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2020


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## **False Advertising Law and New Private Law**

Gregory Klass<sup>1</sup>

April 2020

*Forthcoming as: False Advertising Law, in Oxford Handbook of New Private Law (Andrew Gold et al. eds., Oxford Univ. Pr.)*

One might reasonably wonder why a chapter on false advertising law appears in a volume on private law theory. In the United States false advertising law lives in statutes and regulations; it is enforced by federal agencies and state attorneys general; and its rules can seem designed more to promote consumer welfare and market efficiency than to enforce interpersonal obligations or compensate for wrongful losses. If one views the divide between public and private law as a fixed border between independent regions, false advertising law appears to fall in the domain of public law.

This chapter's working hypothesis is that that picture is a false one. Although it can be helpful to distinguish private from public law, the line between them is not so sharp. Laws that fall on the private side of the divide can be designed in light of purposes and principles commonly associated with public law, and vice versa. U.S. false advertising law provides an example. Despite the fact that it is commonly classified as public law, one can find in it structures, functions, and values commonly associated with private law. The structural features include horizontal duties, transfer remedies, private enforcement, and judge-made rules. These features are partly remnants of earlier private law causes of action. But as legislators and courts adapted those old actions to the new phenomenon of mass consumer marketing, they imposed on advertisers new types of obligations. Those obligations suggest, to use Henry Smith's term, an emergent ethics of false advertising.<sup>2</sup> Although it differs from its common law ancestors, false advertising law can be understood within the private law framework.<sup>3</sup>

False advertising law is unusual in that it imposes on advertisers one duty owed to two distinct categories of persons.<sup>4</sup> The duty not to engage in deceptive advertising is owed both to consumers, who might be deceived by an

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<sup>2</sup> Henry E. Smith, *Systems Theory: Emergent Private Law*, in *Oxford Handbook of New Private Law* \_\_\_\_ (A. Gold et al. eds., 2020).

<sup>3</sup> For comparable analysis of a neighboring field, see Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 *Notre Dame L. Rev.* 1839 (2007).

<sup>4</sup> Or depending on how one individuates duties, two duties with the same content owed to different persons.

advertisement, and to honest competitors, who might lose sales as a result of consumer deception.

The content of the duty differs from false advertising law's common law ancestors. With respect to consumers, common law duties not to lie or negligently make false statements are replaced by the responsibility not to cause consumers to hold false beliefs. Inquiries into meaning and truth thus give way to questions about cause and effect. With respect to competitors, common law duties not to defame are replaced by a duty to adhere to commonly recognized rules of the marketplace. The wrong of calumny is supplanted by the wrong of cheating. Like other areas of private law, there are ethical aspects to these legal obligations. But they differ from those of false advertising law's common law ancestors.

This chapter argues also that although an advertiser's duties can be understood in private law terms, advertising's one-to-many structure poses practical challenges to traditional private law mechanisms and the values sometimes associated with them. Despite the fact that U.S. false advertising law includes backward-looking consumer remedies, the small sums at stake, the difficulty of proving causation and individual loss, and the costs of distributing awards make it difficult to fully compensate consumer victims. For some of the same reasons, consumers often do not exercise their power to sue false advertisers. Finally, although the relevant statutes are drafted to invite judges to develop something like a common law of false advertising, courts of general jurisdiction are ill-equipped to make many of the factual determinations false advertising law requires.

Part One provides a brief introduction to U.S. false advertising law and identifies several structural features associated with the private law. Part Two analyzes false advertising law's consumer-oriented duties. Part Three discusses an advertiser's duties to its competitors. Part Four examines practical impediments to consumer lawsuits, consumer oriented remedies, and adjudicative resolution of false advertising claims. These impediments suggest often unnoticed factual predicates of the traditional private law framework.

## **1 Background**

### **1.1 False Advertising Law in the United States**

False advertising law in the United States is an assemblage. Its primary components are section 5 of the Federal Trade Commission Act, section 43(a) of the Lanham Act, and state consumer protection and false advertising statutes. This section provides an overview of each.

When enacted in 1914, section 5 the Federal Trade Commission (FTC) Act focused not on consumer protection but on "unfair methods of competition

in commerce.”<sup>5</sup> Early judicial decisions on the scope of section 5 were mixed. Some courts read it as limited to already recognized forms of unfair competition, or to require evidence of harm to competitors.<sup>6</sup> Others suggested that practices that were deceptive or unfair to consumers fell within section 5’s ambit because they could be assumed to harm honest and upstanding competitors.<sup>7</sup> In 1938, Congress codified and extended the broader readings by amending section 5 to additionally prohibit “unfair or deceptive acts or practices.”<sup>8</sup> The House Report explained that the purpose of the new language was to “prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors.”<sup>9</sup> The 1938 amendment also added a new section 12 expressly providing that false advertising qualifies as an unfair and deceptive practice.<sup>10</sup>

The FTC Act does not create a private right of action but vests sole enforcement authority in the Federal Trade Commission. In its present form, the Act provides a variety of remedies. The FTC can issue cease-and-desist orders, seek injunctive relief via the courts, and ask for civil penalties.<sup>11</sup> The Act also provides for “such relief as the court finds necessary to redress injury to consumers or other persons . . . resulting from [a] rule violation.”<sup>12</sup> That relief can include “rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice.”<sup>13</sup>

The other major federal false advertising statute is the Lanham Act, first enacted in 1946. The Lanham Act is primarily a federal trademark law, protecting both registered and unregistered marks. Like the FTC Act, the Lanham Act originally focused on unfair competition, not consumer protection. As enacted, however, section 43(a) prohibited the use of any “false designation

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<sup>5</sup> Act to Create the Federal Trade Commission, Pub. L. No. 203, ch. 311, § 5, 38 Stat. 717, 719 (1914).

<sup>6</sup> See, e.g., *FTC v. Gratz*, 253 U.S. 421, 427-29 (1920), *overruled by* *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *FTC v. Raladam Co.*, 283 U.S. 643, 651 (1931).

<sup>7</sup> See, e.g., *FTC v. Winsted Co.*, 258 U.S. 483, 493 (1922); *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 312-13 (1934).

<sup>8</sup> Act to Amend the Act Creating the Federal Trade Commission, Pub. L. No. 75-447, ch. 49, § 3, 52 Stat. 111, 111 (1938) (codified as amended at 15 U.S.C. § 45).

<sup>9</sup> H.R. Rep. No. 1613, 75th Cong., 1st Sess., 3 (1937); see also *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) (discussing legislative history of the FTC Act).

<sup>10</sup> *Supra* note 8, at § 4, 52 Stat. at 114-15 (codified as amended at 15 U.S.C. § 52).

<sup>11</sup> 15 U.S.C. §§ 45(b), 45(m)(1)(A), 54(a).

<sup>12</sup> 15 U.S.C. § 57b(b).

<sup>13</sup> *Id.*

of origin, or any false description or representation” of goods or services.<sup>14</sup> As with section 5 of the original FTC Act, courts disagreed on the scope of section 43(a). Some circuits adopted narrow readings, emphasizing the connection to the common law tort of passing off one’s own products as those of another.<sup>15</sup> Others read “any false description or representation” in section 43(a) to capture other forms of false advertising.<sup>16</sup> In 1988 Congress amended the Lanham Act to conform to the broader readings by adding section 43(a)(1)(B), which prohibits

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 . . . 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.<sup>17</sup>

Courts have uniformly read this language to prohibit any advertising that actually deceives or has the tendency to deceive a substantial portion of the audience as to a material fact.<sup>18</sup>

Keeping with its origins in unfair competition law, courts have continued to hold that the Lanham Act grants standing only to competitors.<sup>19</sup> Consumers do not have a federal right of action against false advertisers. The Lanham Act offers competitor-plaintiffs a range of remedies, including damages in the amount of lost sales or the defendant’s profits, negative injunctions against the deceptive behavior, and occasionally an order that the defendant engage in corrective advertising.<sup>20</sup>

If consumers wish to sue a false advertiser, they must turn to state consumer protection laws. Many of these laws were enacted in the late 1960s and early ‘70s, and all were designed to protect consumers. Because the

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<sup>14</sup> Act of July 5, 1946 (Lanham Act), Pub. L. 79-489, ch. 540, § 43(a), 60 Stat. 427, 441 (codified as amended at 15 U.S.C. §§1051-1127).

<sup>15</sup> *E.g.*, *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 491 (1st Cir. 1988); *Fur Info. & Fashion Council, Inc. v. E.F. Timme & Son, Inc.*, 501 F.2d 1048, 1051 (2d Cir. 1974).

<sup>16</sup> *E.g.*, *U-Haul International, Inc. v. Jartran, Inc.*, 681 F.2d 1159, 1161-62 (9th Cir. 1982); *L’Aiglon Apparel v. Lana Lobell, Inc.*, 214 F.2d 649, 651 (3d Cir. 1954).

<sup>17</sup> Trademark Law Revision Act of 1988, Pub. L. No. 100-667, § 132, 102 Stat. 3946 (codified as amended at 15 U.S.C. § 1125(a)(1)(B)).

<sup>18</sup> *See, e.g.*, *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 272 (4th Cir. 2002) (citing cases).

<sup>19</sup> *See, e.g.*, *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). This despite the fact that the Lanham Act grants standing to “any person who believes that he or she is or is likely to be damaged by such act.” 15 U.S.C. § 1125(a)(1).

<sup>20</sup> 15 U.S.C. §§ 1116(a), 1117(a).

statutes commonly adopt the “unfair and deceptive acts and practices” language of the FTC Act, they are often referred to as “UDAP” statutes. In addition to UDAP statutes, some states also have laws that specifically address false advertising.<sup>21</sup> State statutes commonly provide for enforcement both by state attorneys general and consumer lawsuits.<sup>22</sup> Remedies to consumers generally include compensatory damages, rescission, and restitution. Many statutes also provide for minimum per-violation awards, damage multipliers, punitive damages, and attorney’s fees.<sup>23</sup>

## 1.2 Private Law Elements in False Advertising Law

With this basic description of U.S. false advertising law, I now turn to its private-law aspects. The best definition of “private law” depends on a theorist’s interests. Like Thomas Merrill, I employ a catholic, multi-factor conception.<sup>24</sup> Laws traditionally understood as belonging to private law are characterized by four structural features: horizontal duties, private transfer remedies, private enforcement, and common law origins. Each appears in U.S. false advertising law. That fact does not in itself entail that false advertising law should be classified as part of the private law in any theoretically interesting sense—that it serves functions or embodies values characteristic of private law. But compiling the relevant structural features is a start.

Laws categorized as private law establish horizontal duties: obligations owed to other persons.<sup>25</sup> A duty is horizontal if its violation wrongs someone—a person to whom the duty was owed.<sup>26</sup> The private law does not include duties

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<sup>21</sup> See, e.g., Cal. Bus. & Prof. Code § 17500 (2019); N.Y. Gen. Bus. L. § 350-a (2019).

<sup>22</sup> See Dee Pridgen & Richard M. Alderman, *Consumer Protection and the Law* §§ 6.2 & 7.1 (West 2018).

<sup>23</sup> *Id.* at § 6.1.

<sup>24</sup> Thomas W. Merrill, *Private and Public Law*, in *Oxford Handbook of New Private Law* \_\_\_\_ (A. Gold et al. eds., 2020).

<sup>25</sup> Private laws establish jural relations other than duties—powers, privileges, immunities, etc. When thinking about false advertising law, it is simpler to focus on duties.

<sup>26</sup> Or more precisely, the violation of a horizontal duty “involves an interference with one of a set of individual interests that are significant enough aspects of a person’s well-being to warrant the imposition of a duty on others not to interfere with the interest in certain ways, notwithstanding the liberty restriction inherent in such a duty imposition.” John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 Tex. L. Rev. 917, 937 (2010). This fairly minimalist definition skips over several interesting nuances, such as whether a wrong should always be conceived as the violation of a right.

owed to the state,<sup>27</sup> such as the duty to pay taxes, or to no one, such as victimless crimes. Under U.S. false advertising law, the legal duty not to engage in deceptive advertising appears to be owed to two categories of persons: consumers and competitors.

A second characteristic of private law is that the legal response to a violation includes a transfer from the wrongdoer to the victim. That transfer might take the form of the payment of money, an injunction enforceable by the victim, or the transfer of a legal entitlement. U.S. false advertising law includes transfer remedies of these types. The Lanham Act provides competitors both injunctive and monetary relief. And the remedial measures found in the FTC Act and state UDAP statutes include transfers to consumer victims, often in the form of money damages. Both the FTC Act and UDAP statutes, however, include remedies not traditionally associated with the private law, such as fines, administrative orders, and injunctions granted state enforcement bodies.

The third design element is perhaps most familiar: private law puts the victim in charge of pursuing the remedy. The private law is a sphere of private enforcement. Here too U.S. false advertising law is partly private and partly public in structure. Both the Lanham Act and state UDAP statutes empower putative victims of false advertising—competitors and consumers respectively—to sue. The FTC Act and state UDAP statutes, however, also provide for public enforcement.

Finally, private law is often viewed as belonging to the common law. Legislation at most makes changes around the edges, or codifies judge-made rules. Here false advertising law might appear to differ, as it is a creature of statutes and, to some extent, regulations issued by the FTC or state attorneys general. That said, like many other laws that address fraud and deception,<sup>28</sup> those statutes draw on common law concepts and are worded in ways that invite courts to fill in the details. This is especially true of the Lanham Act, which is enforced solely through private suits. Courts play an essential role in the elaboration of false advertising law.

The fact that U.S. false advertising law exhibits these structural features does not entail that false advertising law qualifies as private law in anything but the thinnest sense. If private law is an interesting theoretical category, it is because its structural features reflect distinctive functions or social values. To say that false advertising law displays features of the private law in a more interesting sense requires a theory of private law that ascribes to it distinctive purposes or principles.

That is not the project of this chapter. Instead, I approach the question from below. Parts Two and Three compare advertisers' horizontal duties to analogous or ancestral common law torts. Despite differences, the duties false

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<sup>27</sup> Except insofar as the state acts in a private capacity, as when it enters into a contract.

<sup>28</sup> For example, the federal mail and wire fraud statutes, which prohibit “any scheme or artifice to defraud.” 18 U.S.C. §§ 1341, 1343 (2019).

advertising law imposes can be understood in ethical, nonconsequentialist terms familiar to the private law. Part Four then discusses challenges mass consumer advertising poses to the realization of values associated with transfer remedies, private enforcement, and the role of courts.

## 2 An Advertiser's Duties to Consumers

False advertising law imposes a duty on advertisers not to deceive consumers.<sup>29</sup> Insofar as the duty is owed consumers, the most similar torts are deceit and negligent misrepresentation, which also address harms deception causes the deceived—as distinguished, say, from defamation, which addresses harms to persons about whom false statements are made. The duty that false advertising law imposes on advertisers, however, is very different from those torts. This Part advances two claims: that the differences are partly explained by the fact that our everyday interpretive practices and moral intuitions are not well-suited to the communications one finds in mass advertising; and that the duty false advertising law imposes on advertisers can nonetheless be understood as an ethical obligation.

There are three salient differences between an advertiser's legal duties and the duties imposed on a speaker by the torts of deceit and negligent misrepresentation. First, whereas the common law torts require proof that the defendant made a false statement of fact on which the plaintiff relied, false advertising law asks whether the advertisement caused in consumers a false belief. The first element of both deceit and negligent misrepresentation is that the defendant made a false statement of fact.<sup>30</sup> The falsehood might be express—a literal falsehood—or implied—as in the familiar doctrine of half-truths. In either case, truth is a defense to the tort. Truth is not always a defense in false advertising actions. Both the FTC Act and most state UDAP statutes prohibit not false statements, but “deceptive acts and practices.” And most courts have read the Lanham Act to sometimes impose liability when consumers draw false inferences from an advertiser's true statements.<sup>31</sup> The ultimate

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<sup>29</sup> There are shades of difference here between the FTC Act, the Lanham Act, and relevant state laws. But all are similar enough in general approach to be treated together.

<sup>30</sup> See Restatement (Second) of Torts §§ 525, 552 (1977).

<sup>31</sup> See, e.g., *Williams v. Gerber Products Co.*, 552 F.3d 934, 938-39 (9th Cir. 2008) (holding that the packaging words “Fruit Juice” juxtaposed alongside images of fruits like oranges, peaches, strawberries, and cherries could potentially suggest that those fruits or their juices are contained in the product, in violation of California's UDAP statute prohibiting “not just advertisement that is false, but also advertisement which, although true ... has a capacity ... to deceive or confuse the public.”); *Am. Home Prod. Corp. v. Johnson & Johnson*, 654 F. Supp. 568, 591 (S.D.N.Y. 1987) (holding that the literally true statement “hospitals recommend acetaminophen, the aspirin-free pain reliever in Anacin-3, more



question in most false advertising cases is not whether the advertisement was true or false, but whether it deceived or was likely to deceive consumers.<sup>32</sup>

Second, whereas the torts of deceit or negligent misrepresentation require a showing that the plaintiff's reliance was justifiable or reasonable,<sup>33</sup> most false advertising laws have no justified-reliance requirement.<sup>34</sup> All that is required is that the advertisement deceived or had a tendency to deceive a substantial portion of the audience. Third, whereas the torts require a showing of fault, liability for false advertising is generally strict. Actual or probable deceptive effect is enough, whether or not the advertiser was or should have been aware of that effect. Taking the second and third points together, we might say that false advertising law expects less of consumers and more of advertisers than do the correlate torts.

What explains these differences?<sup>35</sup> The torts of deceit and negligent misrepresentation deploy our everyday interpretive abilities and moral sensibilities to draw a clear, if not always crisp, line between the permissible and the impermissible. A person commits one or the other tort when she intentionally, recklessly, or negligently says something false with the intent to cause a hearer to rely, the hearer does reasonably rely, and the hearer suffers a loss as a result. Our everyday interpretive abilities and moral sensibilities are less well-suited to the interpretation and evaluation of advertisements.<sup>36</sup>

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than any other pain reliever" violated the Lanham Act based on evidence that consumers mistakenly inferred that most hospitals recommended Anacin-3). A well-known outlier is Judge Easterbrook's opinion in *Mead Johnson & Co. v. Abbott Laboratories*, 201 F.3d 883 (7th Cir. 2000) (suggesting that the literal meaning of "1st Choice of Doctors" insulated advertiser from liability, even if evidence suggested that most consumers took away the message that the product was the choice of most doctors).

<sup>32</sup> The above oversimplifies a bit. Courts have held that a literally false statement might violate false advertising laws without separate evidence of consumer deception, on the theory that a literal falsehood can be presumed deceptive.

<sup>33</sup> For more on how this element of the torts has shifted over time, see Mark P. Gergen, *A Wrong Turn in the Law of Deceit*, 106 *Geo. L. J.* 555 (2018).

<sup>34</sup> Some courts have read false advertising statutes to prohibit only advertisements likely to deceive a *reasonable* consumer. The requirement is not, however, uniform, and judicial understandings of reasonableness are often highly forgiving. See Seana Valentine Shiffrin, *Deceptive Advertising and Taking Responsibility for Others*, in *The Oxford Handbook of Food Ethics* 470, 476-79 (Anne Barnhill et al. eds., 2018).

<sup>35</sup> I discuss the themes in this paragraph and the next in greater detail in Gregory Klass, *Meaning, Purpose and Cause in the Law of Deception*, 100 *Geo. L.J.* 449 (2012). See also Shiffrin, *supra* note 34, at 474 n.12.

<sup>36</sup> Rebecca Tushnet has pushed back against such claims and argued that courts and juries are more capable of recognizing implicit and deceptive messages than current Lanham Act jurisprudence recognizes. Rebecca Tushnet, *Running the*

Ordinary rules of linguistic interpretation presuppose conversation, shared context, and a degree of cooperation. Advertisements are not conversations, but messages broadcast to a large, heterogeneous audience; they seek not only to communicate, but also to influence; and they use text, sound, and images in ways very different from ordinary conversation.<sup>37</sup> All this can make it difficult to parse what an advertisement says—which implications it is reasonable to draw from it. Nor is it obvious how to apply cooperative conversational ethics to advertisers. Because our society values economic activity, businesses are permitted to promote, push, and even puff their products.<sup>38</sup> And because our culture places a high value on individual autonomy, state attempts to regulate speech based on its persuasive power are treated with suspicion.<sup>39</sup> We presume individuals are competent to decide for themselves. As a result, it is not always obvious where to draw the line between, on the one hand, advertisers' permissible attempts to affect consumers' beliefs, preferences, and choices and, on the other, wrongful deception or other forms of manipulation.

The inability of everyday conversational norms to identify what advertisements mean, advertisers' obligations to consumers, and how much to expect of consumers themselves partly explains the law's turn toward a more consequentialist and welfarist framework.<sup>40</sup> That turn also enables false

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*Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. Penn. L. Rev. 1305, 1318-27, 1337-44 (2011).

<sup>37</sup> For a discussion of the role of images in advertising and judicial attempts to take account of them, see Rebecca Tushnet, *Looking at the Lanham Act: Images in Trademark and Advertising Law*, 48 Hous. L. Rev. 861, 895-916 (2011).

Advertisements are in this respect comparable to statements by issuers of securities, although the communicative contents are of course very different. Thus Donald Langevoort has argued that ordinary rules of conversational implicature—such as the half-truth doctrine—should not always apply in securities fraud cases. Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 Stan. L. Rev. 87 (1999).

<sup>38</sup> For example: "Opinions are not only the lifestyle of democracy, they are the brag in advertising that has made for the wide dissemination of products that otherwise would never have reached the households of our citizens." *Presidio Enterprises, Inc. v. Warner Bros. Distributing Corp.*, 784 F.2d 674, 685 (5th Cir. 1986).

<sup>39</sup> For more on this point, see David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum. L. Rev. 334, 353-60 (1991).

<sup>40</sup> See, e.g., RICHARD A. POSNER, *REGULATION OF ADVERTISING BY THE FTC* (American Enterprise Institute for Public Policy Research, 1973); Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J. L. & Econ. 491 (1981); Richard Craswell, "Compared to What?" *The Use of Control Ads in Deceptive Advertising Litigation*, 65 Antitrust L.J. 757 (1997); Richard Craswell, *The Efficient Regulation of Consumer Information*, 24 J. L. &

advertising law to address aspects of advertising that have no analog in the common law torts.<sup>41</sup> Whereas truthfulness is a binary quality, an advertisement might inform one portion of the audience and deceive another, or one element in it might both contain useful information and mislead. A purely consequentialist approach can balance the welfare gains from information some consumers receive against the welfare losses from the false messages received by those or other consumers. Having replaced the inquiry into truth with one into deceptive effect, the law can also look beyond an advertisement's communicative content to its potentially deceptive form, such as its use of images or placement of text. The same goes for assessing disclosures or disclaimers. Although disclosures and disclaimers can render an impliedly false advertisement truthful, they do not always prevent its deceptive effects. And like the advertisement itself, a disclosure or disclaimer is likely to affect different audience members differently and might contain multiple messages. In short, if it is difficult to say when an advertiser crosses the line from permissible persuasion to impermissible manipulation, with the right tools it is possible to determine when an advertisement's deceptive effects are likely to cause a net reduction in consumer welfare.

Such consequentialist and welfarist inquiries are sometimes associated with attempts to erase the distinction between private and public law.<sup>42</sup> By the same token, false advertising law's imposition of strict liability on advertisers and inattention to the reasonableness of consumer reliance might be taken to mean that we have left the realm of moral or ethical obligations commonly associated with the private law.

But if advertisers' legal duties to consumers differ from the common law obligation to tell the truth and questions of relative fault, that does not mean that they have no ethical content.<sup>43</sup> Edward Balleisen describes how the nineteenth century emergence of new technologies of production, distribution and promotion generated novel ways for sellers to interact with buyers.

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Econ. 491 (1981); Richard Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis*, 64 S. Cal. L. Rev. 549 (1991).

<sup>41</sup> Richard Craswell has explored these aspects in detail. See, e.g., Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. Rev. 657 (1985); Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 Va. L. Rev. 565 (2006); Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 Wash. L. Rev. 333 (2013).

<sup>42</sup> See, for example, John Goldberg's arguments in this volume that economic accounts of tort law fail to capture core aspects of it. John C.P. Goldberg, *Torts*, in Oxford Handbook of New Private Law \_\_\_\_ (A. Gold et al. eds., 2020).

<sup>43</sup> The argument in this and the next paragraph might be compared with John Goldberg and Benjamin Zipursky's account of strict liability in *The Strict Liability in Fault and the Fault in Strict Liability*, 85 Fordham L. Rev. 743 (2016).

Opportunities for fraud . . . were particularly salient in the nineteenth-century United States, where technological breakthroughs, transformations in finance and business organization, and the rapid creation of an integrated national economy sparked a series of economic booms, and where migration and the shifting boundaries of social class loosened traditional forms of communal authority. These conditions encouraged the flowering of a booster ethos suffused with thoroughgoing optimism and celebration of the rapid accumulation of wealth; they also fostered the emergence of pervasive information asymmetries. Optimism bred credulousness and willingness to take on risk. Profound differences in access to market intelligence limited the ability of investors and consumers to assess the claims of the parties with whom they contemplated doing business. This combination increased the payoffs and lowered the costs associated with fraud.<sup>44</sup>

This was the milieu in which modern mass advertising was born, a form of communication that challenged both existing understandings of sellers' moral obligations to buyers and existing private law actions. The law evolved in response to those challenges by assigning advertisers new types of legal obligations. These legal obligations, in turn, can be understood to reflect ethical obligations that come with these new forms of communication and persuasion.

Seana Shiffrin has recently argued that false advertising law tracks moral obligations that appear in relationships in which one side's autonomy is enhanced by giving a degree of responsibility to the other, including responsibility for the first side's own mistakes. Suppose a father sees on a bottle of baby formula, "1st Choice of Doctors."<sup>45</sup> If he thought about it, he might recognize that "1st" is not a cardinal, but an ordinal number. If he thought a bit more, he might realize that "1st Choice of Doctors," could mean only first choice of doctors who express a preference, and that if most doctors do not have a preference, the phrase might not mean that a majority, or even a plurality, of doctors recommend the product. Although the ideally reasonable consumer might do all this, it is not obvious that it would be a productive use of his mental energy. On any given day, he is likely to encounter many advertisements and make many small purchasing decisions. Because consumers are not gods, a rule that expects them to stop and think about every claim is not likely to increase consumer autonomy but reduce it.

The point is not simply that advertisers are the least-cost avoiders, but that mass consumer markets generate new types of moral relationships between producers and consumers. Shiffrin argues that advertisers acquire a

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<sup>44</sup> EDWARD J. BALLEISEN, *FRAUD: AN AMERICAN HISTORY FROM BARNUM TO MADOFF* 75 (2017).

<sup>45</sup> The example comes from *Mead Johnson v. Abbott Laboratories*, *supra* note 31.

responsibility not to cause false beliefs in consumers by choosing to participate in and benefit from mass consumer markets.

Conceiving producers as having quasi-fiduciary responsibilities to consumers is a way of underscoring that, if it is to be justified, our property and production system must be regarded as a decentralized yet cooperative project for mutual gain; thus, its design should follow that conception. Then, the assignment of greater responsibility for consumers follows as a natural complement to affording producers greater control and access to the modes of production. The producer has these property rights as a decentralized agent of the public cooperative project and heightened communicative responsibilities figure among the complimentary components of that role as an agent.<sup>46</sup>

Such moral responsibilities recommend imposing on advertisers strict liability for deceptive advertising without inquiring into the reasonableness of consumer reliance. The new obligations that the law imposes on advertisers reflect new ethical relationships generated by mass consumer markets.

### 3 An Advertiser's Duties to Competitors

Although an advertiser's duty not to deceive consumers differs from correlate tort obligations, the idea that those duties are owed to consumers is fairly straightforward. That a duty is owed to someone entails that that person is likely to be harmed by its violation.<sup>47</sup> Because false advertising clearly harms consumers, it is easy to understand why advertisers might owe them a duty not to deceive. Less obvious is that an advertiser might owe the very same duty—

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<sup>46</sup> Shiffrin, *supra* note 34, at 489. Elsewhere Shiffrin contrasts the duty not to deceive with the duty not to lie:

The wrong of lying, by contrast, is not essentially that it risks implanting or leaving false beliefs in the recipient's mind. Rather, the wrong of lying is that it operates on a maxim that, if it were universalized and constituted a public rule of permissible action, would deprive us of reliable access to a crucial set of truths and a reliable way to sort the true from the false. Deception is wrong because it unduly hazards the false for the deceiver's own purposes, whereas lying is wrong because it places the certainty of truth out of reach for the liar's own purposes.

SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY AND THE LAW* 23 (2014).

<sup>47</sup> To be clear, the converse is not necessarily true. The fact that B is or is likely to be harmed by A's action does not entail that A has an obligation to B not to do it.

the duty not to deceive consumers—also to its competitors. This part explores that aspect of false advertising law.<sup>48</sup>

A deceptive advertisement might harm competitors in any of several ways. The two most obvious are when an advertiser makes a false and disparaging claim about a competitor or its products, and when an advertiser seeks to pass off its own products as those of a competitor. Call the injuries that result from such acts “nominative harms,” as they derive from statements, express or implied, about the competitor or its products. Alternatively, or in addition, a false advertisement might harm a competitor by luring customers away from it. An honest business might find it difficult to compete with the apparent deals offered by a dishonest one. Call these “lost-volume harms.” Finally, false advertisements can cause generic harms to all competitors. Left unchecked, they reduce the credibility of commercial advertising in general, causing consumers to be skeptical of truthful claims businesses make and the quality of goods or services in a market.

The principal torts giving competitors standing to sue for deceptive acts, including false advertisements, target nominative harms.<sup>49</sup> Slander of title and trade libel both involve derogatory falsehoods about the plaintiff’s goods, services, or business.<sup>50</sup> In trademark infringement and passing off, the defendant misrepresents its own products as those of the plaintiff.<sup>51</sup> And in each the legal wrong corresponds to a familiar ethical wrong. Trade libel and slander of title are examples of calumny. Passing off is a type of free riding and, when the defendant’s products are of lower quality, akin to disparagement.

As mentioned in Part Two, early judicial construction of the FTC Act and the Lanham Act tended to read them in light of the above torts, restricting their scope to nominative and closely related harms. The 1938 amendments to the FTC Act and the 1988 amendments to the Lanham Act expanded the scope of each.<sup>52</sup> The new “unfair or deceptive acts and practices” language in the FTC Act added harms to consumers, establishing the FTC’s role as a consumer protection

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<sup>48</sup> For a highly instructive discussion of many of the issues in this Part, albeit with a somewhat different focus, see Nicolas Cornell, *Competition Wrongs*, 129 Yale L.J. (forthcoming 2020).

<sup>49</sup> Torts designed to protect competitors that address nondeceptive behavior, such as intentional interference with contractual relations and wrongful exercise of market power, lie at a greater distance from false advertising law.

<sup>50</sup> See Restatement of Torts §§ 624, 626 (1938) (rules for slander of title and trade libel); Restatement (Second) of Torts § 623A cmt. a (1977) (injurious falsehood torts apply “chiefly in cases of the disparagement of property in land, chattels or intangible things or of their quality.”).

<sup>51</sup> Restatement of Torts §§ 717, 741 (1938) (rules for trademark infringement and passing off).

<sup>52</sup> The history of trademark law exhibits a similar trajectory from nominative harms to less direct harms, which there fall under the headings of consumer confusion. See McKenna, *supra* note 3.

agency. The amendments to the Lanham Act extended it beyond passing off to reach any advertiser representation about “his or her or another person’s goods, services, or commercial activities.”<sup>53</sup> The false representation no longer needed to relate to the competitor’s product.

This shift from nominative to lost-volume harms might be read to mean that the Lanham and FTC Acts have evolved from laws designed to protect competitors to laws designed to protect consumers. It is the nature of competition for sellers to lose business to one another—to experience lost volume—without being wronged. Ronald Dworkin calls these “bare competition harms.”

No one could begin to lead a life if bare competition harm were forbidden. We live our lives mostly like swimmers in separate demarcated lanes. . . . [E]ach person may concentrate on swimming his own race without concern for the fact that if he wins, another person must therefore lose.<sup>54</sup>

The obvious victim of a false advertisement is the deceived consumer. Any resulting lost-volume harms to competitors are by comparison incidental and diffuse—incidental because the duty not to deceive is owed the consumer audience; diffuse because it is impossible to know which, if any competitor, might have lost a sale. On this view, competitors are given standing to sue not to vindicate their own losses, but to serve as private attorneys general, with the real goal being to protect consumers. As one court has opined, “[w]hile the Act is not directly available to consumers, it is nevertheless designed to protect consumers, by giving the cause of action to competitors who are prepared to vindicate the injury caused to consumers.”<sup>55</sup>

There is something to this reading. When deciding Lanham Act cases courts regularly emphasize the need to protect consumers from false advertising, and the focus in litigation is on consumer harms. Consider the rule for determining whether an advertisement has deceived a substantial portion of the audience. Courts generally agree that what counts as a substantial portion

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<sup>53</sup> Trademark Law Revision Act of 1988, Pub. L. No. 100-667, § 132, 102 Stat. 3946 (codified as amended at 15 U.S.C. § 1125(a)).

<sup>54</sup> RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 287-88 (2011).

<sup>55</sup> *Alpo Petfoods, Inc. v. Ralston Purina Co.*, 720 F. Supp. 194, 212 (D.D.C. 1989), *aff’d in part, rev’d in part*, 913 F.2d 958 (D.C. Cir. 1990); *see also Coca-Cola Co. v. Procter & Gamble Co.*, 822 F.2d 28, 31 (6th Cir. 1987) (“[C]ompetitors have the greatest interest in stopping misleading advertising, and ... section 43(a) allows those parties with the greatest interest in enforcement, and in many situations with the greatest resources to devote to a lawsuit, to enforce the statute rigorously.”); Jean Wegman Burns, *Confused Jurisprudence: False Advertising under the Lanham Act*, 79 B.U. L. Rev. 807, 874-77 (1999) (arguing that the purpose of the Lanham Act is to protect consumers).

depends on the magnitude of the harm to individual consumers. A smaller number of deceived audience members might qualify as “substantial” if the falsehood is likely to cause them more severe harms.<sup>56</sup> The rule has nothing to do with the nature of the harm, actual or probable, to the competitor-plaintiff. All that matters is harm to consumers. More generally, to establish Lanham Act standing a competitor “need not plead actual harm; the likelihood of harm is the statutory criterion.”<sup>57</sup> Whether the competitor-plaintiff was actually harmed enters into litigation, if at all, only at the case’s conclusion and only should a successful plaintiff seek damages in addition to or instead of injunctive relief.

There is no doubt that consumers benefit from competitor suits under the Lanham Act, and that this is a good thing. But the fact that the contemporary Lanham Act is designed to protect consumers does not entail that consumer protection is its sole purpose.

As originally enacted, both the FTC Act and the Lanham Act targeted unfair competition, not consumer deception. During these periods, some courts and commentators sought to extend the statutes’ reach by identifying ways in which a false advertisement that did not mention a competitor’s product—that did not cause it a nominative harm—might nonetheless wrong the competitor.<sup>58</sup> An example is Justice Brandeis’s 1922 majority opinion in *FTC v. Winsted Hosiery Co.* At issue was a challenge to an FTC finding that the defendant’s false labeling of its underwear as woolen constituted unfair competition, despite the absence of trade libel or passing off—in other words, despite the absence of a nominative harm.

[The facts show] that the practice constitutes an unfair method of competition as against manufacturers of all wool knit underwear and as

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<sup>56</sup> See, e.g., *Firestone Tire & Rubber Co.*, 81 F.T.C. 429 (1972), *aff’d* 481 F.2d 246 (6th Cir. 1973); *Am. Home Prods. Corp. v. Johnson & Johnson*, 654 F. Supp. 568 (S.D.N.Y. 1987). As the Restatement of Unfair Competition explains, “when the potential injury to the deceived consumers is relatively great, a more modest likelihood of harm to competitors may be sufficient to subject the actor to liability.” Restatement (Third) of Unfair Competition § 3 cmt. e (1995).

<sup>57</sup> *Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357, 1367 (Fed. Cir. 2013) (quoting 15 U.S.C. § 43(a)(1)’s provision that a false advertiser “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>58</sup> In addition to the sources discussed in the above paragraph, see, e.g., *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603, 604 (2d Cir. 1925), *rev’d on other grounds*, 273 U.S. 132 (1927) (suggesting a single-source exception to the requirement of a nominative harm); Restatement of Torts § 761 (1939) (suggesting that any competitor whose goods had ingredients or qualities falsely claimed by another had standing to sue); Milton Handler, *False and Misleading Advertising*, 39 Yale L.J. 22, 34-42 (1929) (arguing that lost-volume harms should suffice for competitor standing).



against those manufacturers of mixed wool and cotton underwear who brand their product truthfully. For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. That these, honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding brought against the Winsted Company in the public interest.<sup>59</sup>

Writing in 1948, Rudolph Callmann, drawing on the civil law, argued along the same lines that “the action for unfair competition is not founded upon a violation of property rights but upon the failure to respect an affirmative code of ethics that stems from the competitive relationship.”<sup>60</sup> The 1938 and 1988 amendments to the FTC and Lanham Acts, which expressly authorized the FTC and competitors to go after false advertisers, rendered such arguments unnecessary. But their logic still holds. A false advertiser wrongs its competitors by not adhering to the ethics of the marketplace. The wrong is the wrong of gaining an unfair advantage through cheating.<sup>61</sup>

Which acts qualify as cheating depends on the rules of the marketplace. Steven Gelber has argued, for example, that in the nineteenth century United States it was generally expected that a horse trader would try to put one over on the buyer.<sup>62</sup> In such a market the buyer who has been taken in might

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<sup>59</sup> *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493 (1922). The Court adopted similar reasoning twelve years later, in a case involving candy packaging designed to manipulate children by offering them a chance at prizes:

A method of competition which casts upon one’s competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the [FTC Act] was aimed.

*FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 313 (1934).

<sup>60</sup> Rudolph Callmann, *False Advertising as a Competitive Tort*, 48 Colum. L. Rev. 876, 877 (1948).

<sup>61</sup> Cornell, *supra* note 48, identifies another example of competitor standing for violations of rules designed to protect neither competitors nor competition: competitor suits for violations of employment laws. *See, e.g.*, *Commercial Cleaning Servs. v. Colin Serv. Sys.*, 271 F.3d 374, 378 (2d Cir. 2001) (competitor standing under Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq., for alleged hiring of undocumented aliens); *Diva Limousine, Ltd. v. Uber Techs., Inc.*, No. 18-CV-05546-EMC, 2019 WL 2548459 (N.D. Cal. June 20, 2019) (competitor standing under California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, for alleged misclassification of ride-share drivers as independent contractors).

<sup>62</sup> STEVEN M. GELBER, *HORSE TRADING IN THE AGE OF CARS: MEN IN THE MARKETPLACE* 8-10 (2008). Although one suspects that Gelber is sometimes given to hyperbole,

consider himself wronged. Common wisdom held that professional horse traders were scoundrels. But the seller who lost a sale to a competitor's deceptive practices would have no cause for complaint. "The morality—or more precisely, immorality—of horse trading derived from the way it operated as a game. . . . Horse traders expected to be judged by the ethics of the game."<sup>63</sup> In such a market, although a seller's deceptive acts might wrong the buyer, they would not wrong other sellers. The commonly understood rules of the market permitted such behavior.

Gelber's account of horse trading illustrates what Balleisen describes as "the historically contingent nature of what constituted fraud and who qualified as an authoritative interpreter of commercial culture, especially in domains of economic life characterized by a great deal of entrepreneurial innovation."<sup>64</sup> The past century and a half have seen a seismic shift away from *caveat emptor*, both in the law and in the broader culture. With respect to advertising, the origin of the change lay not in a new understanding of what businesses owed one another. The duty to play by the rules of the game does not specify what those rules are. It came, rather, from new understandings of businesses' obligations to consumers—as exemplified by the changes to the FTC and Lanham acts and enactment of state UDAP statutes. Today the commonly recognized norms of the consumer marketplace prohibit deceptive advertising. Violating those rules harms consumers—as deceptive advertising always has. But with the emergence of the rules of the consumer market, we can now say it also wrongs honest competitors. This is the ethical component of competitor suits under the Lanham Act.

#### 4 Transfer Remedies, Private Enforcement, and Courts

Part Two identified four structural features commonly associated with the private law, each of which appears in U.S. false advertising law: horizontal duties, transfer remedies, private enforcement, and the role of courts. I have so far focused on the horizontal duties advertisers owe consumers and competitors. Although not equivalent to ancestral torts, those duties are comprehensible in terms familiar to the private law. Advertisers are responsible for not deceiving consumers, even when the deception is in a sense the consumer's own fault. And they have an obligation to competitors to play by commonly understood rules of the market, or a duty not to cheat. I now consider the other structural features false advertising law shares with the private law.

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his description of the horse market is highly engaging. "Nobody—not your neighbor, your best friend, your church brethren, not even the minister himself—could be trusted in a horse trade." *Id.* at 9.

<sup>63</sup> *Id.* at 15.

<sup>64</sup> *Supra* note 44, at 99-100. For more on the shift, *see id.* at 50-54, 97-99.

Competitor suits under the Lanham Act look very much like other private lawsuits and might advance the same values. Although lost-volume losses can be difficult to prove, competitors regularly receive injunctive relief and sometimes monetary damages. Competitor-victims of false advertising have the resources to go to court to vindicate their rights, and they regularly do. With respect to competitors, then, private enforcement and transfer remedies might serve the same purposes or advance the same values in false advertising law they do elsewhere in the private law.<sup>65</sup>

The nature of mass advertising, however, creates significant hurdles to both consumer-oriented transfer remedies and consumer enforcement.

Some challenges to providing consumer transfer remedies are of a piece with providing compensation to consumers generally. It is expensive to deliver small monetary awards to a large, diffuse, often heterogeneous group of victims.<sup>66</sup> Others are specific to false advertising. Because advertisements are broadcast to a large, passive audience, it can be especially difficult to determine who received the message and was harmed as a result. Nor is it always obvious how to quantify harms to consumer victims. Papa John's false advertisements about the quality of its pizza ingredients might cause Domino's to lose business,<sup>67</sup> but how should we value the harm to the consumer who chose to eat one company's pizza rather than the other's? Finally, whereas injunctive relief might provide a direct benefit to a competitor that has suffered a lost-volume harm and protect consumers going forward, it is not obvious how such relief benefits the consumer victim of an earlier false advertisement. Although it is reasonable to think that the producer of a deceptive advertisement owes

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<sup>65</sup> A more substantive theory of the purposes and principles of private enforcement and transfer remedies would have more to say on this matter. Benjamin Zipursky, for example, argues in this volume that private enforcement addresses the worry that public enforcement will "render individual protection extraordinarily vulnerable to the influence of the rich, powerful, and well connected, as against the poor, powerless, and unconnected." Benjamin C. Zipursky, *Civil Recourse Theory*, in *Oxford Handbook of New Private Law* \_\_\_, \_\_\_ (A. Gold et al. eds., 2020). It is not obvious that the same worry applies to the typical Lanham Act plaintiff, which is a large, well-resourced corporation.

<sup>66</sup> Although the above sentence might seem obvious, there is surprisingly little empirical evidence for it. Based on a 2015 review of the literature, Brian Fitzpatrick and Robert Gilbert conclude that the "existing data on consumer class actions is far from sufficient to make any conclusions about whether they can serve a compensatory function." Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & Bus. 767, 778 (2015).

<sup>67</sup> See *Pizza Hut Inc. v. Papa John's Int'l*, 80 F. Supp. 2d 600 (N.D. Tex. 2000) (granting successful Lanham Act plaintiff injunctive relief and costs of running corrective advertisements), *rev'd on other grounds*, 227 F.3d 489 (5th Cir. 2000).

something to consumers deceived by it, it is not always obvious what that is or how to get it to them.

Consumer enforcement also faces challenges. Because compensatory measures are low, consumer suits often take the form of class actions. Here the structure of U.S. false advertising law poses doctrinal hurdles. Although advertisements often reach a national audience, consumers have standing to sue only under state laws that vary across jurisdictions, making it difficult or impossible to bring nationwide class actions. More generally, one might wonder whether aggregating claims serves values commonly associated with private enforcement. By distributing enforcement powers to the private sphere, class actions might serve a democratizing or equalizing function. But because the decision makers in a class action are the attorneys who organize and litigate the suit, it is not obvious that class actions significantly advance the autonomy interests of class members in the ways individual enforcement actions can.<sup>68</sup>

A third challenge to a private law approach to false advertising cases applies to both competitor and consumer suits. Courts of general jurisdiction do not have the institutional competence to answer all the factual questions a false advertising case typically poses. Judges and juries are well equipped to address the factual questions that appear in a typical deceit or negligent misrepresentation case: What did the defendant say? Was it true or false? Was the defendant at fault for the falsehood? Was the plaintiff at fault for relying? They have less competence with respect to the central factual question in false advertising litigation: Did the defendant's advertisement cause or was it likely to cause a false belief in a substantial portion of its audience? Answering that question commonly requires the use of empirical studies such as copy tests and surveys, together with the expertise of social psychologists and others. Judges and juries are unlikely to have the background needed to evaluate evidence of this type.<sup>69</sup> The FTC and some state attorneys general, in distinction, are repeat players with their own economists, psychologists, and other experts. And when

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<sup>68</sup> For the tensions between the management of class actions and the values of private enforcement, see Howard M. Erichson & Benjamin C. Zipursky, *Consent vs. Closure*, 96 Cornell L. Rev. 265, 311-20 (2011).

<sup>69</sup> See Burns, *supra* note 55 at 864-67 (listing reasons why courts are ill-equipped to determine whether an advertisement is false or misleading); Richard J. Leighton, *Literal Falsity by Necessary Implication: Presuming Deception without Evidence in Lanham Act Cases*, 97 Trademark Rep. 1286 (2007) ("Many federal judges appear to have reservations about the need for, and reliability of, perception surveys and other extrinsic evidence offered to show how a challenged claim is interpreted by its intended audience."); Rebecca Tushnet, *It Depends on What the Meaning of "False" Is: Falsity and Misleadingness in Commercial Speech Doctrine*, 41 Loy. L.A. L. Rev. 227, 253 (2007) (expresses the "suspicion . . . that juries may not be better at [deciding whose meaning to endorse], and may systematically be worse than agencies with experience evaluating a variety of advertising claims over time.").

a public enforcement body designs an empirical study or hires an expert, it does not have a financial stake in the results. False advertising law's shift away from an inquiry into truth and fault and toward questions of cause and effect has not robbed it of its ethical content. But that shift has perhaps rendered traditional forms of adjudication less suited to its enforcement.

The remedies and adjudicative mechanisms one finds in contract, tort, property and other more traditional areas of private law were not handed down from on high. They were designed to address practical problems generated by specific types of interactions in particular social contexts. Horizontal duties built on the basis of commonly understood moral obligations, backward-looking transfer remedies, and private enforcement in courts of general jurisdiction function well when applied to breaches of exchange agreements, accidents, trespass, and the like. Those mechanisms are not equally suited to the one-many relationships generated by mass consumer markets, including the relationship between advertiser and its audience.

### **Conclusion**

In the past century and a half, mass consumer markets have created the conditions for new forms of interpersonal wrongs. These include not only deceptive advertising, but also defective products and unfair adhesive contract terms. In the United States, the legal response has largely been piecemeal, transmutative, and generative. Early legislation addressing false advertising drew on design elements from the common law, and false advertising law continues to exhibit those genetic markers. But they do not express themselves in the same form. As false advertising law has evolved, it has imposed on advertisers new types of obligations, and it has turned to new mechanisms of enforcement and remedial rules better suited to the one-many structure of consumer transactions.

Notwithstanding the law's adoption of a consequentialist and welfarist framework, however, advertisers' obligations to consumers and to competitors can be understood in ethical terms familiar to the private law. Rather than a duty not to lie or utter falsehoods, advertisers have a responsibility to consumers not to cause them false beliefs. Rather than a duty not to disparage another business or its products, advertisers have a duty to competitors to play by the rules of the marketplace. In this respect, U.S. false advertising law shows its private law roots, even if its branches extend well beyond them.