotional harm. *Cf. id.* (noting that damages for "personal humiliation" are recoverable) (emphasis supplied). Courts make no distinction, however, between human and corporate plaintiffs

Defamation provides the proper avenue if the defendant's false statement would tend to harm the plaintiff's reputation in a sense noted above. For example, a false statement that an individual is a perjurer<sup>130</sup> or connected with organized crime<sup>131</sup> is actionable if all other elements of defamation are met. Actionable statements about a corporate plaintiff include, for instance, untrue assertions that the plaintiff declared bankruptcy<sup>132</sup> or adopted a strategy to induce minors to use a product legally reserved for adults.<sup>133</sup>

## 2. Injurious Falsehood's Focus on Harm to Economic Interest

Whereas defamation concerns safeguarding the plaintiff's reputation,<sup>134</sup> injurious falsehood focuses on something narrower: the plaintiff's economic interest.<sup>135</sup> The element requiring the defendant's statement to have been about the plaintiff's business, business practices, product, service, property, or property rights reveals this focus. The special damages requirement further highlights injurious falsehood's economic interest premise.<sup>136</sup>

Plaintiffs, whether natural persons or artificial entities, possess economic interests in their businesses, the products they sell, the services they provide and the property they own.<sup>137</sup> Untrue allegations that adversely affect these interests may give rise to injurious falsehood claims. For example, consider an assertion that the food item made and sold by the plaintiff has a high fat content, when in reality the fat content is quite low. If

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in terms of ability to recover presumed damages. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1139, 1142 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1985). For an analysis of whether the heavily economic nature of the corporate reputation makes the lack of such a distinction insensible, see Arlen W. Langvardt, *A Principled Approach to Compensatory Damages in Corporate Defamation Cases*, 27 AM. BUS. L.J. 491 (1990).

130. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

131. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). The plaintiffs in *Hepps* lost the case, however, due to their inability to prove the falsity of the defendants' allegation. *Id.* at 769-70, 776-79.

132. *E.g., Dun & Bradstreet*, 472 U.S. at 751-52.

133. *Brown & Williamson Tobacco Corp.*, 827 F.2d at 1122-25, 1138-39.

134. RESTATEMENT (SECOND) OF TORTS § 623A cmt. g (1977) This is more clearly true of the common law than of defamation's constitutional aspects, which focus primarily on the defendant's freedom of expression interests. *See infra* text accompanying notes 154-276.

135. RESTATEMENT (SECOND) OF TORTS § 623A & cmt. g (1977).

136. *See KEETON et al., supra* note 2, § 128, at 967.

137. *See id.* at 965-66; RESTATEMENT (SECOND) OF TORTS §§ 623A, 626 & cmt. a, 629 (1977).



this false assertion—made in the climate of increased public attention to now familiar health warnings about high-fat diets—reduces the plaintiff's sales, an injurious falsehood claim may be in order.<sup>138</sup> This would be true regardless of whether the plaintiff's competitor or a newspaper reporter writing on health issues made the false statement.<sup>139</sup> Similarly, an assertion that the plaintiff's hotel was fully booked when it actually had a number of vacancies would be actionable on injurious falsehood grounds if the plaintiff experienced actual economic injury.<sup>140</sup>

In determining whether a defamation or injurious falsehood claim properly applies to a particular set of facts, one must recall the distinction between reputation and economic interests. If the defendant's false statement harms the plaintiff's economic interest without tarnishing the plaintiff's reputation, injurious falsehood is the proper claim.<sup>141</sup> If, however, the false statement possesses the requisite tendency to harm the plaintiff's reputation, defamation is the appropriate claim—even though the statement may have also harmed the plaintiff's economic interests.<sup>142</sup> Plaintiffs typically prefer defamation to injurious falsehood if the facts plausibly support an allegation of probable reputational harm. This preference stems from the difficulty of satisfying injurious falsehood's special damages requirement, coupled with defamation's potential for presumed damages.<sup>143</sup>

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138. See RESTATEMENT (SECOND) OF TORTS §§ 623A, 626 & cmt. a, 629 (1977). These cases are sometimes referred to as product disparagement cases. See *supra* note 116.

139. See *id.* The plaintiff could probably bring the injurious falsehood claim against the competitor under § 43(a). See *supra* notes 78-79 and accompanying text. The claim against the newspaper reporter, however, almost certainly would not be actionable under § 43(a). *Id.*

140. See *Annbar Assocs. v. American Express Co.*, 565 S.W.2d 701 (Mo. App. 1978). The economic injury would be the loss of patrons who would have stayed at the hotel if not for the false representation. See *id.*

141. See RESTATEMENT (SECOND) OF TORTS § 623A cmt. g (1977). Certain falsehoods that harm the plaintiff's economic interest need not be seen as also harming the plaintiff's reputation. See Langvardt, *supra* note 3, at 921 & n.120.

142. See RESTATEMENT (SECOND) OF TORTS § 623A cmt. g (1977); Langvardt, *supra* note 3, at 920-21. When a case arises in a business setting and the plaintiff is a corporation or partnership, the plaintiff's reputation will logically have significant economic overtones. See Langvardt, *supra* note 129, at 518-19.

143. See, e.g., *Brown & Williamson Tobacco Co. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988). In *Brown & Williamson*, the corporate plaintiff could not demonstrate an economic loss resulting from the defendants' false statement about an advertising strategy the plaintiff allegedly adopted. *Id.* at 1139. Therefore, had the plaintiff been able to sue only on injurious falsehood grounds, it would have lost the suit. See *supra* text accompanying notes 122-124. Because the defendants' statement was actionable on

One often encounters difficulty in drawing the reputation-economic interest distinction.<sup>144</sup> The mechanics of drawing that line in particular cases need not be further explored here, however, given the breadth of section 43(a)'s new language.<sup>145</sup>

### 3. Section 43(a)'s Application to Reputational Injury and Economic Harm

Section 43(a) now sweeps in claims from a broad range of commercial falsehoods about commercial plaintiffs. The statute covers certain reputational and economic interest-based claims, effectively lumping together what the common law historically kept separate. Section 43(a) does so by authorizing claims based on false or misleading statements about the "nature, characteristics, [or] qualities" of the plaintiff's "goods, services, or commercial activities," if the statements were made in "commercial advertising or promotion."<sup>146</sup> Undoubtedly the statute's "goods, services, or commercial activities" language, which corresponds closely to the subject matter contemplated by the common law elements of injurious falsehood,<sup>147</sup> would cover many injurious falsehood cases arising in a commercial context.

The statute's "goods [or] services" language may encompass some defamation claims. They will more likely be swept in, however, by the "or commercial activities" language.<sup>148</sup> Defamation actions based on statements about such activities have not been uncommon in our courts.<sup>149</sup> Moreover, the "likely to be dam-

defamation grounds and the plaintiff proved all necessary common law and constitutional elements, the plaintiff received a substantial award of presumed damages. *Brown & Williamson*, 827 F.2d at 1122-25, 1138-40, 1142.

144. See Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 699 (1986); Langvardt, *supra* note 3, at 920-22.

145. For discussion of the need to maintain the reputation-economic interests line despite the difficulties sometimes associated with drawing it, see Langvardt, *supra* note 3, at 904-06, 920-23.

146. 15 U.S.C. § 1125(a) (1988).

147. See *id.*; see also *supra* text accompanying note 116 (discussing the sort of statement necessary to give rise to an injurious falsehood claim). When it enacted the present version of § 43(a), Congress at the very least meant to sweep in injurious falsehood claims arising in the "commercial advertising or promotion" setting. See *supra* text accompanying notes 71-75, 78-80; *supra* note 73. For discussion of the probable meaning and scope of the "commercial advertising or promotion" language in § 43(a), see *supra* notes 78-79.

148. See 134 CONG. REC. H10430 (daily ed. Oct. 19, 1988) (Rep. Kastenmeier's observation that the amended § 43(a) was intended to create a cause of action for "commercial defamation").

149. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (allegation that corporate plaintiff filed for bankruptcy); *Brown &*

aged" language<sup>150</sup> does not limit standing to those plaintiffs who have suffered demonstrable injurious falsehood-like harm to economic interests. Commercial plaintiffs claiming defamation-like reputational injury, actual or probable, would seem to fit within this language. Thus, section 43(a) apparently allows a commercial plaintiff's claim,<sup>151</sup> whether for reputational injury or economic harm falling short thereof, if the claim is based on statements made in the requisite setting of "commercial advertising or promotion."<sup>152</sup>

The recent extension of section 43(a) to cover many commercial "defamation" and "injurious falsehood" claims would be much less troublesome if it only affected the common law elements and underlying premises of defamation and injurious falsehood.<sup>153</sup> Increasingly, however, courts have subjected those areas of law to constitutional limitations in the form of First Amendment-based rules engrafted on their common law elements.

#### IV. DEFAMATION AND INJURIOUS FALSEHOOD: A CONSTITUTIONAL GLOSS

If a single year may be identified as defamation law's proverbial "turning point," whether for good or for ill,<sup>154</sup> it would be 1964. Prior to that year, the Supreme Court had consistently

Williamson Tobacco Co. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988) (allegation that tobacco company adopted advertising strategy designed to induce minors to begin smoking); Turner v. Welliver, 411 N.W.2d 298 (Neb. 1987) (allegation that plaintiff engaged in unethical insurance practices); Dairy Stores, Inc. v. Sentinel Publishing Co., 516 A.2d 220 (N.J. 1986) (allegation that plaintiff sold impure bottled water).

150. 15 U.S.C. § 1125(a) (1988).

151. For discussion of the prevailing judicial approaches to the awarding of injunctive relief and damages under § 43(a), see *supra* notes 51-53.

152. See 15 U.S.C. § 1125(a) (1988); *supra* text accompanying notes 65-80; *supra* notes 78-79.

153. In that event, the only real objection would be that "federalizing" such claims does not make good public policy. See Hearing on H.R. 4156, Subcomm. on Courts, Civil Liberties, & Administration of Justice, Comm. on the Judiciary, H.R., 100th Cong., 2d. Sess. 100, 104-05 (Sept. 8, 1988) (statement of Professor Ralph Brown questioning the wisdom of federalizing much of injurious falsehood law).

154. Compare Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 194 (calling *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), "the best and most important [decision] ever produced in the realm of freedom of speech") with Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986) (asserting that the long-term effects of *New York Times* on defamation law are more negative than positive).

held that the First Amendment left defamation law unconstrained, save for the longstanding rule against injunctions as impermissible prior restraints.<sup>155</sup> In the 1964 case of *New York Times Co. v. Sullivan*,<sup>156</sup> however, the Supreme Court held that the First Amendment's freedom of speech and press clauses indeed play a substantial role in defamation law.<sup>157</sup> *New York Times* launched a series of decisions in which the Court has sketched—sometimes clearly, sometimes not<sup>158</sup>—defamation's constitutional contours. As will be seen, this line of decisions reflects an ongoing struggle over how defamation law should strike the balance between the plaintiff's reputational interest and the defendant's competing interest in free expression.

#### A. PUBLIC OFFICIAL PLAINTIFFS IN DEFAMATION CASES

In *New York Times*, the plaintiff, an Alabama police commissioner, claimed that certain factual errors in a paid Times advertisement defamed him.<sup>159</sup> The Supreme Court concluded that the item was not a commercial advertisement even though the sponsoring group paid for the newspaper space in which it appeared.<sup>160</sup> Instead, the Court found the advertisement to be

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155. *Near v. Minnesota*, 283 U.S. 697, 718 (1931). Rather than being able to stifle speech by obtaining an injunction against further speech, plaintiffs in defamation cases must seek damages after-the-fact. *Id.* Defamation law maintains this approach today. Injurious falsehood law, however, takes a different approach, under which injunctive relief may be available. KEETON et al., *supra* note 2, § 128, at 928, 971. See Lisa M. Arent, Note, *A Matter of "Governing" Importance: Providing Business Defamation and Product Disparagement Defendants full First Amendment Protection*, 67 IND. L.J. 441, 449-50 (1992). Injunctions are also allowed in § 43(a) cases. See *supra* note 52.

156. 376 U.S. 254 (1964).

157. See *id.* at 256, 264 (expressly referring to freedom of speech clause as well as to freedom of press clause).

158. See *infra* text accompanying notes 163-276.

159. 376 U.S. at 256-59.

160. *Id.* at 265-66. This conclusion was significant because at that time, courts regarded commercial speech as falling outside the First Amendment's protective scope. Not until roughly a decade later did the Supreme Court deem commercial speech to be entitled to First Amendment protection. See *infra* text accompanying notes 308-310. In holding that the expression at issue in *New York Times* merited substantial protection even though the sponsoring group paid for the newspaper space, the Times received that payment, and the sponsoring group sought monetary contributions for its cause, the Court drew an analogy to books and other forms of expression in which economic motives may play a role. See 376 U.S. at 256, 266. The Court also emphasized the importance of not "shackl[ing] the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'" *Id.* at 266 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

political speech, because of its commentary on the civil rights struggle, "one of the major public issues of our time."<sup>161</sup> As viewed by the Alabama courts, however, the factual errors justified a \$500,000 damage award against the newspaper and certain members of the sponsoring group.<sup>162</sup>

The Supreme Court's primary inquiry focused on the potential constitutional deficiency of defamation's then-prevailing strict liability standard, which the Court thought likely to chill the exercise of First Amendment freedoms.<sup>163</sup> The Court reasoned that "erroneous statement is inevitable in free debate,"<sup>164</sup> and that a strict liability regime, coupled with the threat of huge damage awards, might deter speakers from contributing true statements to the marketplace of ideas contemplated by the First Amendment's guarantees. They would refrain for fear of the resulting consequences—potentially devastating liability—if the statements they reasonably believed true turned out to be false.<sup>165</sup> The Court therefore found it essential to devise a rule that would protect makers of some false statements from liability in order to provide the "breathing space" necessary for free

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In addition to the notion that expression in the form of a paid advertisement is not necessarily commercial speech, *see id.*, *New York Times* may fairly be read as standing for two other propositions regarding classification of expression. The first is that speech having underlying economic motives may nonetheless deal with matters of public concern. *See id.* at 271; *infra* text accompanying note 161. The second is that in order to classify expression properly, it is necessary to look at the substance of what was said, not merely the form in which it appeared. *See* 376 U.S. at 265-66, 271. These propositions help influence the determination of the proper role of the First Amendment in § 43(a) cases. *See infra* text accompanying notes 400-407.

161. 376 U.S. at 271. Rather than being a commercial advertisement for the sale of a product, the advertisement largely stated the sponsoring group's views on the ongoing civil rights struggle. *Id.* at 256-59, 265-66. It also protested the manner in which law enforcement officials treated student demonstrators and Dr. Martin Luther King. In the course of doing so, the item made erroneous statements. *Id.* at 257-59.

162. *Id.* at 256. The state court reached this result even though the defendants' statements did not expressly refer to the plaintiff and despite the questionable "stretch" involved in concluding that the statements even impliedly referred to him. *See id.* at 288-89; *see also id.* at 288-92 (Court's apparent extension of constitutional status to defamation law's "of and concerning" requirement). The \$500,000 damage award represented the full amount requested, even though the plaintiff made no attempt to prove actual reputational harm. *Id.* at 256, 260.

163. *Id.* at 264, 267-68. The state court's enforcement of Alabama defamation law provided the state action necessary to implicate the First Amendment. *Id.* at 265.

164. *Id.* at 271.

165. *See id.* at 267-68, 271-72, 278-79.

expression to flourish.<sup>166</sup> In other words, the Court concluded that allowing some falsehoods to be uttered without defamation liability was constitutionally superior to chilling speakers' First Amendment rights to contribute true statements of value to society.<sup>167</sup>

### 1. Enunciation of Fault Requirement

In the Court's view, a First Amendment-based fault requirement would provide the necessary "breathing space."<sup>168</sup> It therefore enunciated what has come to be known as the *New York Times* rule: in addition to defamation's customary elements, plaintiffs who are public officials must prove "actual malice" on the defendant's part in order to prevail.<sup>169</sup> According to the Court, "actual malice" means making a statement with either knowledge of its falsity or reckless disregard for the truth.<sup>170</sup>

Although the *New York Times* Court failed to clearly define "reckless disregard for the truth," it made plain that mere negligence in failing to ascertain truth or falsity does not rise to that level.<sup>171</sup> Later, the Court clarified the reckless disregard standard, stating that it contemplates a defendant who "in fact entertained serious doubts" about the truth of the statement before making it.<sup>172</sup> In sum, the actual malice requirement simultaneously increases substantially the public official plaintiff's<sup>173</sup> burden of proof, and insulates, from defamation liability, makers of falsehoods uttered with neither knowledge of falsity nor serious doubts about truth.

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166. *Id.* at 272 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

167. *See id.* at 278-79. This conclusion was consistent with "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270.

168. *See id.* at 272, 279-80.

169. *Id.* at 279-80. The Court appeared to conclude that if the plaintiff demonstrated actual malice, the plaintiff could then constitutionally recover presumed and punitive damages. *See id.* at 283-84 & n.24.

170. *Id.* at 279-80.

171. *Id.* at 288. The Court stressed that "the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *Id.*

172. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

173. The effects are the same in cases brought by public figure plaintiffs. *See infra* text accompanying notes 178-186.

## 2. Heightened Standard of Proof as to Fault Requirement

Besides enunciating the actual malice rule,<sup>174</sup> the Court, in *New York Times*, raised the standard of proof for actual malice as an additional safeguard to the First Amendment interests at stake. It held that plaintiffs must prove actual malice by clear and convincing evidence, not merely by a preponderance of the evidence.<sup>175</sup> The Court concluded that even under a preponderance standard, let alone the requisite clear and convincing standard, the evidence produced at trial fell far short of establishing actual malice by the Times or the individual defendants.<sup>176</sup>

### B. PUBLIC FIGURE PLAINTIFFS IN DEFAMATION CASES

#### 1. Extending *New York Times*

The Court did not confine defamation's constitutionalization to the public official setting for long; three years after *New York Times*, the Court decided the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*.<sup>177</sup> Chief Justice Warren's concurrence provided the holding and controlling rationale, as the Court extended its actual malice requirement to suits brought by public figure plaintiffs.<sup>178</sup>

In support of this extension, Chief Justice Warren reasoned that public figures resemble public officials as objects of intense public interest and potentially influential participants in public debate.<sup>179</sup> Moreover, he noted, public figures usually enjoy

174. Although it did not squarely hold that the public official plaintiff must prove the statement's falsity, the Court expressed reservations about a rule requiring a defamation defendant to prove its truth. Thus, *New York Times* may have implicitly imposed a proof-of-falsity requirement on public plaintiffs. See 376 U.S. at 271, 279. Indeed, the Court so interpreted *New York Times* in later decisions. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986); *Herbert v. Lando*, 441 U.S. 153, 175-76 (1979).

175. 376 U.S. at 285-86. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Although the clear and convincing standard is somewhat imprecisely defined, it apparently falls somewhere between the preponderance standard normally employed in civil cases and the beyond a reasonable doubt standard required in criminal cases. See BLACK'S LAW DICTIONARY 251 (6th ed. 1990).

176. See 376 U.S. at 286-88.

177. 388 U.S. 130 (1967).

178. *Id.* at 164 (Warren, C.J., concurring). In doing so, the Court also implicitly extended, to the public figure plaintiff setting, *New York Times*'s clear and convincing proof standard (for the actual malice requirement), proof of falsity requirement, and approach to damages. See *id.* at 164-65, 170. For discussion of those aspects of *New York Times*, see *supra* text accompanying notes 174-175 and notes 169, 174.

179. 388 U.S. at 164 (Warren, C.J., concurring). In one companion case, a *Saturday Evening Post* article alleged that the plaintiff, Butts, a famous ex-

ready access to the mass media and may thereby shape public policy and counter criticism of themselves.<sup>180</sup> In the view of the Chief Justice and the Justices who joined him to form a majority on the actual malice holding, no sound reason emerged to treat public figure plaintiffs any differently from public official plaintiffs.<sup>181</sup>

Although periodically targeted for criticism,<sup>182</sup> the actual malice rule for public officials and public figures has weathered a number of applications by the Supreme Court, and the Court does not seem likely to abandon it any time soon.<sup>183</sup> Accordingly, a public plaintiff is destined to lose a defamation suit despite the falsity of the statement allegedly giving rise to reputational injury, unless the plaintiff proves clearly and convincingly that the defendant knew of the statement's falsity or entertained serious doubts as to its truth. This combination of the actual malice requirement and the enhanced standard of proof becomes a tall order—so tall that public plaintiffs have considerable difficulty winning defamation suits.<sup>184</sup> Because a finding that the plaintiff is a public figure is often outcome-de-

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football coach, attempted to fix a college football game. *Id.* at 135-37 (opinion of Harlan, J.). In the other case, an Associated Press dispatch alleged that plaintiff Walker (a retired general) led a violent mob against federal marshals who had been sent to enforce a desegregation order at the University of Mississippi. *Id.* at 140-41.

180. *Id.* at 164 (Warren, C.J., concurring). In a later decision involving a private figure plaintiff, the Court pointed to the public's lack of intense interest in such plaintiffs and to these plaintiffs' relative inability to influence public debate, as justification for requiring such plaintiffs to satisfy elements less stringent than those required in public plaintiff cases. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974). For additional discussion of *Gertz*, see *infra* text accompanying notes 187-212, 229-235.

181. 388 U.S. at 162 (Warren, C.J., concurring). See *id.* at 170 (Black, J., concurring and dissenting, joined by Douglas, J.); *id.* at 172 (Brennan, J., concurring and dissenting, joined by White, J.)

182. See, e.g., Epstein, *supra* note 155, at 783-85; *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 476 U.S. 1187, 1188 (1986) (Burger, C.J., dissenting from denial of cert.); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767-74 (1985) (White, J., concurring in judgment).

183. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

184. For examples of cases in which a public official or public figure plaintiff did not prevail due to inability to satisfy the actual malice requirement, see *Herbert v. Lando*, 441 U.S. 153 (1979); *Monitor Patriot v. Roy*, 401 U.S. 265 (1971); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); cf. *Hustler Magazine*, 485 U.S. 46 (public figure plaintiff who cannot demonstrate false statement of supposed fact and actual malice must lose speech-based intentional infliction of emotional distress case). *But see Harte-Hanks Communica-*



terminative,<sup>185</sup> plaintiffs seek to avoid that classification whenever they may plausibly do so.<sup>186</sup>

## 2. Making the Public Figure Determination

The making of public figure determinations is guided by *Gertz v. Robert Welch, Inc.*,<sup>187</sup> a case also notable for its "constitutionalization" of private figure plaintiff cases, a feature which will be discussed later.<sup>188</sup> In the course of determining that the plaintiff, an attorney, was not a public figure,<sup>189</sup> the Court recognized two types of public figures. One type, the general purpose public figure, acquires "such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." The other type, the limited purpose public figure, "voluntarily injects himself . . . into a particular public controversy and thereby becomes a public figure for a limited range of issues."<sup>190</sup> Both must prove actual malice as an element of a defamation claim.<sup>191</sup>

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tions, Inc. v. Connaughton, 491 U.S. 657 (1989) (public figure plaintiff proved actual malice); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (same).

185. This frequent effect stems from the extreme difficulty of proving actual malice by clear and convincing evidence. See *supra* note 184 (citing cases). Private figure plaintiffs encounter no such difficulty when attempting to establish a defendant's liability for defamation. See *infra* text accompanying notes 201-207.

186. See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448, 454-57 (1976) (plaintiff held to be private figure despite some arguable indicia of public figure status); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974) (Court agrees with plaintiff's argument that he was private figure).

187. 418 U.S. 323 (1974).

188. See *infra* text accompanying notes 199-212, 226-243.

189. 418 U.S. at 351-52.

190. *Id.* at 351. Although *Gertz* appeared to allow for the possibility that one might *involuntarily* become a public figure, see *id.*, later decisions effectively extinguished that prospect, see *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 166 (1979); *Time, Inc.*, 424 U.S. at 454, 457. The Court's decisions have left some uncertainty regarding what constitutes a *public controversy* for purposes of determining whether the plaintiff is a limited purpose public figure. See Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order From Confusion in Defamation Law*, 49 U. PITT. L. REV. 91, 126 n.232 (1987) (discussing the semantic maze created by the Court's uses of *public controversy*, *public concern*, and *public interest* in decisions that imply the existence of subtle differences among the terms but do not clearly distinguish among them).

191. 418 U.S. at 342, 351-52. The Court observed that as compared to private figures, public figures have greater access to the media to counteract falsehoods. In addition, the Court noted that public figures effectively assume the risk that falsehoods will sometimes be stated about them, and that private figures are more vulnerable to reputational injury than public figures are. *Id.* at 344-45.

Supreme Court decisions passing on the public figure issue demonstrate that the classification includes such persons as political candidates, retired military generals, and well-known former football coaches,<sup>192</sup> but not, on the facts presented, a locally prominent private attorney, a wealthy socialite going through a divorce, an alleged spy, or a recipient of government research grants.<sup>193</sup> The fact-specific nature of the public figure inquiry makes it difficult to generalize reliably about which parties will or will not be deemed public figures.

Cases brought by commercial plaintiffs magnify the difficulties inherent in the public figure determination. None of the Supreme Court's public figure decisions, including *Gertz*, involved a commercial plaintiff or a commercial defendant; each case arose in a noncommercial context.<sup>194</sup> Although the Court has decided three corporate plaintiff cases, it has never engaged in a substantive public/private figure analysis in a suit involving a commercial plaintiff, whether individual or corporate.<sup>195</sup>

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192. See, e.g., *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) (judicial candidate); *Monitor Patriot v. Roy*, 401 U.S. 265 (1971) (political candidate); *St. Amant v. Thompson*, 390 U.S. 727 (1968) (political candidate); *Herbert v. Lando*, 441 U.S. 153 (1979) (former general); *Associated Press v. Walker*, 388 U.S. 130 (1967) (former general); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (former football coach); see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (prominent television evangelist-political leader held to be public figure).

193. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (attorney); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (socialite); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979) (alleged spy); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (research grant recipient).

194. See *Gertz*, 418 U.S. 323 (suit by attorney against magazine publisher over falsehoods in magazine); see also *supra* notes 192-193 (citing cases involving nonbusiness plaintiffs against media defendants). For First Amendment purposes, courts do not regard magazines, newspapers, and other media defendants as commercial speakers despite their underlying profit motive. Instead, their educational, informational, and entertainment functions normally entitle such defendants to the full First Amendment protection accorded parties engaged in noncommercial expression. See, e.g., *Hustler Magazine*, 485 U.S. 46; *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). The non-commercial contexts of most of the Court's defamation decisions thus differ from the necessarily commercial settings in which Lanham Act § 43(a)'s "commercial defamation" cases arise. See 15 U.S.C. § 1125(a) (1988); *supra* text accompanying notes 71-80; *infra* notes 421-429.

195. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). Although each of these cases involved a corporate plaintiff, the Supreme Court did not rule on the public/private figure issue. In *Hepps*, the private figure status of one of the plaintiffs evidently was not in dispute. Without explanation or discussion, the

Lower courts, however, have had occasion to decide defamation actions brought by commercial (usually corporate) plaintiffs.<sup>196</sup> When making the public/private figure determination in these cases, lower courts have struggled with the *Gertz* standards,<sup>197</sup> which arose in a noncommercial setting and are not well-suited to corporate plaintiff cases.<sup>198</sup>

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Court referred to the corporate plaintiff as a private figure. See 475 U.S. at 769, 776. The Court acted the same way in *Dun & Bradstreet*. 472 U.S. at 751. In *Bose*, the Court held that appellate review of a lower court's actual malice determination is to be conducted under the independent appellate review standard applicable to First Amendment cases, rather than according to the "clearly erroneous" standard set by Rule 52(a) of the Federal Rules of Civil Procedure. 466 U.S. at 510-11, 514. *Bose* actually presented an injurious falsehood case of the product disparagement variety, rather than a defamation case. See *id.* at 487-88. For a discussion of injurious falsehood cases, see *supra* text accompanying notes 116-124, 134-144. By the time *Bose* reached the Supreme Court, the corporate plaintiff ceased contesting the trial court's conclusion that it was a public figure, depriving the Court of an opportunity to address the issue. See 466 U.S. at 489-90, 492 n.8. The Court also accepted, without reviewing, the lower courts' holdings that the public figure actual malice rule also applied in an injurious falsehood suit brought by a public figure plaintiff. *Id.* at 513. For additional discussion of *Bose*, see *infra* text accompanying notes 268-287.

196. See, e.g., *Flotech, Inc. v. E.I. DuPont de Nemours Co.*, 814 F.2d 775, 777 (1st Cir. 1987); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 589 (1st Cir. 1980); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 274 (3d Cir. 1980); *National Life Ins. Co. v. Phillips Publishing, Inc.*, 793 F. Supp. 627, 634-43 (D. Md. 1992); *Bose Corp. v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249, 1270-74 (D. Mass. 1981), *rev'd*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984); *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 955 (D.D.C. 1976); *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 516 A.2d 220, 227 (N.J. 1986).

197. See, e.g., *Bruno & Stillman*, 633 F.2d at 589; *Steaks Unlimited*, 623 F.2d at 274; *National Life Ins.*, 793 F. Supp. at 634-43; *Bose Corp.*, 508 F. Supp. at 1270-74. See also *Martin Marietta Corp.*, 417 F. Supp. at 955 (public figure standards established in *Gertz* are ill-fitting in corporate plaintiff setting); *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 516 A.2d 220, 227 (N.J. 1986) (same). For discussion and analysis of the difficulties associated with making the public/private figure determination in a corporate plaintiff case, see generally Patricia N. Fetzter, *The Corporate Defamation Plaintiff as First Amendment "Public Figure": Nailing the Jellyfish*, 68 IOWA L. REV. 35 (1982).

198. See Langvardt, *supra* note 3, at 960-62. Although *Gertz's* general purpose public figure classification would seemingly sweep in corporations whose names are immediately recognizable (e.g., General Motors, IBM, etc.), whether a given corporation possesses the notoriety necessary to warrant public figure status is uncertain in most cases. The corporation's size may not be a particularly helpful predictor, in that the public may be more familiar with some relatively small corporations than many larger corporations whose name and business are generally unknown. As for *Gertz's* limited-purpose public figure classification—a classification that requires the plaintiff to assume a leadership role in a public controversy—many corporations will avoid taking such roles in a public controversy. Thus, the *Gertz* standards do not provide a realistic or meaningful way of determining whether a corporate plaintiff is a public or pri-

### C. PRIVATE FIGURE PLAINTIFFS IN DEFAMATION CASES

Once the Supreme Court had formulated the constitutional aspects of defamation actions brought by public plaintiffs, the next major question was whether the First Amendment plays a similar role in suits brought by private figure plaintiffs. After a brief detour in which a plurality appeared to shift the determinative focus from the plaintiff's status to the degree of public interest or concern present in the speech at issue,<sup>199</sup> the Court resumed its prior course in *Gertz*. In this case, the Court answered the private figure question, holding that such cases indeed necessitate some allowance for First Amendment concerns and that the plaintiff's status determines the appropriate extent of accommodation.<sup>200</sup>

#### 1. Fault Requirement to Establish Liability

Concluding that private figure plaintiffs are both more vulnerable to reputational injury and more worthy of reputational protection than public plaintiffs, the *Gertz* Court declined to extend to private figure plaintiffs the actual malice requirement imposed on public plaintiffs.<sup>201</sup> Actual malice would be too stern a standard to expect a private figure plaintiff to meet, given the increased state interest in protecting such people's reputations and the corresponding decrease in the defendant's expressive interests.<sup>202</sup> Nonetheless, the Court recognized that even the private figure setting dictates a need to insulate some makers of false statements from liability in order to protect "speech that matters."<sup>203</sup> The Court regarded defendants' competing First

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vate figure. The standards fail to translate well into the commercial setting which is normally present when a corporate plaintiff brings suit. See Langvardt, *supra* note 3, at 961-62.

199. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43-44 (1971). The plurality took the position that any defamation plaintiff must prove actual malice if the defendant's statement pertained to a matter of public interest or concern. *Id.* *Gertz* repudiated this position. See *infra* note 200.

200. *Gertz*, 418 U.S. at 345-48. In *Gertz*, the Court fashioned a fault requirement for private figure plaintiffs while preserving the actual malice requirement for public official and public figure plaintiffs. See *id.* at 343, 345-48. The Court disapprovingly commented on *Rosenbloom's* public concern-oriented approach, appearing to reject it unequivocally. *Id.* at 346. In a later case, however, a Court plurality curiously reinterpreted *Gertz* as partially grounded in a public concern rationale. See *infra* text accompanying notes 229-243.

201. 418 U.S. at 344-45. For other differences noted in *Gertz* between private figures and public figures, see *supra* note 191.

202. See 418 U.S. at 342-45.

203. *Id.* at 341. See *id.* at 346-50. "Speech that matters" would logically include true statements on a broad range of subjects. See *New York Times Co.*

Amendment interests as sufficiently strong to justify a rule requiring private figure plaintiffs to prove some level of fault in defamation cases. In other words, the First Amendment rendered the common law's strict liability approach constitutionally impermissible.<sup>204</sup>

Although the Court left the individual states free to determine what level of fault to require of private figure plaintiffs,<sup>205</sup> it indicated that proof of the defendant's negligence—the failure to use reasonable care to ascertain the statement's truth or falsity—would suffice.<sup>206</sup> Indeed, after *Gertz*, nearly every state chose negligence as the appropriate fault standard in private figure cases.<sup>207</sup>

## 2. Restrictions on Presumed and Punitive Damages

*Gertz's* constitutionalization of private figure cases did not stop with its announcement of a fault requirement. The Court expressed concern about juries' "largely uncontrolled discretion" to assess presumed and punitive damages under the common

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v. Sullivan, 376 U.S. 254, 264, 267-68, 271-72 (1964) (discussing the need to protect some makers of false statements from liability in order to prevent chilling effect on First Amendment freedoms).

204. See *Gertz*, 418 U.S. at 347-48. But see *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (which some read as having resurrected strict liability for the private figure/private concern cases). See also *infra* note 236 (discussing method of reading *Dun & Bradstreet*). For discussion of the common law's strict liability approach, see *supra* text accompanying notes 109-110.

205. *Gertz*, 418 U.S. at 347-48.

206. See *id.* at 350; see also *id.* at 353 (Blackmun, J., concurring) (so reading the majority opinion). In the course of requiring private figure plaintiffs to prove fault, the Court did not expressly require them to prove the *falsity* of the defendant's statement. See *id.* at 347-48, 350. The court later substantially resolved the proof-of-falsity issue. See *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986). In *Hepps*, the Court held that a private figure plaintiff must prove falsity, at least when the defendant's statement was on a matter of public concern and the defendant was a member of the media. *Id.* at 768-69, 777. The narrowness of the *Hepps* holding may leave a small range of cases in which the plaintiff may not be expected to prove falsity. There are sound arguments, however, for making all defamation plaintiffs prove falsity (as opposed to presuming falsity and requiring the defendant to prove truth). See Langvardt, *supra* note 190, at 110-14. Under Lanham Act § 43(a), there is no comparable burden of proof question. With a false or misleading statement being a statutory element of a § 43(a) claim, the plaintiff logically carries the burden of proving that element. See *id.* For discussion of § 43(a) claims, see *supra* text accompanying notes 47-100.

207. Langvardt, *supra* note 190, at 98 n.50, citing Note, *Private Lives and Public Concerns: The Decade Since Gertz v. Robert Welch, Inc.*, 51 BROOKLYN L. REV. 425, 425-26 (1985).

law.<sup>208</sup> The potentially enormous damages possible under this scheme, the Court reasoned, could chill the exercise of First Amendment freedoms.<sup>209</sup> Therefore, the Court placed First Amendment-based limits on presumed and punitive damages by holding that if the private figure plaintiff established only the minimum level of fault (usually negligence) necessary to prevail, he or she would be restricted to compensatory damages for proven "actual injury."<sup>210</sup> Although *Gertz* seemed to contemplate a fairly broad construction of "actual injury,"<sup>211</sup> requiring proof thereof departed significantly from the common law approach.

In requiring proof of actual injury as the basis for awarding damages when the private figure plaintiff proves only the minimum level of fault necessary to prevail, *Gertz* did not wholly invalidate the common law's presumed damages doctrine. The Court held that if the private figure plaintiff proved actual malice (though not required to do so in order to establish liability), the First Amendment would not bar an award of presumed and punitive damages.<sup>212</sup>

### 3. Media-Nonmedia Issue

For several years after *Gertz*, the Supreme Court's defamation decisions usually centered around familiar questions such as whether a given plaintiff was a public figure or whether the defendant displayed actual malice.<sup>213</sup> A question, however, lingered: whether the constitutional rules announced in *Gertz*

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208. 418 U.S. at 349; *see id.* at 350.

209. *Id.* at 349-50. The Court noted that allowing a plaintiff to recover damages in excess of actual injury—at least where the plaintiff only demonstrated negligence—sweeps farther than the state interest in protecting the plaintiff's reputation justifies. *Id.* at 349. According to the Court, the common law's allowance of presumed damages in certain cases may give juries the ability to punish unpopular opinion. *Id.* The court stressed that "the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury." *Id.* As for punitive damages, the Court stated that they are "wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Id.* at 350.

210. *Id.* at 349-50. The Court has limited this *Gertz* rule to private figure plaintiff cases implicating matters of public concern. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985). For discussion of *Dun & Bradstreet*, *see infra* text accompanying notes 229-243.

211. *See Gertz*, 418 U.S. at 350.

212. *Id.* at 349-50.

213. *E.g.*, *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Hutchinson*

(and its forerunners, *New York Times* and *Butts*) applied in all defamation cases, or only in those brought against media defendants. The Court's prior decisions left room for argument on both sides of that question.<sup>214</sup> The Court appeared poised to resolve the issue in 1985, when it decided *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>215</sup> Instead, a plurality expressly avoided the media-nonmedia issue, disposing of the case on different grounds.<sup>216</sup> An examination of the concurring and dissenting opinions in *Dun & Bradstreet* reveals, however, that if the issue had been squarely presented, a majority would have rejected a distinction between media and nonmedia defendants in terms of defamation's constitutional limitations.<sup>217</sup> The Court thus seemed to unofficially resolve the media-nonmedia question, despite the plurality's express avoidance of it.

Curiously, however, the Court has since employed media-oriented language when stating its holdings or restating previously adopted rules, while declining to express a definite view on the distinction's validity.<sup>218</sup> The issue remains alive, particularly in light of the Court's new composition since it decided *Dun & Bradstreet*.<sup>219</sup> The better view, according to most commentators, holds that in light of the First Amendment's guarantees of free speech and press, defamation's constitutional constraints should apply regardless of whether the defendant is a member of the media.<sup>220</sup>

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v. Proxmire, 443 U.S. 111 (1979); *Herbert v. Lando*, 441 U.S. 153 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

214. See Langvardt, *supra* note 190, at 99-100, 115-17.

215. 472 U.S. 749 (1985).

216. See *Dun & Bradstreet*, 472 U.S. at 753. For discussion of the basis on which the Court resolved the case, see *infra* text accompanying notes 221-254.

217. Concurring, Justice White indicated that he would not favor a media and non-media distinction. *Dun & Bradstreet*, 472 U.S. at 773 (White, J., concurring in the judgment). Dissenting, Justices Brennan, Marshall, Blackmun, and Stevens also expressed disapproval of a media and non-media distinction. *Id.* at 781-83 (Brennan, J. dissenting, joined by Marshall, Blackmun, and Stevens, JJ.).

218. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 n.6 (1990); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986).

219. Justices Scalia, Souter, and Thomas were not on the Court when it decided *Dun & Bradstreet*, and have not taken an identifiable position on the media and non-media issue.

220. See, e.g., Langvardt, *supra* note 190, at 117-23; Patrick J. McNulty, *The Gertz Fault Standard and the Common Law of Defamation: An Argument for Predictability of Result and Certainty of Expectation*, 35 DRAKE L. REV. 51, 83 (1985); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOEFSTRA L. REV. 595, 597 (1979); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 922-23, 928 n.109, 935 (1978).

D. ROLE OF PUBLIC CONCERN DETERMINATIONS IN  
DEFAMATION CASES BROUGHT BY PRIVATE FIGURE  
PLAINTIFFS

1. The *Dun & Bradstreet* Case: Background

*Dun & Bradstreet* was the Supreme Court's first true defamation case involving a commercial plaintiff.<sup>221</sup> Although the case had been expected to resolve the media-nonmedia issue, a plurality instead used it to place a public concern limitation on part, if not all, of the *Gertz* approach to private figure cases.<sup>222</sup> A proper understanding of *Dun & Bradstreet* necessitates a thorough examination of its factual background.

Greenmoss Builders, Inc., a small, closely-held corporation, sued *Dun & Bradstreet* (D&B) after a D&B credit report, issued to five paying subscribers,<sup>223</sup> falsely stated that Greenmoss had filed for bankruptcy. The parties did not seriously dispute that the untrue statement about Greenmoss resulted from D&B's negligence.<sup>224</sup> The same evidently was true of the public-private figure issue, as the Court summarily labeled Greenmoss a private figure.<sup>225</sup>

With falsity, defamatory nature, publication, the plaintiff's private figure status and the defendant's negligence as "givens" here, it would seem that *Gertz* would have limited Greenmoss to

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See also RESTATEMENT (SECOND) OF TORTS § 580B cmt. e (1977) (expressing view that constitutional aspects of defamation law should apply in media and non-media defendant cases). The fundamental lack of soundness attending a media and non-media distinction relates to the issues dealt with in this article, in that the lack of media defendants in § 43(a) cases provides no basis for asserting that First Amendment interests need not be accommodated in such cases. For this article's proposed First Amendment considerations and framework to guide § 43(a) cases, see *infra* text accompanying notes 399-461.

221. The plaintiff, Greenmoss Builders, Inc., was a construction contractor. *Dun & Bradstreet*, 472 U.S. at 751. Although *Bose* also involved a corporate plaintiff, it actually presented an injurious falsehood case rather than a defamation case. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984); *supra* note 195.

222. See *infra* text accompanying notes 229-243.

223. 472 U.S. at 751-52.

224. A D&B employee erroneously copied court records, which showed that a Greenmoss employee (rather than Greenmoss itself) had declared bankruptcy. Although D&B had a policy of verifying the accuracy of such information before including it in a credit report, D&B failed to check with Greenmoss in this instance. *Id.* at 751-52. Negligence, though not actual malice, was thus clearly present. See *id.*; see also *id.* at 781 (Brennan, J., dissenting) (noting that the parties did not question "the requirement of *Gertz* that [the plaintiff] must show fault to obtain a judgment and actual damages"). D&B later issued a corrective notice to the five subscribers, but Greenmoss filed suit anyway. *Id.* at 752.

225. *Id.* at 751.



damages for *proven* actual injury.<sup>226</sup> Greenmoss, however, failed to prove actual injury. The jury nonetheless awarded \$50,000 in presumed damages and another \$300,000 in punitive damages. The trial judge had failed to adequately instruct the jury on the *Gertz* rules requiring proof of injury when the plaintiff proves only negligence, and proof of actual malice as a prerequisite to an award of presumed or punitive damages.<sup>227</sup> Thus, both the jury verdict and the trial judge's failure to give damages instructions in accordance with *Gertz* seemed erroneous—unless *Gertz* was somehow inapplicable.

Although the trial judge later granted a new trial, the Vermont Supreme Court reversed, holding that *Gertz* applied only to cases against media defendants. D&B did not satisfy this criterion. Thus, the court reasoned, the award of presumed and punitive damages to Greenmoss was permissible.<sup>228</sup>

## 2. *Dun & Bradstreet's* Modification of *Gertz*

The *Dun & Bradstreet* plurality expressly avoided resolution of the media-nonmedia issue, and affirmed the Vermont Supreme Court on other grounds.<sup>229</sup> Justice Powell's plurality opinion modified *Gertz* by injecting a public concern element into at least part of *Gertz's* status-of-the-plaintiff approach to private figure cases. In doing so, however, Justice Powell disingenuously denied that his opinion altered *Gertz* in any respect, asserting instead that a public concern element had been present all along.<sup>230</sup>

A fair reading of *Gertz*, which Justice Powell also authored, reveals that it confined its discussion of "public concern" to a *rejection* of a previous decision which used a public concern test to trigger the actual malice rule.<sup>231</sup> *Gertz* premised its formulation

226. See *Gertz*, 418 U.S. at 349-50.

227. *Dun & Bradstreet*, 472 U.S. at 752.

228. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 461 A.2d 414, 417-18 (Vt. 1983), *aff'd* 472 U.S. 749 (1985).

229. 472 U.S. at 753.

230. See *id.* at 755-61, 757 n.4.

231. See *Gertz*, 418 U.S. at 337-39, 345-46. In *Gertz*, the Court rejected the rationale presented by *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). In *Rosenbloom*, a plurality concluded that the actual malice rule applied in any case in which the statement about the plaintiff (whether public figure or private figure) was one of public interest or concern. *Id.* at 43-44. Justice Powell's majority opinion in *Gertz* called the *Rosenbloom* approach insufficiently accommodating of the legitimate state interest in allowing a legal remedy for reputational harm to private figures. *Gertz*, 418 U.S. at 346. The Court also objected to *Rosenbloom's* rationale because it would lead to "*ad hoc*" determina-

of constitutional rules for private figure cases on a single factor: the presence of a private figure plaintiff.<sup>232</sup> Nonetheless, Justice Powell opened his *Dun & Bradstreet* opinion by observing that *Gertz* "held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel *that involved a matter of public concern.*"<sup>233</sup> Noting *Gertz*'s holding that presumed and punitive damages are not recoverable absent a showing of actual malice, Justice Powell framed the issue in *Dun & Bradstreet* as "whether *this rule of Gertz* applies when the false and defamatory statements do not involve matters of public concern."<sup>234</sup> The three Justices forming the plurality, plus two who concurred in the judgment, answered this question with a "no."<sup>235</sup>

To justify a public concern inquiry, at least as to the presumed and punitive damages issues in private figure plaintiff cases,<sup>236</sup> the plurality noted that all of the Court's previous defamation decisions had involved "public issues," and that *Gertz* arose in such a context.<sup>237</sup> Justice Powell observed that "not all speech is of equal First Amendment importance."<sup>238</sup> To illustrate, he cited the First Amendment status of commercial

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tions of what constituted public interest or concern. *Id.* Justice Powell expressed "doubt [about] the wisdom of committing this task to the conscience of judges." *Id.*

232. See 418 U.S. at 346-50; see also *Dun & Bradstreet*, 472 U.S. at 785 n.11 (Brennan, J., dissenting) (observing that "[o]ne searches *Gertz* in vain for a single word to support the proposition that limits on presumed and punitive damages obtained only when speech involved matters of public concern"); *id.* at 772 (White, J., concurring in the judgment) (noting his impression that "the decision in *Gertz* was intended to reach cases that involve any false statements of fact injurious to reputation, whether the statement is made privately or publicly and whether or not it implicates a matter of public importance").

233. 472 U.S. at 751 (emphasis supplied).

234. *Id.* (emphasis supplied).

235. *Id.* at 761, 763; see *id.* at 765 (Burger, C.J., concurring in the judgment); *id.* at 774 (White, J., concurring in the judgment).

236. Limiting the public concern requirement to the presumed and punitive damages aspects of private figure plaintiff cases reads *Dun & Bradstreet* narrowly. This reading stems primarily from Justice Powell's strict framing (at least initially) of the questions as damages issues, see *supra* text accompanying note 234, and from the fact that the plaintiff had demonstrated negligence, see *supra* note 224. Thus, the Court did not actually decide the question whether the basic fault requirement, requiring a minimum showing of negligence, operates in a private figure/private concern case. An equally plausible reading of *Dun & Bradstreet*, however, classifies it as placing a public concern gloss on each aspect of *Gertz*. See 472 U.S. at 773-74 (White, J., concurring in the judgment).

237. *Id.* at 755-56.

238. *Id.* at 758.

speech, which he termed "protected speech, [but] the most prominent example of reduced protection for certain kinds of speech."<sup>239</sup>

The *Dun & Bradstreet* plurality then distinguished between speech on matters of public concern and private concern, deeming the former of core First Amendment significance and the latter of "less First Amendment concern."<sup>240</sup> Justice Powell conceded that expression on matters of private concern "is not wholly unprotected by the First Amendment," but emphasized that in such cases the "protections are less stringent."<sup>241</sup> The plurality concluded that in a private figure defamation case involving a statement of private concern, "the role of the Constitution in regulating state libel law is far more limited" than when statements on matters of public concern are at issue.<sup>242</sup> *Dun & Bradstreet* thus held that "[i]n light of the reduced constitutional value of speech involving no matters of public concern, . . . the state interest [in allowing presumed and punitive damages] adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.'"<sup>243</sup>

### 3. *Dun & Bradstreet's* Public/Private Concern Determination

Having formulated the damages rule, Justice Powell turned to the proper classification of the expression at issue. The plurality concluded that the public/private concern issue should be determined by examining the speech's "content, form, and context . . . as revealed by the whole record."<sup>244</sup> With little explana-

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239. *Id.* at 758 n.5. For additional discussion of the commercial speech analogy drawn in *Dun & Bradstreet*, see *infra* text accompanying notes 247-257, 375-383.

240. 472 U.S. at 758-59. The Court asserted that legal restrictions on speech of private concern would neither seriously threaten free debate nor raise dangers of self-censorship. See *id.* at 760 (quoting *Harley-Davidson Motor-sports, Inc. v. Markley*, 568 P.2d 1359, 1363 (Or. 1977)).

241. *Id.*

242. *Id.* at 759. The plurality's statement indicates that the Constitution continues to play some role in the private figure/concern defamation case, though a more limited role than in the private/public concern case. Elsewhere in the plurality opinion, however, Justice Powell implied that the private figure/concern scenario might not be subject to constitutional constraints. See *id.* at 761 n.7.

243. *Id.* at 761. In dissent, Justice Brennan argued that even in a private figure/concern case, the allowance of presumed and punitive damages absent a showing of actual malice was not sufficiently narrowly tailored to the government interest in affording a remedy for harm to private figures' reputations. See *id.* at 793-95 (Brennan, J., dissenting).

244. *Id.* at 761 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).

tion of how to apply this unenlightening test, the plurality classified the offending credit report as a matter of only private concern.<sup>245</sup> In view of the gloss already placed on *Gertz's* presumed and punitive damages rule, the Court upheld the jury's award of presumed and punitive damages even though Greenmoss had not shown actual malice.<sup>246</sup>

Justice Powell restricted his comments on the public/private concern determination to an analogy to the First Amendment treatment of commercial speech. He characterized the credit report as "solely in the individual interest of the speaker and its specific business audience" and asserted that "[t]his particular interest warrants no special protection when, as in this case, the speech is wholly false and clearly damaging to the victim's business reputation."<sup>247</sup> He also noted that in view of the credit report's limited circulation—to only five subscribers who were contractually bound not to disseminate it further—the facts did not involve a "strong interest in the free flow of commercial information."<sup>248</sup>

Continuing the commercial speech analogy, Justice Powell reasoned that "the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation."<sup>249</sup> The

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245. See *id.* at 762. For a strong argument that *Dun & Bradstreet* involved speech on a matter of public concern, see *id.* at 786-89 (Brennan, J., dissenting).

246. *Id.* at 763. This holding had the unusual effect of allowing punitive damages on a showing of mere negligence. For a discussion of the negligence present in *Dun & Bradstreet*, see *supra* note 224. Tort law generally declines to award punitive damages when the plaintiff has only shown negligence. See RESTATEMENT (SECOND) OF TORTS § 908 & cmt. b (1977).

247. 472 U.S. at 762. Perhaps the *Dun & Bradstreet* credit report's very limited circulation, coupled with the confidentiality requirement imposed on the five paying subscribers, *id.* at 751, accounted for the Court's comment that the expression at issue was "solely in the individual interest of the speaker and its specific business audience," *id.* at 762. This rationale should not lead to a conclusion that all commercial expression merits only private concern analysis, even though the Court drew an analogy to the commercial speech setting. Most commercial advertising would have neither the limited circulation of the D&B credit report nor the confidentiality obligations imposed on the subscribers. For additional discussion of the notion that commercial expression may be of either public or private concern, see *infra* text accompanying notes 255-276, 375-383.

Although the *Dun & Bradstreet* plurality labeled the credit report at issue "clearly damaging to the victim's reputation," 472 U.S. at 762, the plaintiff apparently did not attempt to prove actual damage in this regard. The court awarded only presumed and punitive damages. See *id.* at 751-55.

248. *Id.* at 762 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, 764 (1976)).

249. *Id.* at 762. The Court had cited such a factor in a non-defamation decision to justify giving commercial speech less-than-full First Amendment protection. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer*

profit motive underlying the credit report, coupled with creditors' desires for accurate information, made such expression unlikely to be chilled by regulation.<sup>250</sup> Finally, the plurality emphasized that the credit report was "more objectively verifiable"<sup>251</sup> than fully protected speech, again invoking a previously expressed rationale for extending less-than-full protection to commercial speech.<sup>252</sup>

Notwithstanding the commercial speech analogy, Justice Powell emphasized that the plurality was:

not hold[ing] . . . that the [credit] report is subject to reduced constitutional protection because it constitutes economic or commercial speech. We discuss such speech, along with advertising, only to show how many of the same concerns that argue in favor of reduced constitutional protection in those areas apply here as well.<sup>253</sup>

In addition, he denied that *Dun & Bradstreet* relegated all credit reporting to a status of partial First Amendment protection. Justice Powell asserted, instead, that the content, form, and context test allowed for the prospect that certain credit reports could be of public concern.<sup>254</sup>

#### 4. Commercial Speech, Expression on Economic Matters, and Public Concern Treatment for Defamation Purposes

Presumably, then, if the credit report that gave rise to *Dun & Bradstreet* was not commercial speech, and if particular credit

Council, Inc. 425 U.S. 748, 771-72 (1976). It is questionable, however, whether government sanctioned actions for substantial damages constitute only "incidental state regulation." See *Dun & Bradstreet*, 472 U.S. at 762. These actions, as will be seen, can produce a substantial chilling effect. See *infra* text accompanying notes 409-420.

250. 472 U.S. at 762-63. It is unclear whether this holds true in the context of potentially huge damage awards. If the damages potentially available to a prospective plaintiff were quite large, a speaker (the prospective defendant) driven by a profit-motive might conclude that the costs of engaging in certain expression might be so great as to prevent the making of a profit. Therefore, the speaker might decide to forego the expression, producing a chilling effect. For additional discussion of the chilling effect of potentially large damage awards, see *infra* text accompanying notes 409-420.

251. 472 U.S. at 762. The plurality offered no evidence supporting this allegedly greater degree of verifiability. Accepting the plurality's assumption that the credit report at least resembled commercial advertising, see *id.* at 762-63, it is unclear whether commercial advertising, as a class, is any more or less objectively verifiable than those statements, made in a non-advertising context, that trigger full First Amendment protection.

252. For discussion of the cases in which the Court has addressed the degree of First Amendment protection it affords commercial speech, see *infra* text accompanying notes 301-345, 399-420.

253. 472 U.S. at 762 n.8.

254. *Id.*

reports may be of either public or private concern depending upon the facts, *Dun & Bradstreet* should not be read as indicating that commercial speech is automatically of only private concern. Some courts, however, seem to have read *Dun & Bradstreet* in such a fashion.<sup>255</sup> Although the result in *Dun & Bradstreet* may stem from a questionable application of an "impoverished" notion of what constitutes a matter of public concern,<sup>256</sup> the case does not preclude the conclusion that commercial speech, as well as other expression arising in economic contexts, may be of either public or private concern, depending again upon the relevant facts.<sup>257</sup>

The Supreme Court's defamation cases bolster this conclusion, despite the noncommercial contexts in which they generally arose. *New York Times Co. v. Sullivan*<sup>258</sup> emphasized the importance of examining the substance, rather than the form, of the relevant statement. In this case, the Court held that the defendants' statements, which appeared in a paid advertisement, were fully protected statements on public issues.<sup>259</sup> The Court declined to label the statements as matters of mere private concern even though the individual defendants paid for the newspaper space, a normal attribute of commercial advertising, and the newspaper defendant received this payment—thus manifesting a profit motive—for publishing the advertisement.<sup>260</sup>

Similarly, in *Curtis Publishing Co. v. Butts*,<sup>261</sup> Chief Justice Warren's controlling concurrence included various statements with a commercial ring to them, even though *Butts* did not arise in a commercial setting.<sup>262</sup> Commenting on the similarities between public officials and public figures, the overlap between government and the private sector and apparently matters of

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255. See *infra* text accompanying notes 375-383, 391-395.

256. 472 U.S. at 786 (Brennan, J., dissenting).

257. This conclusion will be justified not only in immediately following portions of the text but also in later portions of the article. See *infra* text accompanying notes 258-276, 375-390, 402-407, 433-451.

258. 376 U.S. 254 (1964).

259. *Id.* at 256-59, 265-66.

260. See *id.* at 256, 265-66. For additional discussion of *New York Times'* factual context and the Court's refusal to afford the expression at issue there less-than-full First Amendment protection, see *supra* text accompanying notes 159-162. See also *supra* notes 160-161 (examining further the nature of the speech at issue in *New York Times*); *infra* note 304 (discussing other cases in which Supreme Court has established that presence of underlying profit motive does not automatically make expression commercial in nature).

261. 388 U.S. 130, 162-170 (1967) (Warren, C.J. concurring).

262. For discussion of the context in which *Butts* arose, see *supra* note 179.

public concern,<sup>263</sup> the Chief Justice noted the "rapid fusion of economic and political power," the "merging of science, industry, and government," the interaction between government and business, the emergence of "national and international markets," and the role of corporations in helping to shape public policy.<sup>264</sup> It would appear, therefore, that the Court allowed considerable room for statements about commercial matters to fall within the realm of public concern.<sup>265</sup> If, as in *Butts*, statements about the alleged fixing of a football game are of public concern,<sup>266</sup> the same should certainly be true of a wide range of statements made in the business setting, including many that appear in commercial advertising.<sup>267</sup>

In a 1984 decision, *Bose Corp. v. Consumers Union of United States, Inc.*,<sup>268</sup> the Court offered further indications that a broad range of speech about commercial issues and parties may fall

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263. See 388 U.S. at 162-65 (Warren, C.J., concurring).

264. *Id.* at 163. Chief Justice Warren's comments are relevant to this article's proposed First Amendment framework for Lanham Act § 43(a) cases. As will be seen, that framework partially turns on a public/private concern distinction applied within the commercial context encountered in § 43(a) cases. See *infra* text accompanying notes 439-451.

265. Although *Butts* thus recognized the importance of expression with economic and business connections, it should be noted that at that time, the Supreme Court had not yet formally extended First Amendment protection to commercial speech. The Court did not explicitly hold that commercial speech merited some First Amendment protection until 1976. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-72 (1976). For discussion of *Virginia Board of Pharmacy* and the Court's other major commercial speech decisions, see *infra* text accompanying notes 301-345.

266. See *Butts*, 388 U.S. at 135-36; see also *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755-56 (1985) (noting that each of the Court's previous defamation decisions had involved statements on matters of public concern).

267. Similarly, in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), the Court noted that "the First Amendment extends to myriad matters of public interest." *Id.* at 42. The Court held the "public interest" classification to include the allegations giving rise to *Rosenbloom*: that the plaintiff sold obscene magazines. *Id.* at 32-34, 41-43. Surely much speech on business and economic-related matters—even much commercial advertising—is equally significant. Although the Court later repudiated *Rosenbloom's* holding that even a private figure plaintiff must prove actual malice in order to win a defamation case involving a matter of public interest or concern, see *supra* note 199, the Court has continued to recognize the importance of granting meaningful First Amendment protection to statements of public concern, see *supra* text accompanying notes 229-243. As a result, *Rosenbloom's* comments on what constitutes a matter of public interest or concern assume a continued significance. For discussion of the importance of making public/private concern distinctions in Lanham Act § 43(a) cases that arise in the context of commercial advertising or similar expression, see *infra* text accompanying notes 377-392, 402-453.

268. 466 U.S. 485 (1984).

under the public concern umbrella. Although *Bose* technically was a case of injurious falsehood rather than defamation,<sup>269</sup> the Court used it to resolve issues surrounding the independent appellate review standard which the First Amendment mandates regarding lower court determinations of actual malice.<sup>270</sup> The falsehood at issue pertained to characteristics of the plaintiff corporation's stereo speakers.<sup>271</sup> The Court's use of *Bose* to clarify important First Amendment issues, coupled with its implicit characterization of the case in *Dun & Bradstreet*, leads to the conclusion that the Court regarded the statement in *Bose* as one of public concern.<sup>272</sup> The defendant in *Bose* was a consumer magazine<sup>273</sup> containing a statement that did not constitute commercial speech. The same statement, if made today by a consumer magazine, would not be actionable under the new section 43(a).<sup>274</sup> *New York Times*, however, requires a focus on the substance of what was said, rather than the form in which it was said.<sup>275</sup> Thus, a statement identical to that in *Bose*, if made by the plaintiff's competitor in an advertisement for its product, should still be a statement of public concern even though it would be commercial speech actionable under the new section 43(a).<sup>276</sup>

#### E. CONSTITUTIONAL ASPECTS OF INJURIOUS FALSEHOOD

The foregoing discussion of *Bose*, an injurious falsehood

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269. *Id.* at 487.

270. *Id.* at 499, 510-11, 514. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964).

271. *Bose*, 466 U.S. at 487-88.

272. In *Dun & Bradstreet*, the plurality stated that "every other case in which this Court has found constitutional limits to state defamation laws . . . involved expression on a matter of undoubted public concern." 472 U.S. at 756. Even though *Bose* technically presented an injurious falsehood case, the Court effectively treated it as a defamation case in terms of the appropriate standard of independent appellate review. See *supra* text accompanying notes 269-270. *Bose* thus would logically be one of the "public concern" cases to which the D&B plurality referred.

273. *Bose*, 466 U.S. at 487-88.

274. The defendant's magazine article—a critical review of a stereo speaker system—did not propose a commercial transaction and, therefore, was not commercial speech. See *infra* text accompanying notes 301-305. If made today, similar statements would not be actionable under Lanham Act § 43(a) because they are not made in the context of commercial advertising or promotion. See *supra* notes 78-79.

275. See *supra* text accompanying notes 159-161, 268-260.

276. See *infra* text accompanying notes 301-305; *supra* notes 78-79; cf. *supra* note 274 (explaining why actual facts of *Bose* are not commercial speech, and not actionable under present § 43(a)).



case, leads logically to a brief consideration of the constitutional aspects of that common law action. It is important to note at the outset that the Supreme Court has not crafted a special set of constitutional requirements for injurious falsehood cases.

One might even argue, after a technical parsing of *Bose*, that the Court has not imposed any serious First Amendment limits on injurious falsehood. After all, the Court expressly avoided deciding whether the plaintiff corporation in *Bose* was a public figure.<sup>277</sup> Similarly, the Court declined to state whether defamation's actual malice requirement applies to injurious falsehood as well.<sup>278</sup> Instead, the Court uncritically accepted the lower courts' approach to these issues, and proceeded to consider the independent appellate review issue.<sup>279</sup>

Nevertheless, the Court's choice of *Bose* as the vehicle for addressing a major First Amendment question arising in defamation cases makes it reasonably apparent that injurious falsehood law cannot go unchecked by the First Amendment.<sup>280</sup> Although the Court has not authoritatively detailed the constitutional aspects of injurious falsehood, it would be difficult, after *Bose*, for the Court to deem injurious falsehood unaffected by freedom of expression concerns.<sup>281</sup>

Lower courts have tended to read *Bose* as indicating that freedom of expression concerns must be accommodated in injurious falsehood cases.<sup>282</sup> The courts have differed, however, concerning the proper approach to the constitutionalization of injurious falsehood law.<sup>283</sup> A number of courts have taken defa-

277. *Bose*, 466 U.S. at 492 n.8.

278. *Id.* at 513.

279. *Id.* at 492 n.8, 513. The Court held that appellate review of lower courts' determinations of actual malice must be conducted according to an independent review of the entire record rather than under the "clearly erroneous" standard set forth in the Federal Rules of Civil Procedure. *Id.* at 510-11, 514.

280. If the Court did not regard injurious falsehood law as raising at least some of the freedom of expression concerns defamation law presents, *Bose* would have been a completely unsatisfactory vehicle for addressing the First Amendment issues decided there.

281. Even though the Court acknowledged that *Bose's* central issue "reaches us on a somewhat peculiar wavelength," 466 U.S. at 514, an understandable signal derived from *Bose* is that the First Amendment must sometimes constrain injurious falsehood law.

282. See RESTATEMENT (SECOND) OF TORTS § 623A (1977); *id.* caveats (1), (2) & cmts. c, d.

283. See *id.* This is due in part to the lack of a definitive ruling from the Supreme Court. See *supra* text accompanying notes 277-281. There is another possible explanation for the differences among courts on the proper approach to the constitutionalization of injurious falsehood law: the longstanding differences among states on what is necessary to satisfy injurious falsehood's com-

mation's public/private figure approach and transplanted it into the injurious falsehood realm.<sup>284</sup> Whether that approach is the best course of action remains open to debate.<sup>285</sup> For present purposes, however, it suffices to say that the interests at stake in injurious falsehood cases, although not identical to those in defamation litigation,<sup>286</sup> are sufficiently similar to warrant meaningful First Amendment protection.<sup>287</sup>

Any attempt to craft a First Amendment framework for Section 43(a) cases obviously implicates the constitutional dimensions of defamation and injurious falsehood. Consideration of these constitutional rules, however, does not end the First Amendment inquiry. Although the Supreme Court's defamation decisions have occasionally touched upon commercial matters, the Court defined defamation's constitutional parameters for the

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mon law requirement of proof of fault. Although the common law of the various states has tended to agree that an injurious falsehood plaintiff must establish the defendant's fault, *see* KEETON et al., *supra* note 2, § 128, at 969, different states have required different showings in this regard. Some have required proof of the defendant's knowledge of falsity or reckless disregard for the truth. *See, e.g.,* Simmons Ford, Inc. v. Consumers Union of United States, Inc., 516 F. Supp. 742, 744 (S.D.N.Y. 1981); RESTATEMENT (SECOND) OF TORTS § 623A (1977). This is the same degree of fault the actual malice standard contemplates, except by common law. Other states, however, have required what may be called common law malice—ill will or spite motives toward the plaintiff. *See, e.g.,* Systems Operations, v. Scientific Games Dev. Corp., 555 F.2d 1131, 1140 (3d Cir. 1977). Still other states have required proof of the defendant's intent to cause economic harm. *See* RESTATEMENT, *supra*, § 623A caveats (1), (2). Complicating matters further, some states allow the plaintiff to establish the requisite fault by proving any of the forms of fault just discussed. *See, e.g.,* Annbar Assocs. v. American Express Co, 565 S.W.2d 701 (Mo. App. 1978).

284. *See, e.g.,* Flotech, Inc. v. E.I. DuPont de Nemours Co., 814 F.2d 775, 777 (1st Cir. 1987); Blatty v. New York Times Co., 728 P.2d 1177, 1181, 1182-83 (Cal. 1986), *cert. denied*, 485 U.S. 394 (1988); Dairy Stores, Inc. v. Sentinel Pub. Co., 486 A.2d 344, 345 (N.J. Super. 1985), *aff'd on other grounds*, 516 A.2d 220 (N.J. 1986). These courts borrowed the defamation scheme at least to the extent that public figure plaintiffs are expected to prove actual malice. Negligence—the fault requirement that private figure plaintiffs must establish in defamation cases—generally has not been seen as an appropriate type or level of fault to sustain an injurious falsehood claim. RESTATEMENT (SECOND) OF TORTS § 623A cmt. d.

285. For instance, it may be argued that the constitutional aspects of injurious falsehood law should utilize the fault concepts of negligence and actual malice, but that the applicable fault requirement should be triggered by factors other than the plaintiff's status (the approach taken in defamation law). Under this proposal, the fault requirement in a given injurious falsehood case would be determined according to the nature of the speech at issue and the defendant's status. *See* Langvardt, *supra* note 3, at 959-75.

286. *See supra* text accompanying notes 125-153.

287. *See Bose*, 508 F. Supp. 1249, 1270-74 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984).

most part in noncommercial cases.<sup>288</sup> Section 43(a) "defamation" and "injurious falsehood" cases, on the other hand, arise in commercial settings.<sup>289</sup> It therefore becomes relevant to consider the line of Supreme Court decisions delineating the scope of First Amendment protection enjoyed by commercial speech.

## V. COMMERCIAL SPEECH AND THE FIRST AMENDMENT

Although the Court has come to regard the First Amendment as protecting a broad range of expression,<sup>290</sup> it does not extend to all speech.<sup>291</sup> The Supreme Court's First Amendment jurisprudence establishes, moreover, that not every protected category of expression merits the same degree of insulation from government regulation.<sup>292</sup> The commercial/noncommercial distinction is the primary means by which the Court has designated different levels of First Amendment protection.<sup>293</sup>

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288. See *supra* text accompanying notes 194-198, 255-276; *infra* text accompanying notes 421-432.

289. Such section 43(a) cases must arise in the context of "commercial advertising or promotion." 15 U.S.C. § 1125(a) (1988). See *supra* text accompanying notes 65-80.

290. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985).

291. For instance, obscene expression falls outside the First Amendment's protective scope. *Miller v. California*, 413 U.S. 15, 23 (1973). The First Amendment also leaves unprotected speech designed to incite, and likely to incite, imminent lawless activity. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). The same apparently is true of so-called "fighting words," those statements whose utterance inflicts injury or tends to provoke an immediate violent response. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The Supreme Court has recently emphasized, however, that even within these unprotected classifications of speech such as fighting words, the government may not make content-based discriminations among different types of fighting words. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992).

292. See, e.g., *Dun & Bradstreet*, 472 U.S. at 757-62.

293. Since *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the Supreme Court has held that commercial speech merits an intermediate level of First Amendment protection rather than the full protection accorded political speech and other forms of noncommercial expression. See, e.g., *id.* at 770-72. For additional discussion of the commercial/noncommercial distinction in First Amendment jurisprudence, see *infra* text accompanying notes 294-345. The Court has also indicated that speech on a matter of public concern merits greater First Amendment protection than speech of private concern. See *Dun & Bradstreet*, 472 U.S. at 758-60. The Court has not clearly enunciated, however, many specifics differentiating between these relative degrees of protection.

## A. FULL PROTECTION FOR NONCOMMERCIAL EXPRESSION

Noncommercial expression on a whole host of subjects merits "full" First Amendment protection.<sup>294</sup> Although this label does not mean that the government may never constitutionally regulate such speech, it does mean that the government will face considerable difficulty sustaining a content-based restriction against a First Amendment attack.<sup>295</sup> Political speech<sup>296</sup> serves as the best example of fully protected noncommercial expression, given its "core" First Amendment status.<sup>297</sup>

The First Amendment protects much more than political speech, however. Other noncommercial expression receives the same constitutional solicitude given to political speech.<sup>298</sup> The Supreme Court has extended full First Amendment protection to "expression about philosophical, social, artistic, economic, lit-

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294. See, e.g., *Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992) (political speech); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 508-09 (1991) (expression on matters of crime); *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (expressive conduct of a political nature); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) ("expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-68, 271-72, 278-79 (1964) (expression dealing with major social issues).

295. In order for a court to uphold a content-based regulation of fully protected speech, the regulation must be necessary to the fulfillment of a compelling government purpose. See, e.g., *Burson*, 112 S. Ct. at 1851; *Boos v. Barry*, 485 U.S. 312, 318, 321 (1988). This stern "strict scrutiny" test means that the content-based government restriction usually falls. See *Burson*, 112 S. Ct. at 1857 ("reaffirm[ing] that it is the rare case in which we have held that a law survives strict scrutiny"). For examples of the strict scrutiny test's ultimate effect (i.e., the government restriction's nullification on First Amendment grounds), see *Simon & Schuster*, 112 S. Ct. at 510-12; *Texas v. Johnson*, 491 U.S. 397, 412 (1989). *Burson*, however, is an example of the "rare case" in which a government restriction on fully protected speech passes the strict scrutiny test. 112 S. Ct. at 1857-58.

296. The political speech classification logically includes statements about government operations, significant social and public policy issues, and individuals connected with such matters. See, e.g., *Burson*, 112 S. Ct. at 1850; *Texas v. Johnson*, 491 U.S. at 406; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-86 (1978); *New York Times*, 376 U.S. at 269-71.

297. See, e.g., *Burson*, 112 S. Ct. at 1850; *Texas v. Johnson*, 491 U.S. at 406; *Boos*, 485 U.S. at 318; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985); *Bellotti*, 435 U.S. at 784-86.

298. See, e.g., *Simon & Schuster*, 112 S. Ct. at 510-12 (book authored by criminal); *Hustler Magazine*, 485 U.S. 46 (parody of public figure); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (theatrical production); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (issues of public concern); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (magazine article about play); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (works of literature); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (movie).

erary, or ethical matters—to take a non-exhaustive list of labels.”<sup>299</sup> In addition, the Court has indicated that speech on matters of public concern is a highly valued commodity for First Amendment purposes.<sup>300</sup>

## B. INTERMEDIATE PROTECTION FOR COMMERCIAL SPEECH

### 1. The Direct Regulation Context

The Court has not extended full First Amendment protection, however, to commercial speech<sup>301</sup> when the government seeks to restrict it by direct regulation, as opposed to the indirect but significant regulation found in judicial enforcement of legal rules allowing private parties to bring civil actions for damages.<sup>302</sup> Although it has sometimes defined “commercial speech” as expression that is solely in the economic interest of the speaker and his audience,<sup>303</sup> the Supreme Court usually defines it as expression that does “no more than propose a commercial transaction.”<sup>304</sup> As a result, the Court typically treats

299. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). That an economic motive underlies the expression does not necessarily deprive it of its fully protected character. See *infra* note 304.

300. *Dun & Bradstreet*, 472 U.S. at 758-60. The Court has not clearly stated whether all speech on matters of public concern merits full protection. Except for defamation cases brought by private figure plaintiffs, see *id.* at 759-61, the Court has not specified what level of protection the First Amendment requires for noncommercial speech of only private concern. Nor has the Court expressly ruled whether commercial speech may sometimes fall within the public concern category. See *supra* text accompanying notes 254-256. This article posits that commercial speech may be of either public or private concern. See *supra* text accompanying notes 254-276; *infra* text accompanying notes 375-386, 433-449.

301. *E.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-72 (1976).

302. The term “direct regulation” refers to government regulations (usually statutes or agency rules) that proscribe or restrict expression and are enforced in government-initiated proceedings for injunctive relief, restitutionary relief, or other administrative sanctions. The direct regulation setting existed in each of the Supreme Court’s commercial speech decisions discussed in this subsection. See *infra* text accompanying notes 303-344. The term “indirect regulation,” on the other hand, refers to judicial enforcement of legal rules allowing private parties to sue for damages. Defamation, injurious falsehood, and Lanham Act § 43(a) claims would thus be of the indirect regulation variety. Use of the term “indirect regulation” does not mean that this sort of regulation has insignificant effects on the speaker. As indicated later, see *infra* text accompanying notes 411-418, indirect regulation may pose more severe adverse First Amendment consequences than direct regulation. For additional discussion of the importance of distinguishing between direct and indirect regulation in the context of commercial speech, see *infra* text accompanying notes 408-420.

303. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561 (1980).

304. *E.g.*, *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 (quoting Pitts-

advertising intended to promote the sale of a product or service as commercial speech. Indeed, the Court's commercial speech decisions have consistently involved advertising which the government sought to regulate directly under statutes or rules banning or restricting expression of a certain content.<sup>305</sup>

The Court has not decided a commercial speech case involving indirect government regulation through a private party's legally authorized suit for damages. The Court's defamation cases occasionally touched upon related issues but were ultimately held not to involve commercial speech.<sup>306</sup> The direct regulation-indirect regulation distinction drawn here must be kept in mind during examination of the Court's commercial speech decisions, each of which involved direct regulation.<sup>307</sup>

## 2. *Virginia Board of Pharmacy* and Its Effect

Even though commercial speech does not receive full First Amendment protection, its present constitutional status is a

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burgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973)). Regardless of which definition of commercial speech is employed, it is clear that the speaker's profit motive will not alone suffice to make the speech commercial in nature. Various Supreme Court decisions establish that an underlying profit motive does not lessen the degree of constitutional protection extended to that expression. See, e.g., *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 756 n.5 (1988); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). Speech as to which there is a profit motive is not necessarily *solely* in the economic interest of the speaker and his audience. Neither does it necessarily propose a commercial transaction. Therefore, such expression is not automatically commercial speech under either of the commercial speech definitions set forth in the text. See *supra* text accompanying notes 303-304.

305. See, e.g., *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986) (restriction on advertisements for gambling casinos); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (restriction on unsolicited mailings of contraceptive advertisements and promotional materials); *Central Hudson Gas & Elec. Corp.*, 447 U.S. 557 (restriction on advertisements by utility companies); *Virginia State Bd. of Pharmacy*, 425 U.S. 748 (restriction on pharmacists' ability to advertise prescription drug prices). None of these cases arose in the context of a private plaintiff's suit for damages.

306. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In *Dun & Bradstreet*, the plurality drew an analogy between commercial speech and the credit report at issue, but expressly noted that the credit report was not commercial speech. 472 U.S. at 762 & n.8. In *New York Times*, the Court held that a paid advertisement dealing with major civil rights issues did not constitute commercial speech. 376 U.S. at 265-66.

307. For a discussion of the significance of the distinction between direct regulation and indirect regulation more fully in a later section see *infra* text accompanying notes 408-420.

step up from the treatment it historically received. Prior to the mid-1970s, the Court consistently classified commercial speech as unprotected by the First Amendment.<sup>308</sup> In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>309</sup> a 1976 decision, the Court partially reversed course and held that commercial speech deserved First Amendment protection, although not the full measure extended to political speech and its noncommercial equivalents.<sup>310</sup>

*Virginia Board of Pharmacy* created a place for commercial speech in the First Amendment hierarchy, largely because of the Court's conclusion that society has "a strong interest in the free flow of commercial information."<sup>311</sup> The Court also observed that for certain consumers, the interest in freely obtaining commercial information "may be as keen, if not keener by far, than [their] interest in the day's most urgent political debate."<sup>312</sup> Despite this political speech reference, *Virginia Board of Pharmacy* did not equate commercial and political speech in terms of level of First Amendment protection. Rather, the Court held that commercial speech logically merited an intermediate level of protection, under which the government would enjoy more freedom to regulate than if full protection were the applicable standard.<sup>313</sup> The Court provided some guidance on the nature of this intermediate level of protection, by stating that such protection for commercial speech hinged on the expression's being

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308. *E.g.*, *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942).

309. 425 U.S. 748 (1976).

310. *Id.* at 770-72. The Court struck down a statute that dealt with the professional conduct of pharmacists. The statute effectively prohibited pharmacists from advertising their prices for prescription medications. *Id.* at 749-50, 752. Thus, the case presented an instance of direct regulation. *See supra* note 302. Although *Virginia Board of Pharmacy* was the first decision in which the Court expressly held that commercial speech merited First Amendment protection, two cases decided shortly before *Virginia Board of Pharmacy* strongly implied that such a holding was just around the corner. *See Bigelow v. Virginia*, 421 U.S. 809, 818-22 (1975); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 384 (1973). *See also Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162-65 (1967) (Warren, C.J., concurring) (commenting on the importance of speech dealing with business and economic matters).

311. 425 U.S. at 764. The Court added that a free flow of commercial information was "indispensable" to the making of private economic decisions in our free enterprise system. *Id.* at 765.

312. *Id.* at 763. According to the Court, consumers' keen interest in receiving commercial information translated into a First Amendment right to receive such information. *Id.* at 756-57. This right to receive information formed much of the basis for the Court's conclusion that commercial speech could not be wholly excluded from the First Amendment realm. *See id.*

313. *See id.* at 770.

truthful and about a lawful activity.<sup>314</sup>

In an effort to justify its decision not to extend full First Amendment protection to commercial speech, the *Virginia Board of Pharmacy* Court cited certain supposed attributes that made less-than-full protection more appropriate for such expression. Commercial speech, the Court asserted, is more objectively verifiable than most political expression.<sup>315</sup> Moreover, the Court emphasized that commercial speech is hardier and more durable than political speech, and thus less likely to be chilled by government regulation. The Court regarded the profit motive underlying commercial speech as a force that would likely prevent the commercial speaker from being easily deterred.<sup>316</sup>

### 3. *Central Hudson* and Early Applications of Four-Part Test

Other than establishing that commercial speech must be truthful and pertain to a lawful activity in order to merit protection,<sup>317</sup> *Virginia Board of Pharmacy* did not specify many details regarding the intermediate level of protection and its application. In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>318</sup> the Court adopted a four-part test intended to

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314. *Id.* at 771-72. In other words, false commercial speech receives no First Amendment protection; nor does commercial speech about an unlawful activity. It should be remembered, however, that the Court's *Virginia Board of Pharmacy* ruling arose in the direct regulation context. For explanation of this article's use of the term "direct regulation," see *supra* note 302. Courts should not follow this same approach to false commercial speech in the indirect regulation context. See *infra* text accompanying notes 408-420.

In the noncommercial setting, the Court treats false statements and statements about unlawful matters much differently than it does when dealing with commercial speech. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-73 (1964) (falsity does not necessarily cause loss of First Amendment protection for speech); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (expression about unlawful activity remains protected by First Amendment unless expression is both directed to incite and likely to incite imminent lawless action).

315. 425 U.S. at 771-72. This proposition is debatable. See *supra* note 252.

316. *Id.* This is also debatable, especially when the focus shifts from the direct regulation context of *Virginia Board of Pharmacy*, see *supra* note 304, to the indirect regulation setting of a damages action. As this Article will show, a potentially substantial damage award may have more of a chilling effect than the threat of remedies available in the direct regulation context. See *infra* text accompanying notes 410-418. Although the *Virginia Board of Pharmacy* Court referred to the presence of a profit motive, the Court reaffirmed elsewhere in the opinion that the desire for profit does not in and of itself cause fully protected speech to lose that character. See 425 U.S. at 761-62.

317. See *id.* at 771-72. The indirect regulation setting warrants a different approach, however. See *infra* text accompanying notes 408-420.

318. 447 U.S. 557 (1980). *Central Hudson* presented another direct regulation case in the sense noted at *supra* note 302. The case centered around a state



supplement *Virginia Board of Pharmacy* and govern the First Amendment analysis of government restrictions on commercial speech.

The *Central Hudson* test's first element is a threshold inquiry designed to determine whether any First Amendment protection is available. It specifies that: (1) the affected commercial speech must pertain to a lawful activity and be non-misleading.<sup>319</sup> Satisfaction of this element<sup>320</sup> entitles the expression to First Amendment protection. Because the First Amendment provides only intermediate protection, however, the Court will uphold the government regulation if the remaining elements of the *Central Hudson* test are satisfied: (2) the government has a "substantial" underlying interest to further with regard to the regulation; (3) the regulation directly advances this underlying interest; and (4) the regulation is no more extensive than necessary to further the government interest.<sup>321</sup>

These elements focus on the nature and strength of the government's supporting interest (element two), and on the degree of "fit" between that interest and the particular regulation at issue (elements three and four).<sup>322</sup> Although later decisions have modified the test in certain respects, it remains the rule that if the government regulation does not satisfy elements two through four, the regulation violates the First Amendment.<sup>323</sup>

Under the intermediate level of protection enunciated in *Virginia Board of Pharmacy* and refined in *Central Hudson*, it always remained possible that even truthful commercial speech about lawful matters could undergo significant government regulation without any First Amendment transgression occurring. The Supreme Court's first decade of commercial speech deci-

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Public Service Commission regulation that restricted promotional advertising by utility companies. *Id.* at 558.

319. *Id.* at 566.

320. If the commercial speech refers to an unlawful activity or is misleading, the remaining elements become moot because the government action will not be held to violate the First Amendment. *See id.* As *Virginia Board of Pharmacy* made plain, the First Amendment does not protect (in the direct regulation setting, *see supra* note 314) commercial speech that misleads consumers or promotes an unlawful activity, *see Virginia Board of Pharmacy*, 425 U.S. at 771-72.

321. *Central Hudson*, 447 U.S. at 566. *But see* Board of Trustees v. Fox, 492 U.S. 469, 480 (1989), which effectively altered the final element of the *Central Hudson* test. *See infra* text accompanying notes 337-343.

322. *See Central Hudson*, 447 U.S. at 566; *Fox*, 492 U.S. at 475, 479-80.

323. *Central Hudson*, 447 U.S. at 566; *Fox*, 492 U.S. at 475. *Fox* and *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986) modified the content and application of the *Central Hudson* test. For discussion of *Posadas* and *Fox*, *see infra* text accompanying notes 330-343.

sions following *Virginia Board of Pharmacy* nonetheless revealed a tendency to take a dim view of government attempts to restrict commercial speech that was neither false nor designed to promote unlawful pursuits.<sup>324</sup> The Court struck down, for instance, restrictions on attorneys' ability to advertise,<sup>325</sup> utility companies' freedom to promote the service they provided,<sup>326</sup> and contraceptive sellers' mailings of unsolicited promotional materials.<sup>327</sup>

The Court, in its early commercial speech decisions, exhibited considerable concern for the relationship between the underlying government interest and the regulation under review—the degree of “fit” issue which *Central Hudson's* final two elements contemplate. More often than not, careful attention to those elements revealed an insufficiently close relationship between the regulation and the government interest,<sup>328</sup> because the regulation either was unlikely to advance the interest in any meaningful way or swept too broadly, restricting more expression than necessary to further the government interest just as effectively.<sup>329</sup>

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324. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *Bolger v. Youngs Drug. Prods. Corp.*, 463 U.S. 60, 68 (1983); *Central Hudson*, 447 U.S. at 561; *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977); *Virginia Board of Pharmacy*, 425 U.S. at 749, 750-52 (each striking down restrictions on non-misleading speech about lawful activities).

325. *Zauderer*, 471 U.S. at 637; *Bates*, 433 U.S. at 363.

326. *Central Hudson*, 447 U.S. at 561.

327. *Bolger*, 463 U.S. at 68.

328. See, e.g., *id.* at 60, 71-75 (1983); *Central Hudson*, 447 U.S. at 566-67.

329. See, e.g., *Bolger v. Youngs Drug. Prods. Corp.*, 463 U.S. 60, 71-75 (1983); *Central Hudson*, 447 U.S. at 566-67. In *Bolger*, the Court struck down a federal statute that barred unsolicited mailings of contraceptive advertisements. 463 U.S. at 75. Because the non-misleading advertisements promoted the legal sale of contraceptives, they merited no First Amendment protection under *Central Hudson's* first element. The Court concluded that the government could not override this protection because the minimal degree of fit between the statute and the government's underlying interest failed *Central Hudson's* final two elements. *Id.* at 71-75. Even though the Court acknowledged that the government possessed a substantial interest in helping parents in deciding when to discuss contraception with their children, the Court determined that the statute's sweeping ban would do very little to further this interest and was excessively broad. See *id.* *Bolger* also presented a threshold issue: whether the contraceptive advertisements constituted commercial speech or fully protected noncommercial expression. The advertisements' noncommercial aspects included their statements on the uses of contraceptive devices to prevent pregnancy and minimize the risk of venereal disease transmission. According to the Court, the speaker's economic motive often strongly indicates the expression's commercial nature. *Id.* at 66-67. This statement must be considered in the context of designing advertisements to promote the sale of a commercial product. *Id.* at 75. Outside that context, the mere presence of an

#### 4. Weakening of Four-Part Test?

The Court's more recent commercial speech decisions, however, reflect greater tolerance of government restrictions on truthful commercial speech about lawful activities. In *Posadas de Puerto Rico Associates v. Tourism Co.*,<sup>330</sup> the Court upheld Puerto Rico's prohibition of certain commercial advertisements for casino gambling, a legal activity in Puerto Rico.<sup>331</sup> Applying *Central Hudson's* third and fourth elements, the Court did not conduct the careful analysis, manifested in previous decisions,<sup>332</sup> of the degree of fit between the advertising ban and the government's underlying interest. The Court instead deferred to Puerto Rico's legislative judgment that the regulation directly advanced the government's interest in a way no more extensive than necessary.<sup>333</sup> After noting that the legislature would not have enacted the advertising ban if it did not consider the restriction an appropriate means of advancing the interest in protecting its citizens from casino gambling's harmful effects, then Justice Rehnquist indicated that it would be inappropriate for the Court to interfere with this "reasonable" legislative judgment.<sup>334</sup>

By authorizing a deferential approach to the final two elements of the *Central Hudson* test, *Posadas* weakened the test despite purporting to adhere to it. Such deference will likely allow more government regulation of commercial speech to withstand constitutional attack than would the independent judicial analysis undertaken prior to *Posadas*.<sup>335</sup> In a later case, *Board*

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underlying economic motive does not necessarily render the expression commercial in nature. See *supra* note 304. The *Bolger* Court concluded that if speech contains some political aspects but appears predominantly commercial, it should be treated as commercial speech entitled only to an intermediate degree of First Amendment protection. 463 U.S. at 67-68.

330. 478 U.S. 328 (1986).

331. *Id.* at 330-31, 344.

332. See *supra* text accompanying notes 324-329.

333. See *Posadas*, 478 U.S. at 341-44. For additional discussion of the deferential approach taken in *Posadas*, see Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 MINN. L. REV. 289, 292, 301 (1987).

334. 478 U.S. at 341-44.

335. Compare the deferential approach of *Posadas*, *id.* at 341-44, with the cases cited at *supra* note 324 (each of the latter reflecting an apparently great willingness to view commercial speech restrictions skeptically). *Posadas* did not stop at an apparent alteration of the Court's application of *Central Hudson's* third and fourth elements. After deeming the advertising before the Court constitutional because it passed the four-part test, the majority outlined (in an opinion authored by Justice, now Chief Justice, Rehnquist) an alternative anal-

of *Trustees of the State University of New York v. Fox*,<sup>336</sup> the Court followed the lead of *Posadas* by expressing approval of its deferential approach<sup>337</sup> and relaxing *Central Hudson's* final element, which requires the government regulation to be no more extensive than necessary to further the underlying government interest.<sup>338</sup> Conceding that language in previous decisions might have indicated that this element mandated a "least-restrictive-means" analysis, Justice Scalia stated that *Central Hudson* neither contemplated nor required such an analysis.<sup>339</sup>

The Court chose a different path in *Fox*, holding that this final element merely requires that the government regulation of commercial speech be "a means narrowly tailored to achieve the desired objective."<sup>340</sup> Justice Scalia noted that the First Amendment requires only a "reasonable" fit, "not necessarily [a] per-

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ysis with potentially significant implications for First Amendment jurisprudence. Justice Rehnquist asserted that because Puerto Rico would have had the power to ban casino gambling, it should logically possess the power to take the less intrusive step of allowing casino gambling but prohibiting certain advertising promoting it. 478 U.S. at 345-47. This dictum could justify a broad range of restrictions on commercial speech if seized upon in future cases, because there are few underlying activities that the government could not constitutionally ban. See *Lively*, *supra* note 333, at 300. According to the *Posadas* dissenters, Justice Rehnquist's analysis was backwards. The dissenters asserted that in terms of constitutionally protected freedoms, the advertising ban would be more drastic than a ban on the underlying activity because the activity, unlike the advertising, carries no constitutional protection. 478 U.S. at 354 n.4 (Brennan, J., dissenting). So far, the Court has not invoked the *Posadas* dictum again. There is of course no guarantee, however, that the Court will not play it as a constitutional trump card in some future commercial speech decision.

336. 492 U.S. 469 (1989).

337. See *id.* at 479-80.

338. See *supra* text accompanying note 321.

339. *Fox*, 492 U.S. at 475-80. The Court labelled prior references to a least-restrictive-means approach as dicta, because the Court had never formally held that a government restriction on commercial speech must be the absolutely narrowest means of furthering the applicable government interest in order for the restriction to withstand First Amendment attack. *Id.* at 477, 480.

340. *Id.* at 480. *Fox* arose out of a state university regulation which operated to prevent private parties from holding "Tupperware parties" in students' dormitory rooms. The student plaintiffs maintained that this application unconstitutionally deprived them of their rights to receive commercial speech. For discussion of the right to receive commercial information, see *supra* note 314. The *Fox* trial court ruled for the university. The court of appeals reversed and remanded because the trial court had not determined whether the regulation was the least restrictive means by which the university could have furthered its substantial interests in preserving a sound educational environment and in protecting students from unscrupulous merchants. The Supreme Court, however, reversed and remanded because the court of appeals erred in requiring the "least restrictive means" analysis. 492 U.S. at 471-82.

fect" fit, between the regulation and the underlying government interest.<sup>341</sup> After *Fox*, therefore, a regulation that is more extensive than necessary to serve the government interest—and thus constitutionally infirm under *Central Hudson*—may now be held not to violate the First Amendment. A restriction that sweeps more broadly than the narrowest possible regulation may still be reasonably suited to the advancement of the government interest. *Fox*'s "narrowly tailored" approach requires only the latter.<sup>342</sup>

*Fox*'s relaxation of the four-part test necessarily means that courts will be less likely to strike down government restrictions on commercial speech on First Amendment grounds than they would have been during the era preceding *Fox* and *Posadas*. This in turn translates into a probable lessening, although not an elimination, of the First Amendment protection given to commercial speech.<sup>343</sup> For purposes of this article, however, it is useful to recall an earlier caveat: the Supreme Court developed its commercial speech doctrine in the context of direct government regulation of advertising, and has not resolved the issues surrounding indirect regulation through private parties' legally authorized suits for damages.<sup>344</sup> The indirect regulation setting—the setting section 43(a) cases present—implicates interests that call for only a partial acceptance of, as well as modifications to, current commercial speech doctrine.<sup>345</sup>

## VI. INADEQUACY OF JUDICIAL TREATMENT OF FIRST AMENDMENT CONSIDERATIONS IN SECTION 43(a) "DEFAMATION" AND "INJURIOUS FALSEHOOD" CASES

The relative youth of the new section 43(a) means that courts have not yet had an abundance of opportunities to address the First Amendment issues associated with the "defamation" and "injurious falsehood" claims now actionable under the

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341. *Id.* at 480.

342. *See id.* at 476-80.

343. The *Fox* Court declined to acknowledge that it reduced *Central Hudson*'s severity. The Court instead maintained that *Fox* only clarified the degree of scrutiny to be given to government action that restricts commercial speech. *Id.* at 480-81. In his opinion for the Court, Justice Scalia stated that the decision strengthened "the essential protections of the First Amendment" by maintaining a clear distinction between the respective levels of protection given to commercial and noncommercial expression. *See id.* at 481.

344. *See supra* text accompanying notes 301-307.

345. *See infra* text accompanying notes 408-420.

statute. Regrettably, however, the opportunities that have arisen have not been exercised effectively. The problem stems partially from the longstanding view that as to false advertising claims, the former version of section 43(a) created a strict liability regime under which fault requirements and other First Amendment principles were not essential to proper judicial resolution.<sup>346</sup> That view, not particularly objectionable when the claim stems from the defendant's false statements about its own products or services,<sup>347</sup> has carried over into judicial construction of the newly amended version.<sup>348</sup> Application of the same strict liability approach, however, has become considerably more troublesome now that the statute allows suits based on a defendant's statements about the plaintiff's products, services, or commercial activities.<sup>349</sup>

*U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*<sup>350</sup> is the leading case addressing the First Amendment's proper role in "commercial defamation" claims brought under the new section 43(a). There, the Third Circuit Court of Appeals highlighted the relevant issues and concerns, but resolved them in a fashion that was unsatisfactory not only for the matter at issue but also for future section 43(a) cases.<sup>351</sup> Unfortunately, other courts have not attained even this imperfect level of analysis.

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346. See *supra* text accompanying notes 37-43.

347. It may safely be presumed that the defendant would nearly always be in a strong position to determine whether statements about the defendant's own product or service are factually supportable. Therefore, it is not unreasonable to maintain—as the strict liability approach under the former § 43(a) seems to—that a defendant speaks at his, her, or its peril when stating falsehoods about the defendant's product or service. A strict liability regime, when confined to the defendant's false statements about the defendant's product or service, is justifiable on another ground: the probable lack of a chilling effect resulting from such a regime. It is doubtful that a rule of strict liability would deter an advertiser from commenting on his, her, or its own product or service in advertisements. The same would not necessarily be true, however, of an advertiser's comments about a competitor's product or service. See *infra* text accompanying notes 402-407, 414-420.

348. See, e.g., *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914 (3d Cir.), cert. denied, 498 U.S. 816 (1990); *Energy Four, Inc. v. Dornier Medical Sys., Inc.*, 765 F. Supp. 724 (N.D. Ga. 1991).

349. For discussion of the present § 43(a)'s allowance of such claims, see *supra* text accompanying notes 65-100. This article's proposed First Amendment framework for such cases appears at *infra* text accompanying notes 399-461.

350. 898 F.2d 914 (3d Cir.), cert. denied, 498 U.S. 816 (1990).

351. See *infra* text accompanying notes 374-390.

A. THE *U.S. HEALTHCARE* DECISION

## 1. Factual Background and Third Circuit's Rationale

*U.S. Healthcare* arose from a "comparative advertising war"<sup>352</sup> in which Blue Cross, an insurance company, and U.S. Healthcare, a health maintenance organization, each extolled the virtues of its own health coverage while commenting unfavorably on the other's services and commercial activities. U.S. Healthcare ("USH") sued Blue Cross, raising several state law claims including defamation, injurious falsehood, and interference with contractual relations, as well as a federal claim under section 43(a). Blue Cross counterclaimed on the same legal theories. The trial judge granted Blue Cross's motion for post-trial judgment on USH's claims; the jury found for USH on Blue Cross's counterclaims.<sup>353</sup> The trial judge classified each party as a public figure whose burden it was to prove, by clear and convincing evidence, that the other party possessed actual malice. Neither party satisfied its burden, however.<sup>354</sup> Concluding that the trial court had adopted an erroneous analytical framework, the Third Circuit Court of Appeals reversed and remanded.<sup>355</sup>

The Third Circuit analyzed the various alleged falsehoods cited by the parties to determine which were actionable. It concluded that each competitor had stated injurious falsehood and section 43(a) claims insofar as the other's advertisements inaccurately detailed its competitor's health plan. Moreover, the Third Circuit held actionable, under section 43(a), certain advertisements in which Blue Cross allegedly misrepresented features of its own coverage.<sup>356</sup>

In addition, the court determined that defamation and section 43(a) claims existed in favor of USH based on certain Blue Cross advertisements. These advertisements suggested that primary care physicians affiliated with USH's health maintenance organization possessed a financial interest in not referring patients to specialists, and that USH took reprisals against primary care physicians who made many such referrals.<sup>357</sup> Ac-

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352. *U.S. Healthcare*, 898 F.2d at 917.

353. *Id.* at 918-20.

354. *Id.* at 920.

355. *Id.* at 939.

356. *Id.* at 926. The court held other statements in the parties' advertisements to be non-actionable puffing. *Id.* at 925-26. For the court's discussion of the elements of a § 43(a) claim, see *id.* at 921-22.

357. The court observed that these statements were "capable of defamatory

ording to the court, the advertisements implied that "U.S. Healthcare, the people who run it, and the doctors who are employed by it, all place personal profit above adequate health care,"<sup>358</sup> and thus "suggest[ed] reprehensible conduct by U.S. Healthcare and its employees in the conduct of their business."<sup>359</sup>

The Third Circuit also determined that Blue Cross was entitled to pursue defamation and section 43(a) claims based on a USH television commercial depicting a Blue Cross brochure resting on a hospital bed pillow.<sup>360</sup> During this depiction, while a narrator outlined the shortcomings of Blue Cross coverage, a pair of hands pulled a sheet over the Blue Cross brochure and the camera panned to grieving family members standing around the bed. The Third Circuit observed that "the depiction of a distressing death scene in a health insurance commercial [was not] an uncalculated association."<sup>361</sup> The court noted that USH intended "a scare tactic" which a jury could regard as suggesting that Blue Cross "knowingly provides health care so substandard as to be dangerous."<sup>362</sup>

The Third Circuit then turned to First Amendment issues, stating that they would be resolved identically under each of the actionable defamation, injurious falsehood and section 43(a) claims.<sup>363</sup> Because the case arose in the comparative advertising context, the court found it necessary to reconcile defamation's constitutional aspects with the diminished constitutional status of commercial speech.<sup>364</sup> It observed that "[i]n the context of government restriction of speech, false and misleading commercial speech have no First Amendment value."<sup>365</sup> Nonetheless, the court noted, the First Amendment does protect some false and defamatory statements.<sup>366</sup> Moreover, the Third Circuit recognized that the Supreme Court had placed a First

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meaning." *Id.* at 926. It also noted that "Lanham Act claims may lie." *Id.* at 927.

358. *Id.* at 926.

359. *Id.*

360. *Id.* at 926-27.

361. *Id.* at 927. This observation notwithstanding, the court did not require a knowing falsehood (or any similar fault requirement) as an element of a § 43(a) "commercial defamation" claim. *See id.* at 921-22.

362. *Id.* at 927. Nevertheless, the court did not require a knowing falsehood (or any similar fault requirement) as an element of a § 43(a) "commercial defamation" claim. *See id.* at 921-22, 937.

363. *See id.* at 931.

364. *See id.* at 927-30.

365. *Id.* at 928 n.15.

366. *Id.*



Amendment premium on speech dealing with matters of public concern by affording it "heightened constitutional protection in the defamation context."<sup>367</sup>

According to the court, "the subordinate valuation" of commercial speech should not be confined to the line of cases dealing with direct government regulation of advertising.<sup>368</sup> The Third Circuit classified the advertisements at issue as commercial speech, under the Supreme Court's commercial speech decisions defining the term. In doing so, it stressed the advertisements' profit-driven promotion of products and services.<sup>369</sup> Relying primarily on the *Dun & Bradstreet* plurality's use of the commercial speech analogy,<sup>370</sup> the Third Circuit concluded that the USH and Blue Cross advertisements rose only to the level of private concern.<sup>371</sup>

The Third Circuit stated that even though USH and Blue Cross might arguably have been public figures, the trial court erred in invoking defamation law's public figure doctrine and actual malice requirement. Regarding the public figure approach as not only inapplicable but unworkable in the case's commercial setting,<sup>372</sup> the Third Circuit held that "while the speech here is protected by the First Amendment, . . . the First Amendment requires no higher standard of liability than that mandated by the substantive law for each claim."<sup>373</sup>

## 2. Analysis of the Decision

In *U.S. Healthcare*, the Third Circuit clearly made a thoughtful attempt to reconcile seemingly inconsistent First Amendment doctrines. It correctly rejected the trial court's First Amendment approach to those issues; the case's commercial origins made the public figure actual malice doctrine unsuitable.<sup>374</sup> The rationale the Third Circuit ultimately adopted,

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367. *Id.* at 929.

368. *Id.* at 932. *Contra* National Life Ins. Co. v. Phillips Publishing, Inc., 793 F. Supp. 627, 645-48 (D. Md. 1992) (in defamation case, constitutional fault requirements should not be altered even if defendant's statements were made in context of commercial speech).

369. *U.S. Healthcare*, 898 F.2d at 933-36.

370. 472 U.S. 749, 762 & n.8, 763 (1985).

371. *U.S. Healthcare*, 898 F.2d at 930-32.

372. *Id.* at 937-39.

373. *Id.* at 937.

374. The public/private figure distinction is not well-suited to commercial cases, in which corporations are often the plaintiffs. *See supra* text accompanying notes 194-198. *But see* National Life Ins. Co. v. Phillips Publishing, Inc., 793 F. Supp. 627, 640-43 (D. Md. 1992) (rejecting argument that public/private

however, was just as unsatisfactory as the trial court's.

The Third Circuit's approach in *U.S. Healthcare* effectively equated commercial speech with speech of only private concern.<sup>375</sup> In taking this approach, however, the court unduly relied on a misreading of *Dun & Bradstreet*. Citing *Dun & Bradstreet's* commercial speech analogy, the *U.S. Healthcare* court asserted that if credit reports are matters of only private concern, then commercial speech should nearly always be of private concern.<sup>376</sup>

*Dun & Bradstreet* did not hold, however, that all credit reports are of private concern, only that the particular credit report at issue—one with an extremely limited circulation—was of private concern.<sup>377</sup> Justice Powell's plurality opinion allowed for the prospect that certain credit reports could be of public concern. The rationale adopted in *Dun & Bradstreet* indicates that an allegation of bankruptcy, if made in a widely circulated credit report, would likely be of public concern.<sup>378</sup> The advertisements in *U.S. Healthcare* were very widely circulated,<sup>379</sup> a fact that undercuts the Third Circuit's conclusion that they were of only private concern. Moreover, in drawing the commercial speech analogy in *Dun & Bradstreet*, Justice Powell noted that he was not labelling credit reports as commercial speech.<sup>380</sup> Thus, even though the particular credit report involved in the case received the private concern designation, *Dun & Bradstreet* cannot stand for the proposition that commercial speech is necessarily of only private concern.

Although the Third Circuit did acknowledge that commercial speech might occasionally be classified of public concern,<sup>381</sup>

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figure distinction should not be applied in defamation cases brought by corporate plaintiffs). Moreover, as will be seen, an actual malice standard effectively bestows full First Amendment protection. See *infra* text accompanying notes 425-427. Commercial expression, of course, receives only an intermediate level of protection. See *supra* text accompanying notes 308-313.

375. See 898 F.2d at 931 & n.20, 932-37.

376. See *id.* at 931-32. The court initially seemed to allow for some chance that commercial speech might sometimes be of public concern. See *id.* at 932 n.21. The court's later analysis effectively eliminated this prospect, however. See *infra* text accompanying notes 381-390.

377. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-63 (1985).

378. *Id.* at 762 n.8.

379. The parties' advertisements appeared on television and radio and in the print media. 898 F.2d at 918-19.

380. 472 U.S. at 762 n.8. For additional discussion of the commercial speech analogy used in *Dun & Bradstreet*, see *supra* text accompanying notes 247-257.

381. *U.S. Healthcare*, 898 F.2d at 932 n.21, 933 n.24.

it rendered that acknowledgement—already too grudging in nature—virtually meaningless when analyzing the advertisements at issue. Despite citing references in the Supreme Court's commercial speech decisions to the considerable importance of a free flow of commercial information,<sup>382</sup> the Third Circuit gave short shrift to this important First Amendment interest. It stated that the offending advertisements dealt with health care issues of considerable public interest and significance, yet labeled the advertisements as matters of private concern.<sup>383</sup>

These inconsistencies stem from the difficulty of the First Amendment issues in cases of this nature. They also reflect the *U.S. Healthcare* court's failure to appreciate that a finding of public concern does not inescapably lead to full First Amendment protection for the expression. The court correctly noted the Supreme Court decisions indicating that an advertiser cannot convert otherwise commercial speech into fully protected noncommercial expression by simply referring to noncommercial issues of broad social significance.<sup>384</sup> The Third Circuit missed the point, however, when it cited those cases. The references to important public health care issues did not convert the offending advertisements into noncommercial expression. Instead, although the court failed to realize it, those references and subject matter made the commercial speech<sup>385</sup> of public, rather than merely private, concern. Correctly emphasizing why the advertisements could not constitute fully protected noncommercial expression, the *U.S. Healthcare* court cited—but simultaneously missed the effect of—factors that entitled the advertisements to a greater degree of First Amendment protection than the court ultimately allowed.<sup>386</sup> Although commercial

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382. *Id.* at 931 n.20, 933 n.24.

383. *See id.* at 935-37. The advertisements dealt with "the quality, availability, and cost of health care." *Id.* at 937. The court acknowledged that these issues "are among the most important and debated issues of our time." *Id.*

384. *See id.* at 936-37, 939.

385. The court correctly labelled the advertisements commercial speech. The parties designed advertisements to promote their respective health care plans, *see id.* at 917-19, and to therefore fall within the classic commercial speech definition of expression that "propose[s] a commercial transaction." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n.*, 413 U.S. 376, 385 (1973)).

386. Despite the expression's commercial nature, the court should have recognized that the speech implicated a matter of public concern. The health care issues explored in the advertisements, major social issues facing our society, warranted the public concern classification. *See* 898 F.2d at 917-19. As the court itself acknowledged, issues such as the "quality, availability, and cost of

speech of public concern does not merit full First Amendment protection, it is entitled to a meaningful level of constitutional accommodation.

Furthermore, even if it had been correct that the commercial speech at issue was of only private concern, the Third Circuit nonetheless failed to provide adequate First Amendment protection. *Dun & Bradstreet*, on which the Third Circuit relied so heavily, did not hold that speech of private concern lies outside the First Amendment's scope. Instead, the Supreme Court's message was that the First Amendment does protect expression of private concern, albeit to a lesser degree than speech of public concern.<sup>387</sup>

The Third Circuit conceded that the speech at issue, which it correctly labelled commercial and incorrectly labelled of private concern, "is protected by the First Amendment."<sup>388</sup> It immediately negated this conclusion, however, by adding that "the First Amendment requires no higher standard than that mandated by the substantive law for each claim."<sup>389</sup> If considered in light of "the substantive law" of section 43(a), this statement effectively contends that although the speech affected by the statutory claim for damages merits First Amendment protection, that protection is adequately provided by a strict liability standard and a set of damages rules allowing substantial damages without rigorous proof requirements.<sup>390</sup> So viewed, the statement borders on the nonsensical. A more meaningful First Amendment approach, proposed below, is obviously in order.

## B. OTHER DECISIONS UNDER THE NEW SECTION 43(a)

Other courts encountering the First Amendment implications of section 43(a) false advertising cases<sup>391</sup> have not demon-

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health care are among the most important and debated issues of our time." *Id.* at 937. For additional analysis revealing why the advertisements in *U.S. Healthcare* should have been classified within the public concern realm despite their commercial nature, see *infra* text accompanying notes 440-451.

387. *Dun & Bradstreet*, 472 U.S. at 760.

388. *U.S. Healthcare*, 898 F.2d at 937. With this statement, the Third Circuit seemed to recognize that in the indirect regulation context, falsity in the commercial expression should not forfeit all First Amendment protection. See *infra* text accompanying notes 408-420.

389. 898 F.2d at 937.

390. For discussion of § 43(a)'s strict liability scheme, see *supra* text accompanying notes 37-41, 85-100. The damages rules in § 43(a) cases are discussed at *supra* note 53. Similar problems attend the common law of defamation. See *supra* text accompanying notes 109-115.

391. Sometimes, of course, courts have not had occasion to reach the First

strated anything approaching the level of scrutiny the Third Circuit applied in *U.S. Healthcare*. Accordingly, those courts have provided little to help sharpen and harmonize the relevant freedom of expression doctrines at issue.

For instance, *Energy Four, Inc. v. Dornier Medical Systems, Inc.*,<sup>392</sup> involved competing suppliers of electrodes for lithotripsy machines. The court preliminarily enjoined each party from making false statements about its own, or the other's, product.<sup>393</sup> The court's analysis of the defendant's First Amendment argument consisted solely of its observation that the statements deserved no protection because they were untrue commercial speech, and such speech "disserves the aims of the first amendment."<sup>394</sup> As suggested by the court's struggle in *U.S. Healthcare*, not to mention the considerable discussion elsewhere in this article, the First Amendment issues in section 43(a) "commercial defamation" cases are not so readily disposed of as the *Energy Four* court believed.

Other courts have simply ignored—whether deliberately, in order to avoid complicating the case, or unintentionally—the implications of the new section 43(a)'s allowance of "commercial defamation" claims. These courts merely recite essentially the same elements required by the old section 43(a), without any mention or consideration of whether the statutory amendment warrants First Amendment-based alterations of those elements.<sup>395</sup>

To their credit, some courts in section 43(a) false advertising

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Amendment issues. For example, in *American Express Travel Related Serv. Co. v. Mastercard Int'l, Inc.*, 776 F. Supp. 787 (S.D.N.Y. 1991), the court concluded that the plaintiff's § 43(a) claim failed because the defendant's advertisements were neither false nor misleading. *Id.* at 790-91. It was thus unnecessary to address First Amendment issues. In *National Artists Management Co. v. Weaving*, 769 F. Supp. 1224 (S.D.N.Y. 1991), the court decided whether the plaintiff sufficiently pleaded its § 43(a) claim. *Id.* at 1229-34. Given the case's preliminary posture, the court may have hesitated to engage in an in-depth First Amendment analysis. In *Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130 (S.D.N.Y. 1990), the court rejected the plaintiff's § 43(a) claim because the defendant did not state the alleged falsehoods in the context of "commercial advertising or promotion." *Id.* at 141-42. See 15 U.S.C. § 1125(a) (1988). It was therefore unnecessary for the court to consider whether any First Amendment-based fault requirement should be imposed.

392. 765 F. Supp. 724 (N.D. Ga. 1991).

393. *Id.* at 726, 735.

394. *Id.* at 735.

395. See, e.g., *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544, 1548-49 (2d Cir. 1991); *Janda v. Riley-Meggs Indus.*, 764 F. Supp. 1223, 1227-29 (E.D. Mich. 1991).

cases have shown modest sensitivity to freedom of expression concerns even if their decisions do not attempt to provide a workable First Amendment framework.<sup>396</sup> In addition, courts deciding section 43(a) cases that do not involve false advertising<sup>397</sup> have begun to see that the First Amendment may limit the statute's sweep.<sup>398</sup>

## VII. ACCOUNTING FOR FIRST AMENDMENT CONSIDERATIONS IN "COMMERCIAL DEFAMATION" CASES UNDER SECTION 43(a)

### A. JUSTIFICATIONS FOR DEVELOPMENT OF FIRST AMENDMENT REQUIREMENTS

Now that section 43(a) allows suits over a defendant's statements in commercial settings about a plaintiff's products, services, or commercial activities, a blind application of the once-tolerable strict liability approach of the old section 43(a) is hardly innocuous. Such an approach would allow plaintiffs in what otherwise would be a defamation or injurious falsehood case to evade the First Amendment's strictures by restyling the

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396. For example, in *National Artists Management Co. v. Weaving*, 769 F. Supp. 1224 (S.D.N.Y. 1991), the court failed to require a First Amendment-based fault element, but did cite freedom of expression concerns as a reason for not interpreting 43(a)'s "commercial advertising or promotion" language broadly. *See id.* at 1231, 1232-35. In *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958 (D.C. Cir. 1990), the court cited First Amendment justifications for ensuring that injunctions granted in § 43(a) cases are sufficiently narrowly tailored. *See id.* at 971-73, 973 n.16. *ALPO Petfoods* involved the defendant's false statements about the defendant's own product. *See id.* at 961-63. The same First Amendment concerns about excessively broad injunctions should logically apply, however, in cases involving a defendant's false or misleading statements about the plaintiff's product, service, or commercial activities. *See infra* text accompanying notes 453-455.

397. For discussion of the various uses of § 43(a) other than for false advertising claims, see *supra* text accompanying notes 22-64.

398. *See Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490, 493-97 (2d Cir. 1989) (holding that First Amendment protected defendant from liability on plaintiff's § 43(a) claim that defendant's parody of plaintiff's book summaries created likelihood of confusion as to whether parody was produced by plaintiff); *Rogers v. Grimaldi*, 875 F.2d 994, 997-1002 (2d Cir. 1989) (holding that First Amendment limits use of § 43(a) for claim that movie title included plaintiff's name without consent and created likelihood of confusion as to whether movie was about plaintiff or endorsed by her); *Ocean Bio-Chem, Inc. v. Turner Network Television, Inc.*, 741 F. Supp. 1546, 1552-53, 1553 n.2 (S.D. Fla. 1990) (holding that First Amendment protects makers of movie from liability on plaintiff's § 43(a) claim for trademark infringement).

action as a section 43(a) claim. That state of affairs would make neither common nor constitutional sense.

The Supreme Court's defamation decisions verify the constitutional need to insulate some false statements from liability in order to protect "speech that matters"<sup>399</sup> and provide the "breathing space"<sup>400</sup> necessary to meaningfully exercise the First Amendment guarantees of free speech and press. The constitutional aspects of defamation law, as well as the less clearly defined constitutional aspects of injurious falsehood law, rest on the fundamental premise that a strict liability scheme creates a significant danger of a chilling effect. Persons who otherwise would be inclined to contribute statements, information and ideas to public debate may engage in self-censorship, even when their statements would be true, for fear of the liability that would be readily imposed if the statements were found to be false. The Supreme Court has recognized this same chilling effect in damages rules that allow plaintiffs relatively easy access to potentially large monetary awards.<sup>401</sup>

The interests potentially affected by section 43(a) "commercial defamation" claims do not mirror those involved in state law defamation claims, because of the latter's availability in non-commercial contexts.<sup>402</sup> Nevertheless, the interests are sufficiently similar to warrant the conclusion that section 43(a) cannot go unconstrained by the First Amendment. A need to prevent chilling of expression and provide the necessary "breathing space" arises in the section 43(a) realm, even though the expression reached by the statute necessarily occurs in a commercial context. The Supreme Court's defamation decisions, and its decisions on direct government regulation of commercial speech, establish that speech on economic matters is a valued First Amendment commodity,<sup>403</sup> even when the expression

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399. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

400. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

401. For discussion of the chilling effect created by a strict liability scheme and the potential for large damage awards, see *supra* text accompanying notes 163-167, 203-212.

402. See *supra* text accompanying notes 101-115, 125-133, 258-276.

403. See, e.g., *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 487-88, 510-11 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763-64 (1976); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 163 (1967) (Warren, C.J., concurring). See *supra* text accompanying notes 255-276, 298-300, 311-313.

stems from a commercial setting.<sup>404</sup>

The Court's decisions also demonstrate that the First Amendment does not stop at protecting speakers' interests. Potentially interested listeners enjoy correlative rights to receive information on a wide variety of matters about which they are concerned, including commercial subjects. As the Court has noted, some consumers may have a significantly greater interest in commercial matters than in the leading political issues of the day.<sup>405</sup> All of this leads to the conclusion that commercial ex-

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404. *E.g., Virginia State Bd. of Pharmacy*, 425 U.S. at 756-57, 763-64. Moreover, the Supreme Court has indicated that the form in which expression appears will not solely determine the expression's First Amendment status (or lack thereof). Instead, the expression's substance achieves a greater importance than its form. *See New York Times*, 376 U.S. at 265-66 (holding that even though expression at issue appeared in form of paid advertisement, it was fully protected expression rather than then-unprotected commercial speech). For additional discussion of this aspect of *New York Times*, see *supra* text accompanying notes 159-161, 257-259; *supra* notes 160-161. *See also* *National Life Ins. Co. v. Phillips Publishing, Inc.*, 793 F. Supp. 627, 644-45 (D. Md. 1992) (recognizing substance-over-form notion as applied in *New York Times*).

This focus on substance should be carried over to the § 43(a) realm. Assume, for illustrative purposes, that a *non-competitor* of the plaintiff makes a false statement about the plaintiff's business activities. Also assume that the statement gives rise to a defamation claim (but not a § 43(a) claim, due to the lack of a "commercial advertising or promotion" setting) in which a First Amendment-based fault requirement would arise. If a *competitor* of the plaintiff states the same thing—i.e., the same substance—in a setting governed by § 43(a), the competitor should not lose all First Amendment protection simply because of the surrounding commercial setting. Of course, the competitor merits less First Amendment protection than the non-competitor because of the commercial setting in which the competitor made its statement, but this commercial context should not wholly deprive the competitor of all First Amendment protection. *See infra* text accompanying notes 408-439.

The facts of *Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499 (D.S.C. 1989), resemble those in the above hypothetical. In this pre-new § 43(a) case, the plaintiff sued a competitor and members of the media for defamation after the defendants alleged that the plaintiff engaged in deceptive merchandising practice. *Id.* at 1501-03. After classifying the plaintiff as a public figure, the court granted the defendants' motion for summary judgment on the ground that the plaintiff failed to prove actual malice. If *Sunshine Sportswear* had arisen under the present § 43(a), the competitor defendant would likely have faced a § 43(a) claim because he arguably made the statements about the plaintiff while promoting his business. The media defendants would still have escaped defamation liability due to the plaintiff's inability to prove actual malice. The competitor defendant, who served as the media defendants' source, would have been at risk of liability, however, under § 43(a)'s strict liability approach. Besides reflecting too little focus on the substance (as opposed to the form) of expression, this scenario illustrates the incongruity of having a First Amendment-based fault requirement in defamation law but not having one under § 43(a).

405. *Virginia State Bd. of Pharmacy*, 425 U.S. at 756-57, 763-64.



pression is "speech that matters."<sup>406</sup> Accordingly, First Amendment-based requirements must supplement section 43(a)'s literal language in the false advertising context.<sup>407</sup>

#### B. REJECTION OF DIRECT REGULATION CASES' TREATMENT OF FALSE OR MISLEADING COMMERCIAL SPEECH

The First Amendment-based requirements proposed below would allow the makers of some commercial falsehoods to escape section 43(a) liability.<sup>408</sup> This might seem inconsistent with one aspect of the Supreme Court's commercial speech doctrine: the rule that misleading commercial speech, as opposed to its truthful, partially protected counterpart, receives no First Amendment protection.<sup>409</sup> The apparent inconsistency disappears, however, when one considers the significant differences between the direct regulation context in which the Court's commercial speech decisions arose and the indirect regulation presented by section 43(a) cases. As discussed below, the difficult First Amendment issues associated with section 43(a)'s "commercial defamation" claims cannot be adequately addressed by uncritical resort to the treatment of false or misleading commercial speech in the direct regulation context.

As used here, the term "direct regulation" refers to government regulation, usually by statute or agency rule, which proscribes expression of a certain content or subject matter. In addition, the term contemplates the government as the enforcing actor, proceeding directly against the alleged violator in a civil, administrative, or even criminal, proceeding. Available remedies typically include injunctive, restitutionary, or administrative relief.

"Indirect regulation" refers to instances in which the government, by statute or common law, authorizes private parties to bring civil suits for damages when a defendant allegedly violates the statute or common law rule. Although an arm of the

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406. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

407. This means that even though Congress made efforts to account for First Amendment concerns by restricting § 43(a) "defamation" claims to the commercial context, *see supra* text accompanying notes 94-100, those efforts fell short of the mark.

408. *See infra* text accompanying notes 421-439.

409. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976). For discussion of the Supreme Court's commercial speech decisions, *see supra* text accompanying notes 301-345.

government—the judicial system—gives effect to these legal rules when it decides such cases, the government's enforcement role is more circumscribed than in the case of direct regulation.<sup>410</sup> In this context, the direct enforcing actor is the private plaintiff. The term "indirect regulation" does not signify, however, that such regulation's effects on commercial speakers are insignificant. Indirect regulation's consequences, including a potential chilling effect, may often exceed those of direct regulation.

The Supreme Court's commercial speech decisions, which held that the First Amendment protects only true commercial speech, all arose in the direct regulation context.<sup>411</sup> In that setting, denying First Amendment protection to false commercial speech becomes acceptable because direct regulation will generally be narrowly tailored.<sup>412</sup> The government regulation will likely reach only the specific falsehood, without consequences for the truthful components of the commercial speech. Indeed, the government could constitutionally regulate the truthful portions only if the regulation satisfied *Central Hudson's* test for evaluation of commercial speech restrictions.<sup>413</sup> Moreover, a regulation allowing injunctive relief against a specific commercial falsehood or an administrative remedy directed toward the falsehood will not likely deter the motivated commercial speaker from returning the next day with truthful commercial statements. The same cannot be said of indirect regulation, however.

In the indirect regulation context presented by section 43(a)'s authorization of civil damage actions, an award of damages due to an instance of false advertising will not always be narrowly tailored.<sup>414</sup> Although a falsehood triggered the award, the advertisement almost certainly included true statements as well. The true statements may have contained information of value to readers, hearers, or viewers of the advertisement.<sup>415</sup>

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410. There is, however, sufficient government involvement to satisfy the state action requirement of the First Amendment. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

411. See cases cited and discussed at *supra* text accompanying notes 301-345.

412. Cf. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (requiring that restrictions on commercial speech in the direct regulation context be "narrowly tailored to achieve the desired [governmental] objective").

413. For explanation and discussion of this four-part test, see *supra* text accompanying notes 317-345.

414. Cf. *Fox*, 492 U.S. at 480 (requiring that restrictions on commercial speech be "narrowly tailored to achieve the desired [governmental] objective").

415. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974) (expressing

The damage award, however, effectively subjects the accurate and valuable information to the same consequences as the falsehood. This will most likely occur when the damage award is large in relation to the defendant's financial resources and the defendant thereafter concludes that advertisements—even those featuring true, informative statements—do not justify the "cost." In other words, the false advertising damage award may have a significant chilling effect.

Furthermore, the threat of a possible 43(a) damage award, as well as the costs associated with defending against even an unmeritorious suit, may deter the prospective commercial speaker from running advertisements. This chilling effect would seem especially likely to limit the prospective advertiser's inclination to use comparative advertisements,<sup>416</sup> which tend to arouse its competitor's ire. An irate competitor may lodge a section 43(a) claim if an objectionable comparison contains a statement of "fact"<sup>417</sup> that the competitor alleges to be false or misleading. If the chilling effect occurs, the deterred commercial speaker does not suffer the First Amendment loss alone. Other "losers" are those members of the public who would have benefited from true and informative statements never brought to light.<sup>418</sup>

The foregoing differences between the direct regulation context of the Supreme Court's commercial speech decisions and section 43(a)'s indirect regulatory scheme demand a rejection, in the latter context, of the former's treatment of false or misleading commercial speech. For purposes of section 43(a)'s "commercial defamation" claims, courts must afford false or misleading commercial speech an intermediate level of First Amendment protection,<sup>419</sup> in order to protect "speech that matters."<sup>420</sup>

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concern about defamation rules that allow potential for overly large damage awards); *cf.* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 763-64 (1976) (discussing value of commercial information and consumers' rights to receive such information); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 163 (1967) (Warren, C.J., concurring) (commenting on importance of statements on business and economic matters).

416. See Singdahlsen, *supra* note 37, at 342, 364-65, 382-83.

417. For discussion of the false statement of fact requirement under § 43(a), see *supra* notes 58-105.

418. *Cf. Virginia State Bd. of Pharmacy*, 425 U.S. at 756-57 (discussing consumers' rights to receive commercial information).

419. This intermediate level would be comparable to that established for non-misleading commercial speech in the direct regulation cases discussed at *supra* text accompanying notes 301-345.

420. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *cf. National Life Ins. Co. v. Phillips Publishing, Inc.*, 793 F. Supp. 627, 645-48 (D. Md. 1992)

### C. A PROPOSED FIRST AMENDMENT FRAMEWORK

It is now time to confront the fundamental issue addressed by this article: the nature and form of the First Amendment restrictions which courts should require for section 43(a) "defamation" and "injurious falsehood" claims. A convenient, but unsatisfactory, conclusion would be to act as some courts in the injurious falsehood context have done, and engage in wholesale borrowing of the First Amendment framework the Supreme Court has fashioned for defamation cases.<sup>421</sup>

The commercial context in which section 43(a) cases necessarily arise demands, however, a different First Amendment analysis. The appropriate standard should recognize commercial speakers' freedom of expression interests without losing sight of an essential concept: that the First Amendment protects commercial expression to a lesser degree than noncommercial expression.<sup>422</sup> Defamation and injurious falsehood law have often glossed over this concept.<sup>423</sup> Courts should not make the same mistake when "constitutionalizing" section 43(a).<sup>424</sup>

#### 1. Proof of Fault

Although the commercial expression giving rise to section 43(a) "defamation" or "injurious falsehood" actions merits some constitutional accommodation, it does not justify the blind appli-

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(holding that in defamation case, constitutional fault requirements should not be altered even if defendant's statements were made in context of commercial speech).

421. For discussion of judicial attempts to accommodate First Amendment considerations in injurious falsehood cases, see *supra* text accompanying notes 277-289; *supra* notes 283-284.

422. Section 43(a) "commercial defamation" claims necessarily involve commercial expression. See 15 U.S.C. § 1125(a) (1988) (requiring that statement giving rise to suit must have been "in commercial advertising or promotion"). For discussion of the different levels of First Amendment protection extended to commercial and noncommercial expression, see *supra* text accompanying notes 290-313.

423. See *supra* text accompanying notes 194-198; see also Langvardt, *supra* note 3, at 962-63, 968-69 (discussing importance of paying greater attention to distinction between commercial and noncommercial expression in injurious falsehood cases).

424. The First Amendment framework proposed below focuses primarily on a fault requirement and the need to draw a public/private concern distinction within the realm of commercial speech. See *infra* text accompanying notes 425-451. A preliminary component of a suitable "constitutionalization" of § 43(a), however, should be judicial adoption of a narrow construction of the *promotion* language in the statute. Such a construction is outlined at *supra* notes 78-79. In particular, courts should reject the questionable interpretation apparently advanced by Sen. DeConcini. See *supra* note 79.

cation of defamation's actual malice requirement. The actual malice requirement's stern nature frequently makes it outcome-determinative in public figure plaintiff cases. It is extremely difficult to prove by even a preponderance of the evidence—let alone clear and convincing evidence—that the defendant made the statement at issue with knowledge of its falsity or reckless disregard for the truth.<sup>425</sup> This burden effectively equates the actual malice standard with full First Amendment protection<sup>426</sup> and provides defamation defendants with quite favorable odds against liability. Although commercial expression merits First Amendment protection, the Supreme Court's commercial speech cases illustrate that it deserves a lesser degree than the actual malice requirement provides.

Thus, section 43(a) "commercial defamation" cases also warrant a First Amendment standard less demanding than actual malice. Moreover, the inappropriateness of engrafting the actual malice rule upon section 43(a) means that little reason exists to extend defamation's public/private figure distinction to section 43(a) cases. The Supreme Court developed that distinction in cases involving human plaintiffs and noncommercial settings; it is poorly suited to cases involving corporate plaintiffs in commercial contexts.<sup>427</sup> A more workable approach for false advertising cases avoids an expenditure of judicial energy on the often elusive status-of-the-plaintiff inquiry<sup>428</sup> by focusing on the speech at issue and applying an understandable fault requirement.

In order to more suitably reflect commercial speech's intermediate level of First Amendment protection, all plaintiffs in section 43(a) "defamation" or "injurious falsehood" cases should be expected to prove negligence on the defendant's part.<sup>429</sup> This

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425. For discussion of the actual malice requirement and its usual effect in defamation cases brought by public official and public figure plaintiffs, see *supra* text accompanying notes 182-186.

426. See *supra* text accompanying notes 184-185, 294-295.

427. See *supra* text accompanying notes 194-198; *supra* note 198.

428. For further discussion of the difficulties associated with making public figure determinations in cases brought by business entities, see generally Fetzer, *supra* note 197.

429. Of course, some false advertising claims brought under § 43(a) may be based on the defendant's false statements about the defendant's own product, service, or commercial activities. See 15 U.S.C. § 1125(a) (1988). For reasons noted earlier, the strict liability approach traditionally followed under § 43(a) would remain appropriate for such claims. See *supra* note 347. When some of the statements giving rise to a § 43(a) suit are about the defendant's product, service, or commercial activities, and other statements giving rise to the same suit referred to the plaintiff's product, service, or commercial activities, the neg-

requirement would be satisfied by showing that the defendant failed to use the degree of care a reasonable person would have exercised, under the circumstances, to ascertain the truth or falsity of the statement before making it. Private figure plaintiffs generally must meet a similar negligence standard in defamation cases. Courts are already familiar with this readily understandable concept.<sup>430</sup>

As a fault requirement, negligence poses a considerably less severe burden than does the actual malice standard.<sup>431</sup> Negligence effectively provides an intermediate standard that falls between the polar extremes of actual malice and strict liability. A rule requiring all plaintiffs to prove negligence would suitably accommodate a defendant's legitimate, although not compelling, First Amendment interest in commercial expression, without amounting to constitutional overkill.

## 2. Standard of Proof as to Fault

The public concern doctrine, now a mainstay of First Amendment jurisprudence,<sup>432</sup> is also relevant in section 43(a) litigation. As previously demonstrated, commercial speech may encompass subjects of both public and private concern.<sup>433</sup> Although commercial speech protection never rises above an intermediate level, commercial expression of public concern should logically receive somewhat greater protection than does commercial expression of private concern.<sup>434</sup> A suitable First Amendment framework for section 43(a) "commercial defamation" cases must therefore incorporate these varying degrees of First Amendment protection.

An appropriate implementation would require the plaintiff to prove negligence by clear and convincing evidence in a section

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ligence requirement should apply only as to the latter statements. The negligence requirement should also apply as to any § 43(a) claim-triggering statement that simultaneously refers to the plaintiffs and defendant's respective goods, services, or business activities.

430. See *supra* text accompanying notes 201-207.

431. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-45, 347-48, 350 (1974).

432. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756-63 (1985). For discussion of *Dun & Bradstreet's* injection of a public concern element into the constitutional aspects of defamation suits brought by private figure plaintiffs, see *supra* text accompanying notes 221-254.

433. See *supra* text accompanying notes 254-276, 375-390, 400-407.

434. Cf. *Dun & Bradstreet*, 472 U.S. at 758-60 (indicating that speech on matter of public concern is more highly valued for First Amendment purposes than is speech on matter of private concern).

43(a) "commercial defamation" case involving a statement of public concern. If the offending statement rose only to the level of private concern, the plaintiff would merely need to satisfy the normal preponderance of the evidence standard. Although the clear and convincing evidence standard has never been a model of clarity, it is nonetheless reasonably familiar to courts by virtue of its long use in defamation cases applying the actual malice standard.<sup>435</sup>

Escalating the usual standard of proof on the negligence issue provides a useful means of extending somewhat greater protection to commercial expression of public concern. At the same time, commercial expression of private concern would still receive meaningful protection by virtue of the negligence requirement.<sup>436</sup> As a result, the public/private concern distinction would not assume an "all-or-nothing" significance in terms of the resulting First Amendment protection. Avoiding such all-or-

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435. When the actual malice requirement applies under defamation's constitutional aspects, the plaintiff must prove actual malice by clear and convincing evidence. *See supra* text accompanying notes 174-176, 184.

436. *Cf. Dun & Bradstreet*, 472 U.S. at 758-60 (noting that even though speech on matters of public concern is more highly valued under First Amendment, speech on matters of private concern does not go unprotected by First Amendment). In an earlier article dealing with the First Amendment aspects of injurious falsehood, I asserted that the plaintiff should not be expected to prove fault in an injurious falsehood suit brought against a competitor defendant whose statement was commercial in nature and dealt with a matter of only private concern. *See Langvardt, supra* note 3, at 974-75. Although that assertion differs from the proposal made in the text for § 43(a) "commercial defamation" cases involving expression on matters of private concern, a sound reason exists for the difference. Injurious falsehood law has traditionally included a requirement that the plaintiff prove special damages as a substantive element of the claim, thereby, making many injurious falsehood cases difficult to win. *See supra* text accompanying notes 122-124. The stern special damages requirement, although a common law element, would have the dual effect of providing competitor defendants adequate protection (for First Amendment purposes) against liability when their commercial speech is of private concern. A fault requirement, therefore, would be unnecessary in that configuration of injurious falsehood case. *See Langvardt, supra* note 3, at 974-75. *But see id.* at 973-74 (proposing fault requirement of negligence in injurious falsehood case against competitor defendant whose commercial expression was on matter of public concern). Section 43(a) cases, however, do not carry a special damages requirement of the sort found in injurious falsehood. Judicial approaches to the awarding of damages in § 43(a) cases are more liberal than the injurious falsehood approach. *See supra* note 53. Moreover, unlike the rule in injurious falsehood cases, § 43(a) plaintiffs may win their suit and obtain injunctive relief without proof of any actual harm. *See supra* note 52. The absence of a special damages requirement as a check against § 43(a) liability leads to the conclusion that a fault requirement is necessary in order to provide defendants some level of First Amendment-based protection in "commercial defamation" cases involving statements on matters of private concern.

nothing consequences is particularly appropriate when the underlying characterization will likely be a close call, as the public/private concern determination will often be, and an erroneous determination results in either far too much or far too little constitutional protection.<sup>437</sup>

### 3. Making Public/Private Concern Determinations in Context of Commercial Expression

When the Supreme Court, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, emphasized the importance of “public concern” in defamation actions, it provided only the unenlightening “content, form, and context” test for distinguishing between matters of public and private concern.<sup>438</sup> A meaningful application of the section 43(a) fault rules proposed earlier demands that this test be supplemented by explicit factors and detailed considerations. The factors suggested below<sup>439</sup> will at least sharpen the focus when courts deciding section 43(a) “defamation” or “injurious falsehood” cases must determine whether commercial expression is of public or private concern. In making that determination, courts should consider:

1. Whether the defendant’s statement pertains to a matter of public safety or public health,<sup>440</sup>

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437. For example, in *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914 (3d Cir.), cert. denied, 498 U.S. 816 (1990), the Third Circuit struggled with the question whether the commercial speech at issue was of public concern. The court ultimately—and erroneously—concluded that the expression was of private concern even though it dealt with major health care issues of considerable public interest and debate. *Id.* at 930-32, 937-39. For explanation of why the court’s conclusion was incorrect, see *supra* text accompanying notes 375-387. As a result of this close-to-the-line (and erroneous) determination, the expression at issue effectively received no First Amendment protection, notwithstanding the court’s assertion that § 43(a)’s strict liability approach somehow provided meaningful First Amendment protection. See 898 F.2d at 937; *supra* notes 388-390. If the Third Circuit had resolved the difficult public concern/private issue by holding that the expression was of public concern, the court evidently would have imposed a fault requirement or devised some other means of providing meaningful First Amendment protection for the expression. See 898 F.2d at 929, 937.

438. 472 U.S. 749, 761 (1985).

439. In the immediately following list of factors relevant to a determination of whether § 43(a)-triggering commercial expression was of public concern or private concern, I have drawn upon a similar list of factors in an article in which I proposed First Amendment requirements for cases brought under the common law of injurious falsehood. See Langvardt, *supra* note 3, at 965-68 & nn.351-61. I also relied upon the same portions of the earlier article for various comments in *infra* footnotes 440-446, which accompany the factors listed in the text.

440. Questions of public safety and health present logical candidates for



2. Whether the defendant's statement pertains to one of life's essential needs;<sup>441</sup>
3. Whether the consuming public frequently and extensively uses the product or service referred to in the defendant's statement;<sup>442</sup>
4. Whether the defendant's statement pertains to a product, service, or commercial activity that the government regulates heavily;<sup>443</sup>
5. Whether the defendant's statement alleges the commission of a

public concern treatment, given the obvious societal significance of such issues. See *U.S. Healthcare*, 898 F.2d at 935-37 (statements regarding health care issues may be of considerable public interest and debate) see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 763-65 (1976) (considerable public interest in matters such as prescription drug prices); *Machleder v. Diaz*, 617 F. Supp. 1367, 1373, 1375 (S.D.N.Y. 1985) (allegations about dumping of chemical wastes are of public concern in invasion of privacy case), *aff'd in part and rev'd in part on other grounds*, 801 F.2d 46 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987). But see *U.S. Healthcare*, 898 F.2d at 937 (concluding incorrectly that commercial nature of expression converted it to expression of private concern).

441. Food, water, and other essentials of life are of such profound importance that allegations regarding them may qualify for the public concern classification. See, e.g., *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 516 A.2d 220, 230 (N.J. 1986) (statements on chlorine content of bottled water are of public concern in case brought on defamation and injurious falsehood grounds); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 274 (3d Cir. 1980) (allegations regarding meat quality are of public concern in defamation case). This should not mean, however, that public concern treatment would be automatic for all statements connected in some sense to an essential of life such as food or water. The other factors set forth in the text would still need to be considered in light of the precise content and nature of the allegations themselves.

442. It seems reasonable to assume that in general, the likelihood of public concern increases if the statement deals with a frequently used product or service rather than a product or service whose extent and frequency of use are limited. See, e.g., *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (statements tending to falsely describe stereo speakers' performance apparently were of public concern); see *supra* note 272. Under this factor, it would become important to consider the number of actual and potential users who could be affected if the product or service were as falsely depicted in the defendant's statements.

443. If the government actively regulates the product, service, or commercial activity discussed in the defendant's statement, the government's relationship to such matters would seem likely to make the statement a candidate for public concern. Whether public concern treatment would be appropriate in a particular case would depend upon the nature and extent of the relevant government regulation. See, e.g., *National Life Ins. Co. v. Phillips Publishing, Inc.*, 793 F. Supp. 627, 634 (D. Md. 1992) (significant government regulation of insurance business is among reasons why allegation regarding financial instability of insurance company is of public concern); *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1348 (S.D.N.Y. 1977) (significant government regulation of insurance companies and issuance and sale of securities makes insurance company public figure about which statements are of public interest). Cf. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 & n.8 (1985) (holding that allegation of bankruptcy in credit report at issue was of only private concern, but appearing to concede that certain allegations of bankruptcy may be of public concern).

criminal act;<sup>444</sup>

6. Whether the defendant's statement alleges the commission of an unethical act;<sup>445</sup>
7. Whether the defendant's statement was widely circulated and often repeated.<sup>446</sup>

In a broad range of defamation and injurious falsehood decisions analogous to section 43(a) cases, one or more of the above factors served as a basis on which courts expressly or impliedly attached the public concern label to the expression at issue. The list is admittedly tentative, preliminary, and almost certainly not all-inclusive. Courts will likely find supplementation necessary as they proceed beyond the infancy of section 43(a) "commercial defamation" claims. Because the factors are designed to give greater substance to the "content, form, and context" test and thereby aid the making of the public/private concern determination, the factors need not all point toward the same conclusion. When different factors suggest different possible results on the public/private concern issue, courts will have to decide, in light of all the relevant circumstances, which factors weigh more heavily in the balance.

Application of these factors would likely result in a determination of public concern status for a great deal of, although not all, commercial speech—a result consistent with the Supreme Court's defamation and commercial speech cases.<sup>447</sup> Those who

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444. Allegations of criminal behavior deal with matters of undoubted public concern, according to various Supreme Court defamation decisions. *See, e.g.*, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 326-27 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 32-34, 41-43 (1971); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 135-36 (1967); *see also Dun & Bradstreet*, 472 U.S. at 755-56 (noting that each of the Court's previous defamation decisions involved statements on matters of public concern).

445. Given recent years' calls from various quarters in society for a renewed emphasis on ethical behavior, statements alleging unethical individual or corporate acts should be likely to receive the public concern label. *See, e.g.*, *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988) (allegation that tobacco company adopted advertising strategy designed to induce minors to begin smoking); *Turner v. Welliver*, 411 N.W.2d 298 (Neb. 1987) (allegation of unethical insurance practices).

446. In a general sense, a widely circulated or often repeated statement would have a greater tendency to be of public concern than would an un-repeated statement of very limited circulation. *Cf. Dun & Bradstreet*, 472 U.S. at 762 & n.8 (noting limited circulation of expression as being among facts leading to conclusion that expression at issue was of private concern). Once again, however, the other factors already discussed must also be considered in order to see whether the generalization just expressed is in fact borne out in a particular case.

447. *See, e.g.*, *Bose Corp. v. Consumers Union of United States, Inc.*, 466

argue that this result overvalues commercial expression must recall a lesson evidently forgotten in *U.S. Healthcare*: affording certain commercial speech public concern status does not threaten to transform that expression into a fully protected equivalent of noncommercial expression.<sup>448</sup> Even commercial speech of public concern enjoys no more than intermediate First Amendment protection.<sup>449</sup>

#### 4. Injunctive Relief and Damages

This article has not attempted, other than by way of background description, to examine the specific requirements for obtaining injunctive relief and damages for a violation of section 43(a).<sup>450</sup> A comprehensive First Amendment framework, however, requires some examination of the extent to which the prevailing approaches to granting injunctive relief and awarding damages raise freedom of expression concerns.

Courts have construed section 43(a)'s "likely to be damaged" language as authorizing a virtually automatic injunction when a proper commercial plaintiff proves that the defendant's advertisement contained a false or misleading statement.<sup>451</sup> In contrast, defamation law very seldom has allowed injunctive relief, with injurious falsehood law being slightly more receptive to that remedy.<sup>452</sup> Commercial speech's diminished degree of First Amendment protection will not shield the defendant from injunctive relief that is narrowly tailored.<sup>453</sup> To be narrowly tailored, the injunction should prohibit only those statements found to violate section 43(a), rather than indiscriminately sweeping in other statements that were in the same advertisement but did not contribute to the false or misleading

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U.S. 485, 487-88, 510-11 (1984); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-64 (1976); *Curtis Publishing*, 388 U.S. at 163 (Warren, C.J., concurring); see *supra* text accompanying notes 254-276, 298-300, 311-313.

448. See *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 930-37 (3d Cir.) *cert. denied*, 498 U.S. 816 (1990). For additional discussion of this forgotten lesson, see *supra* text accompanying notes 384-386.

449. See *Virginia State Bd. of Pharmacy*, 425 U.S. at 756-57, 763-65, 770.

450. See *supra* notes 51-53.

451. See *supra* note 52.

452. See *KEETON et al.*, *supra* note 2, § 128, at 928, 971; *Near v. Minnesota*, 283 U.S. 697, 718 (1931).

453. Cf. *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) (restrictions on commercial speech must be narrowly tailored to achieve desired governmental objective).

impression.<sup>454</sup>

Moreover, the negligence requirement proposed earlier should apply regardless of whether the plaintiff seeks injunctive or monetary relief. Uniform application would go a long way toward alleviating First Amendment concerns about the present approach's arguably lenient granting of injunctive relief.<sup>455</sup>

Although the Lanham Act neither allows punitive damages nor follows the common law's presumed damages doctrine,<sup>456</sup> the probable chilling effect of damage awards—actual or threatened—in section 43(a) false advertising cases warrants concern. This chilling effect<sup>457</sup> stems from some courts' recent tendency to take a loose approach to proof of damages under section 43(a). Such an approach relaxes, but does not wholly eliminate, the plaintiff's burden of proving damages in order to obtain a monetary recovery. Under a relaxed burden allowing greater flexibility in both the means of proving damages and the permissible items of damages, the potential for large damage awards increases.<sup>458</sup> Critics of the present trend argue that this potential has been realized too often in recent years.<sup>459</sup> Although this trend in section 43(a) cases cannot be fully equated with defamation's common law rule of presumed damages, the same potential chilling effect that prompted the Supreme Court to limit the presumed damages doctrine<sup>460</sup> requires a judicial toughening of section 43(a)'s proof of damages rules. This article, however, leaves the appropriate details to able commentators who have focused more carefully on remedies issues arising under section 43(a).<sup>461</sup>

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454. See *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 971, 973 n.16 (D.C. Cir. 1990).

455. See *supra* notes 51-52.

456. For discussion of the presumed damages doctrine in the common law of defamation, see *supra* text accompanying notes 111-115. The damages rules in § 43(a) cases are discussed at *supra* note 53.

457. See *supra* text accompanying notes 208-212, 410-420.

458. For discussion of judicial approaches to the awarding of damages in § 43(a) cases, see *supra* note 53.

459. See, e.g., Singdahlsen, *supra* note 37, at 364-65, 393-94.

460. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974). For discussion of *Gertz's* effect on the availability of presumed damages in defamation cases brought by private figure plaintiffs, see *supra* text accompanying notes 208-212.

461. E.g., Best, *supra* note 9; BeVier, *supra* note 9; Frederickson, *supra* note 51; Heald, *supra* note 51; Petty, *supra* note 9; Schechter, *supra* note 9; Singdahlsen, *supra* note 37; Waltzer, *supra* note 51.

## VIII. CONCLUSION

Courts need concrete guidance regarding the proper accommodation of plaintiffs' commercial interests and defendants' freedom of expression interests in "defamation" and "injurious falsehood" cases brought under section 43(a). The statute's broadened range of prohibited falsehoods and the inevitable upsurge in falsehood-based commercial litigation triggered by the new section 43(a) make the issue one of considerable importance.

Judicial interpretations of the pre-"commercial defamation" version of section 43(a) provide little help in this regard. Decisions under the new version also reflect inadequate accommodation of emerging First Amendment concerns. Moreover, the difficult freedom of expression issues associated with section 43(a) "commercial defamation" claims cannot be satisfactorily resolved by uncritical resort to the treatment of false or misleading commercial speech in the context of direct government regulation.

The strict liability approach apparently contemplated by the literal language of section 43(a) ignores the significant freedom of expression interests that gave rise to First Amendment-based requirements in defamation and injurious falsehood law, undervalues the speech at issue in section 43(a) cases, and insufficiently considers the consumer's constitutional entitlement to receive information on a broad range of commercial subjects. Nonetheless, because section 43(a) "commercial defamation" claims limit themselves to commercial speech, it would be inappropriate to engage in a wholesale adoption of the identical First Amendment framework devised by the Supreme Court for state defamation law.

A proper accommodation of First Amendment interests requires that all plaintiffs in section 43(a) "defamation" and "injurious falsehood" cases prove negligence on the defendant's part. The section 43(a) plaintiff would satisfy this requirement by introducing sufficient proof that the defendant failed to use the degree of care a reasonable person would have exercised, under the circumstances, to ascertain the truth or falsity of the statement before making it. If the commercial expression giving rise to the claim is of public concern, courts should require the plaintiff to prove the negligence element by clear and convincing evidence. The normal preponderance standard would suffice on the negligence element if the commercial expression is only of private concern. The making of the sometimes difficult public con-

cern/private concern determination would be aided by consideration of the various factors outlined in this article. As litigation under the new section 43(a) increases, courts may also find it necessary to revise their present approaches to granting injunctive and monetary relief in order to minimize the potential chilling effect on First Amendment freedoms.

When Congress enacted the present version of section 43(a), it apparently sought to minimize First Amendment concerns by limiting the statute's breadth to commercial expression. As this article has demonstrated, Congress failed in that well-intentioned effort. Judicial adoption of the framework set forth herein would be a substantial step toward remedying the First Amendment problems created by the language of the new section 43(a).

