Florida Law Review

Volume 45 | Issue 3 Article 3

July 1993

The World's Best Article on Competitor Suits for False Adverstising

Lee Goldman

THE WORLD'S BEST ARTICLE ON COMPETITOR SUITS FOR FALSE ADVERTISING

Lee Goldman[*]

* Professor, University of Detroit-Mercy School of Law. J.D., 1979, Stanford University; B.A., 1976, Queens College.

I. INTRODUCTION

Since 1990, advertising expenditures in the United States have surpassed $130 billion per year.[1] As the casual consumer knows, much of this advertising is misleading, if not blatantly false.[2] Consumers and competitors are harmed as a result.[3]

Although individual consumers harmed by such advertising generally have not sustained damages sufficient to justify the costs of litigation, competitors often have.[4] Section 43(a) of the Lanham Act[5] gives competitors a federal cause of action against rivals who engage in false or misleading advertising.[6] In recent years, there has been a dramatic increase in the number of such suits brought by competitors.[7] There also has been a

---

1. *See* MARTIN MAYER, WHAT EVER HAPPENED TO MADISON AVENUE?: ADVERTISING IN THE '90'S 219 (1991).

2. It is inevitable that some consumers will be misled by commercial advertising. Given the time and space limitations of the various media outlets, advertising copy is necessarily incomplete. Most advertisements contain more than one message with different meanings to different people. *See* Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 672-76 (1985). Nevertheless, much advertising is knowingly and intentionally misleading. *See infra* notes 65-70 and accompanying text. Such misrepresentation is not limited to the fly-by-night companies interested in a fast dollar. Established companies, particularly those selling parity products, often find it beneficial to stretch the truth. For example, some commentators have estimated that every 1% increase in market share created by advertising for over-the-counter drug companies increases sales by $15 million. *See* Ross D. Petty, *Competitor Suits Against False Advertising: Is Section 43(a) of the Lanham Act a Pro-Consumer Rule or an Anticompetitive Tool?*, 20 U. BALT. L. REV. 381, 388 (1991). Under such circumstances, it is not surprising that some businesses may adopt questionable advertising strategies when their goods cannot be distinguished by legitimate means.

3. *See infra* notes 31-40 and accompanying text.

4. *See* Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 667-69 (1977).

5. 15 U.S.C. § 1125(a)(1) (Supp. IV 1992). Section 43(a) of the Lanham Act, now codified in 15 U.S.C. § 1125(a)(1), provides:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Id.

6. *Id.*

7. *See* Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 1 (1992). The increase in litigation

correlative increase in the commentary, much of it critical, discussing such actions.[8]

In the leading article, Professor Lillian BeVier suggests that false advertising does not pose a systematic threat to consumer welfare, and if it did, competitor lawsuits would not effectively provide systematic relief for the hypothetical consumer injury.[9] She maintains that in a free market system, consumers generally have ample means to protect their interests.[10] They may observe and compare rivals' goods before purchase and punish false advertisers after purchase "by spreading the word about the offending product and by not repurchasing it."[11] In those cases in which consumers are not able to protect themselves through such marketplace actions, they are unlikely to believe advertisers' claims. Under these circumstances, according to Professor BeVier, competitors have limited in-

---

has been the result of several factors including (1) the rise in comparative advertising after the Federal Trade Commission's policy statement encouraging such advertising, *see In Regard to Comparative Advertising*, 16 C.F.R. § 14.15 (1993); Cornelia Pechmann & David W. Stewart, *The Effects of Comparative Advertising on Attention, Memory, and Purchase Intentions*, 17 J. CONSUMER RES. 180, 180 (1990); (2) the 1988 Trademark Law Revision Act's elimination of the requirement that defendant's misrepresentations concern inherent characteristics of the defendant's goods and the Act's explicit extension of § 43(a) to false disparaging comments made by the defendant about the plaintiff's goods, *see* Trademark Law Revision Act of 1988, Pub. L. No. 100-667, tit. I, § 132, 102 Stat. 3935, 3946 (1988) (current version at 15 U.S.C. § 1125(a) (Supp. IV 1992)); Ross D. Petty, *Supplanting Government Regulation with Competitor Lawsuits: The Case of Controlling False Advertising*, 25 IND. L. REV. 351, 370 (1991); and (3) the growth of negative commercial advertising following the success of such campaigns in the political sphere, *see* Karen E. James & Paul J. Hensel, *Negative Advertising: The Malicious Strain of Comparative Advertising*, J. ADVERTISING, June 1991, at 53, 53. The continuing relevance of each of these factors suggests that the explosion in the number of competitor suits for false advertising should not abate in the 1990s. Possible increased supervisory activity by the federal government should not reverse the trend because the FTC focuses on different types of cases from those typically brought by private parties. *See infra* notes 123-27 and accompanying text.

8. *Compare* BeVier, *supra* note 7, at 3-4 (suggesting it is unlikely that competitor lawsuits would effectively provide relief for consumer injury); Ellen R. Jordan & Paul H. Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527, 528 (1979) (doubting competitor's need for any legal action premised on false advertising); Petty, *supra* note 2 (comparing FTC and Lanham Act cases and questioning the Lanham Act's ability to adequately protect consumers) *and* 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, 340-41 (1991) (expressing reservations about the usefulness of competitor lawsuits for false advertising) *with* 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, 672 (1984) (endorsing an expanded application of the Lanham Act to protect consumers, competitors, and the competitive process); Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1, 70-71 (1985) (concluding private litigation is the best process for controlling many kinds of troublesome advertising) *and* Roger E. Schecter, *Additional Pieces of the Deception Puzzle: Some Reactions to Professor BeVier*, 78 VA. L. REV. 57 (1992) (critiquing Professor BeVier's position).

9. *See* BeVier, *supra* note 7, at 2-3.

10. *Id.* at 8.

11. *Id.*

centives to make false claims.[12]

It is this article's thesis that Professor BeVier and the other commentators who are critical of competitor suits for false advertising systematically overstate the success with which the market mechanism protects against false advertising. Both theory and empirical evidence,[13] that is, reality,[14] raise serious questions about many of these commentators' assumptions. Equally important, their single-minded focus on consumer welfare fails to accord sufficient significance to other goals of the Lanham Act.[15] For example, the traditional tort law goal of compensating victims of wrongdoing receives no weight.[16]

Nonetheless, these commentators provide valuable contributions by their discussion of the costs resulting from competitor lawsuits. Contrary to the explicit or implicit assumptions of many of the writers endorsing expanded enforcement of section 43(a), these actions are not cost-free.[17] They may chill useful, informative advertising; often involve significant litigation costs; and may produce anticompetitive results.[18] However, this article argues that the costs enumerated by the critics of competitor false advertising suits overstate the problems created by competitor enforcement of section 43(a). This article also proposes amendments to the Lanham Act

---

12. *Id.* at 8-13. For a more extensive discussion of Professor BeVier's position, see *infra* notes 47-56 and accompanying text.

13. To test commentators' assumptions, the author reviewed and catalogued all § 43(a) cases brought by competitors that were reported in the ten year period from April 1, 1983 through April 1, 1993, in which a false advertising claim was the primary ground for relief. Cases excluded from this article's analysis include those in which (1) patent, copyright, misappropriation, trade secret, or trademark or tradename issues were the focus of the litigation, see, for example, Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986); Otis Clapp & Son, Inc. v. Filmore Vitamin Co., 754 F.2d 738 (7th Cir. 1985); Rickard v. Auto Publisher, 735 F.2d 450 (11th Cir. 1984); (2) the plaintiff was a noncompetitor, see, for example, Janda v. Riley-Meggs Indus., 764 F. Supp. 1223 (E.D. Mich. 1991); Torres v. Illinois Bell Tel. Co., No. 86-C1718, 1987 U.S. Dist LEXIS 7157 (N.D. Ill. Aug. 3, 1987); (3) the only reported opinions discuss issues other than the substantive false advertising claim, see, for example, Nabisco Brands v. Keebler Co., No. 91-C20115, 1991 U.S. Dist. LEXIS 19159 (N.D. Ill. May 6, 1991) (discussing venue transfer); Construction Technology v. Lockformer Co., 704 F. Supp. 1212 (S.D.N.Y. 1989) (discussing statute of limitations); and (4) the decision rested on pre-1988 amendment law, see, for example, Turbosound, Inc. v. Eastern Acoustics Works, 672 F. Supp. 575 (D. Mass. 1987); National Ass'n of Pharmaceutical Mfrs. v. Ayerst Labs., 1987-1 Trade Cas. (CCH) ¶ 67,573 (S.D.N.Y. 1987); Borden, Inc. v. Kraft, Inc., 224 U.S.P.Q. (BNA) 811 (N.D. Ill. 1984); Zerpol Corp. v. DMP Corp., 561 F. Supp 404 (E.D. Pa. 1983). For a complete list of included cases, see *infra* app.

14. To be fair, Professor BeVier acknowledges that her analysis does not describe reality, but is designed to offer "a testable hypothesis about the likely order of magnitude of false claims." BeVier, *supra* note 7, at 13 n.39. Nevertheless, her theory departs from reality so significantly that one must question the validity of the assumptions underlying the theory.

15. *See infra* notes 108-14 and accompanying text.

16. *See infra* notes 108-14 and accompanying text.

17. *See, e.g.*, Bauer, *supra* note 8, at 672, 706; Best, *supra* note 8, at 57.

18. *See infra* part V.

that would further reduce the costs from competitor suits without sacrificing the potential benefits such suits offer.

Absolute truth in all advertisements is not desirable, much less attainable.[19] When Chun King parodies medical testimonials with an ad for its chow mein that says, "Nine out of ten doctors recommend Chun King," and the visual shot shows nine Chinese doctors in a group shot with one Caucasian doctor, little purpose would be served by enjoining the advertisement because it is literally false and a few slow consumers might be misled. Ultimately, the critics of section 43(a) are correct that a cost-benefit analysis should be employed to design sensible false advertising rules.[20] The fault in their argument lies in the exclusion of goals other than consumer welfare from their analysis and in the appraisal of the consumer welfare effects of competitor actions.

Part II of this article reviews the theory of advertising, focusing on the market effects of false advertising. Part III describes and critiques the commentary questioning the usefulness of competitor suits for false advertising. Part IV addresses the related issue of alternatives to competitor suits to eliminate false advertising, and concludes that although the variety of alternative enforcement mechanisms reduce the need for competitor actions, competitor actions provide benefits that no other policing tool provides. Part V discusses the types and severity of costs associated with competitor suits for false advertising. It acknowledges that although those costs are not as severe as critics of private enforcement of section 43(a) suggest, the costs are nonetheless real. Finally, part VI recommends two relatively minor, albeit potentially controversial, changes to existing false advertising law that should reduce the costs identified in part V.

II. THEORY OF ADVERTISING

Although some commentators assert that high levels of image advertising unethically manipulate consumer demand, create spuriously perceived differences in products, and yield higher prices and entry barriers,[21] there is little debate concerning the beneficial effects of truthful informational advertising. Informational advertising increases buyer knowledge about the price, quality and benefits of various products, thus reducing consumers' search costs and the total costs to consumers of transacting business.[22] Truthful informational advertising not only produces lower effective pric-

19. *See* Craswell, *supra* note 2, at 714-17.

20. *See* Craswell, *supra* note 2, at 681-88.

21. *See* MARK S. ALBION & PAUL W. FARRIS, THE ADVERTISING CONTROVERSY: EVIDENCE ON THE ECONOMIC EFFECTS OF ADVERTISING 31-32 (1981); BeVier, *supra* note 7, at 4-8.

22. *See* STANLEY I. ORNSTEIN, INDUSTRIAL CONCENTRATION AND ADVERTISING INTENSITY 2-3 (1977).

es, but induces sellers to improve the quality of their goods.[23] Better informed buyers are not likely to purchase inferior merchandise.[24] Advertising may also reduce barriers to entry and improve product offerings by allowing the new entrant to quickly gain market awareness and acceptance.[25] For example, "Mutual fund product innovation increased dramatically, and the market share of no-load funds grew significantly, when the Securities and Exchange Commission relaxed advertising restrictions. Cholesterol advertising led to a wave of product changes and market share shifts that reduced consumption of dietary cholesterol."[26] Studies of the impact of restrictions on advertising consistently confirm that advertising improves market performance.[27] The Federal Trade Commission (FTC) and the United States Supreme Court both recognize the benefits of truthful informational advertising.[28] Thus, policymakers must be wary not to silence or chill truthful advertising in their enthusiasm to cleanse the marketplace of misrepresentations or fraudulent practices.

Nevertheless, if truthful informative advertising is an unequivocal social good, false advertising is unequivocally bad. In the short run, deceptive advertising injures consumers and competitors.[29] In the long run, false advertising results in a reduction of product quality and a misallocation of resources. If left unchecked, deceptive advertising may eventually undermine the entire competitive system.[30]

Consumers who are misled may be injured in three ways. They may suffer physical injury, incur economic damage, or face the psychological harm of frustrated expectations.[31] For example, physical harm can occur if a seller of over-the-counter drugs deceives consumers about the efficacy of its product. The consumer, believing the product to be effective, may fail to seek alternative treatment. The consumer also may be directly in-

---

23. *Id.* at 2.

24. *Id.*

25. *See* Singdahlsen, *supra* note 8, at 376. Comparative advertising even may aid entry by permitting "informational free-riding." That is, "by comparing its product to an established brand, a new entrant can quickly and cheaply inform the consumer of the relevant market for its product." *Id.*

26. J. Howard Beales, III, *What State Regulators Should Learn From FTC Experience in Regulating Advertising*, 10 J. PUB. POL'Y & MARKETING 101, 102 (1991) (citations omitted).

27. *Id.*

28. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 763 (1976) ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."); *In re* National Soc'y of Professional Eng'rs, No. 911-0042, 64 Antitrust & Trade Reg. Rep. (BNA) 627 (May 20, 1993) (consent decree prohibiting professional association from restricting truthful advertising by its members); Beales, *supra* note 26, at 105.

29. *See infra* notes 31-39 and accompanying text.

30. *See* Pitofsky, *supra* note 4, at 671.

31. *See* Roger E. Schecter, *The Death of the Gullible Consumer: Towards a More Sensible Definition of Deception at the FTC*, 1989 U. ILL. L. REV. 571, 580.

jured if the seller misrepresents the likelihood and severity of possible side-effects.

Of course, the purchase of an ineffective product results in immediate economic loss. Even if a product is effective, false advertising may cause economic damage if consumers are induced to pay a higher price for the product than the market would otherwise demand.[32] Finally, even if a product is effective and worth the price charged, some, including the Supreme Court and the FTC, believe that false advertising still injures the consumer.[33] They maintain that the seller's failure to deliver the bargained-for goods and the consumers' consequent frustrated expectations constitutes real, albeit nonquantifiable, harm.[34]

Competitors also suffer injury from false advertising.[35] In addition to direct sales lost to the dishonest seller, an honest rival may suffer a loss in profits if the false advertising brings the entire industry into disrepute. For example, in *W.L. Gore & Associates v. Totes, Inc.*,[36] Totes introduced its TECH-TEX fabric as "the Hi-Tech Break-Through in Super-Breathable/Water Resistant Fabrics . . . the ultimate in comfortable golf rain suit," and "seven times more breathable than GORE-TEX fabric."[37] The manufacturer of GORE-TEX brought suit under section 43(a), and the court, after finding the defendant's claims false, concluded that consumers dissatisfied with TECH-TEX would have no reason to purchase GORE-TEX when they were led to believe that TECH-TEX was the superior product.[38] Less immediate, to the extent that misled consumers become skeptical of all advertising, competitors may have to spend more money to truthfully educate consumers about the attributes of their goods.[39]

The potential long-range harms from false advertising are even more damaging. In a competitive economy, consumer purchases determine the mix and quantity of goods and services produced. By distorting consumer purchasing patterns, false advertising tinkers with the basic signaling mechanism.[40] Deceived consumers will make inappropriate choices resulting in a misallocation of resources.[41] For example, if Excedrin does not relieve headache pain fast, not only will there be many cranky consumers,

---

32. *Id.* at 581.
33. *See, e.g.*, FTC v. Algoma Lumber Co., 291 U.S. 67 (1934).
34. *See* Schecter, *supra* note 31, at 582. Consumers may even experience lower self-esteem if they perceive themselves as having been "duped." *Id.*
35. *Id.*
36. 788 F. Supp. 800, *amended*, 1992 U.S. Dist LEXIS 4055 (D. Del. Apr. 1, 1992).
37. *Id.* at 804.
38. *See id.* at 811.
39. Schecter, *supra* note 31, at 583.
40. *See* Beales, *supra* note 26, at 102; Schecter, *supra* note 31, at 584.
41. Beales, *supra* note 26, at 102; Schecter, *supra* note 31, at 584.

but too much capital and labor will be employed to produce a worthless product rather than a more effective pain reliever or some other socially useful good. Additionally, product quality may diminish if inferior goods can be advertised and sold as equivalent to or better than its higher priced competition.

If consumers react by completely ignoring advertising claims, false advertising may begin to undermine the basic workings of a competitive marketplace.[42] As explained by Professor Pitofsky, "In markets where product claims are viewed with utter suspicion, high price is adopted as an indication of quality, and price competition and product improvement become economically irrational."[43] New entrants with improved or innovative products ultimately may be barred from the marketplace because they have no effective means to communicate with the public.

Finally, false advertising may have long-term effects beyond the economy. Society's moral and ethical standards are diminished if false advertising is accepted as a standard business practice.[44] Lying and cheating become increasingly acceptable as they become more prevalent.[45] Eventually, this dishonesty may reach beyond the commercial marketplace.[46] The level of discourse in political campaigns already may reflect this phenomenon. False advertising in the commercial arena may even impact social or political ideals. If cars "made in America" contain mostly Japanese parts or "environmentally sound" oil companies fail to take sufficient precautions to prevent oil spills, the deceived consumer will be unable to accurately voice their social and political preferences through their marketplace spending.

The multitude of harms from false advertising, however, does not necessarily demand recognition of competitor suits under section 43(a). The advisability of competitor suits is a function of three variables: (1) the prevalence of false advertising and the effectiveness of competitor suits for remedying such advertising, (2) the availability of alternative means to police the marketplace, and (3) the costs entailed by granting competitors standing to sue for false advertising. The succeeding sections address each of these variables.

---

42. Pitofsky, *supra* note 4, at 671.

43. *Id.*

44. *See* Schecter, *supra* note 31, at 584-85.

45. *See id.*

46. *Cf.* NORMAN DOUGLAS, SOUTH WIND 63 (Scholarly Press, Inc., 1971) (1925), *cited in* Castrol, Inc. v. Pennzoil Co., 987 F.2d 939 (3d Cir. 1993) ("[Y]ou can tell the ideals of a nation by its advertisements.").

III. THE CRITICS' VIEW OF COMPETITOR SUITS FOR FALSE ADVERTISING AND A RESPONSE

A. *The Threat Posed by False Advertising*

1. The Critics' View

Using consumer welfare as the exclusive criterion and adopting a paradigm in which the defendants in section 43(a) actions act in good faith, Professor BeVier, like earlier critics of private enforcement under section 43(a), concludes that false advertising does not pose a major threat to consumers.[47] Her argument builds upon the framework of earlier commentators defining search goods, experience goods, and credence goods and suggests that the marketplace protects against deception by sellers of such goods.[48]

Search goods are those whose characteristics can be ascertained by presale inspection. They include the smell of perfume, the comfort of a pair of shoes, and the beauty of a painting.[49] Advertising about search goods, according to the critics of competitor suits, is unlikely to be false because, by definition, consumers can cheaply verify search qualities before purchase.[50] "[L]ittle purpose could be served by falsely advertising about search qualities," and advertisers might incur the cost of lost credibility for future claims.[51]

Experience goods are those that must be used or consumed to be evaluated.[52] Examples include the taste of canned tuna and the durability of a pair of sneakers. Although the consumer can cost-effectively determine the quality of experience goods only by purchase, here too, the critics of competitor suits argue, sellers have little incentive to falsely advertise.[53] For most products, a seller depends upon repeat purchasers to remain successful. A deceived consumer is likely to withhold additional purchases and distrust future claims by the seller.[54] The deceived con-

47. BeVier, *supra* note 7, at 2-4.

48. *See, e.g.*, Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68-69 (1973); Jordan & Rubin, *supra* note 8, at 529; Phillip Nelson, *Advertising as Information*, 82 J. POL. ECON. 729, 729 (1974).

49. *See* BeVier, *supra* note 7, at 9. It is more accurate to refer to search attributes or characteristics, because any good may combine search, experience, and credence attributes. For example, although the comfort of a pair of shoes is a search quality, the shoes' durability is an experience characteristic. Nonetheless, this article follows the earlier terminology of search, experience, and credence goods, unless otherwise specified.

50. *E.g.*, BeVier, *supra* note 7, at 9; Jordan & Rubin, *supra* note 8, at 529.

51. BeVier, *supra* note 7, at 9.

52. *See id.*

53. *See id.* at 11-12.

54. *See id.* at 11.

sumer also may induce family and friends to withhold purchases from the offending seller.[55] Sellers, aware of these effects of false advertising on reputation, are unlikely to view deception as a plausible marketplace strategy.[56] Furthermore, "[c]onsumers know that self-interested advertisers have incentives to overstate quality when their claims cannot be verified prepurchase. Consumers, accordingly, will so discount producer-supplied hard information about the quality of experience characteristics that producers will not invest in trying to provide it."[57]

Credence goods, or more likely credence services, are those that have characteristics that cannot be evaluated by the nonexpert even after purchase and use, for example, a drug's likelihood of side effects, the healthiness of frozen dinners, and the quality of dental care.[58] Sellers seemingly have a great incentive to falsely advertise such goods because purchasers will never learn of the deception.[59] Those suspicious of competitor suits, however, argue that consumers will ignore credence claims for this reason.[60] Given consumer disbelief, advertisers realize that they cannot profit by falsely advertising credence traits and therefore do not make such false claims.[61]

In summary, according to Professor BeVier and her fellow critics of competitor suits, advertisers have little incentive to falsify their product claims.[62] Consumers can verify claims prepurchase; disbelieve self-interested, unverified claims; and punish false advertisers by spreading the word about the offending producer and refusing to again purchase that seller's goods.[63] These free-market consumer responses eliminate, or at least substantially reduce, the need for competitor suits under section 43(a).

2. A Response to the Critics

This article challenges the critics' model on three grounds. The model (1) adopts questionable basic assumptions, (2) overstates the ability of consumers to detect and punish false advertising claims, and (3) mistakenly relies on consumer skepticism to protect against undetectable false claims.[64]

---

55. *Id.*
56. *See, e.g.*, *id.* at 11-12; Jordan & Rubin, *supra* note 8, at 529.
57. BeVier, *supra* note 7, at 10.
58. *Id.* at 12-13.
59. *Id.* at 13.
60. *See id.*
61. *Id.*
62. *See id.* at 8.
63. *See id.*
64. *See generally* Schecter, *supra* note 8 (cogently presenting many of the same criticisms).

(a) The Basic Assumptions

Professor BeVier's paradigm of a good faith defendant is naive. Empirical evidence suggests that many defendants in competitor suits for false advertising either acted in bad faith or at least knowingly stretched the truth.[65] Of the sixty reported competitor cases reviewed, more than half challenged claims by defendants acting in questionable faith.[66] That figure probably underestimates the number of bad faith defendants because it is likely that a disproportionate number of settled, but unreported, cases involved defendants who failed to act in good faith. Dishonest defendants also were not limited to fly-by-night operators. Several nationally known companies were found guilty of making completely unsupported claims. For example, Totes claimed that its waterproof golf jacket "allows seven times more air to your skin" than its competitor's.[67] No test was done to support the claim.[68] Alpo's declaration that its product contained the formula preferred by responding veterinarians two to one over the leading puppy food, also lacked substantiation.[69] Owens-Corning Fiberglas Corp. went one step further; it made claims previously proven false by its own study.[70]

This article also challenges the critics' adoption of consumer welfare as the sole goal of false advertising law. The single-minded focus on consumer welfare denigrates both the interests of competitors in being treated fairly and receiving compensation for their injuries and the interest of society in an ethical and moral marketplace. There is express language in the Lanham Act supporting some of these other interests. For example, section 45 of the Act specifically states, in part, "The intent of this chapter is to . . . protect persons engaged in . . . commerce against unfair competition."[71]

Courts also have recognized that the Lanham Act is designed to protect commercial interests and not merely intended to be a broad public interest statute. Denying standing to consumers, the court in *Colligan v.*

65. *See infra* app.

66. *See infra* app. (listing and categorizing competitor suit cases reviewed). Admittedly, categorizing whether a defendant's claims were made in good or bad faith involves a large subjective element. With that caveat, 34 cases probably should be considered to have involved claims made in bad faith, or at least questionable faith. *See infra* app. In 22 cases, all claims were arguably made in good faith. *See infra* app. Five cases defied categorization because the reported opinion contained insufficient facts. *See infra* app. The total of 61 exceeds the sample of 60 because one case involved an unrelated counterclaim for false advertising. *See infra* app.

67. *Gore*, 788 F. Supp. at 809-10.

68. *Id.* at 810.

69. Alpo Petfoods v. Ralston Purina Co., 913 F.2d 958, 962 (D.C. Cir. 1990).

70. American Rockwool v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411, 1439 (E.D.N.C. 1986).

71. 15 U.S.C. § 1127 (1988).

Activities Club[72] stated, "The Act's purpose, as defined in [section] 45, is exclusively to protect the interests of a purely commercial class against unscrupulous commercial conduct."[73] It is this focus on protection of private, rather than public interests that distinguishes the Lanham Act from the antitrust laws to which Professor BeVier analogizes as support for an exclusive focus on consumer welfare.[74] As a business tort statute, the Lanham Act, like tort law generally, should be concerned with placing injured parties in the same positions in which they would have been if there had been no violation.

Perhaps what is objectionable is not the critics' focus on consumer welfare as the sole goal of false advertising law, but their implicit definition of consumer welfare. The critics err by refusing to give any consideration to intangible, nonquantifiable interests—a problem seemingly endemic to economic efficiency scholars. Society values ethical conduct and the fair treatment of its members as well as compensation for victims of tortious conduct.[75] Yet, these values do not enter into the calculus of the critics of competitor actions.

(b) Consumers' Ability to Detect and Punish Falsehoods

Even if defendants are assumed to act in good faith and consumer welfare is adopted as the sole standard by which to judge the advisability of competitor suits for false advertising, the critics' model still fails to persuade. Although the free market has some ability to self-correct, the critics overstate that ability and therefore grossly underestimate sellers' incentives to falsely advertise.[76] First, the critics miscalculate the ability of consumers to detect falsehoods. Many advertisements contain credence claims which consumers do not test, even if the goods sold are search or experience goods. Comparative advertising, a form of marketing that has increased dramatically in the past two decades,[77] is illustrative. Although a

72. 442 F.2d 686 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

73. *Id.* at 692; *see also* Guarino v. Sun Co., 819 F. Supp. 405 (D.N.J. 1993) (holding that a gasoline consumer lacked standing to sue for false advertising under the Lanham Act because she was not engaged in commerce). Some cases, however, have recognized that the statute also encompasses public interest goals. *See, e.g.*, Camel Hair & Cashmere Inst. of America v. Associated Dry Goods Corp., 799 F.2d 6, 15-16 (1st Cir. 1986).

74. *See* BeVier, *supra* note 7, at 4 n.12. In any event, not all commentators agree that the exclusive concern of the antitrust laws is consumer welfare. *See, e.g.*, HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 41 (1985); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1052 (1979); Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1076-81 (1979).

75. If a single plaintiff wins a huge punitive damage award against a company guilty of reckless conduct, tort law still permits other plaintiffs to seek recovery. Additional suits do not further optimal deterrence, but they do ensure that victims are compensated for their injuries.

76. *See supra* notes 9-12 and accompanying text.

77. *See* Pechmann & Stewart, *supra* note 7, at 180. Comparative advertising has increased be-

consumer theoretically could test the advertised product against the competition, the consumer frequently does not do so. Initially, the rational consumer will not choose to purchase two identical products. After purchase and use, the consumer is either satisfied with the dishonest seller's product, even if they would have been happier with a competitor's goods, or the consumer assumes that if the "superior" product is not completely satisfactory, the competitor's merchandise must be even worse.[78] Thus, the consumer may never use both or all of the compared products and may be unable to evaluate whether the comparative advertisement was false.

Other popular credence claims for search or experience traits include testimonials, survey evidence, and sales or popularity statistics. A consumer may be persuaded by claims that "veterinarians prefer the formula in Alpo two to one,"[79] or "Christina Ferrare uses Body on Tap shampoo,"[80] for a variety of reasons. The purchaser may value a feeling of kinship with the celebrity endorser[81] or may use such claims as a low-cost indicia of quality.[82] Yet, the consumer will likely never become aware of the truth or falsity of any of these representations.[83] Even advertisements for the paradigm search trait, price, may involve influential credence claims. Consumers may not be able to verify a seller's claim that its price is fifty percent off or only two percent over cost. Yet, evidence suggests that consumers value such information regardless of the level of the final market price.[84] Of the sixty catalogued cases, thirty-four involved advertise-

---

cause FTC policy, beginning in the 1970s, has encouraged such advertisements. *See id.* In addition, advertisers have reacted to the success of negative campaigning in the political arena. *See* James & Hensel, *supra* note 7, at 53. Forty-three of the 60 cases catalogued, or over 70%, involved either explicit or implicit comparative claims. *See infra* app.

78. *See, e.g., Gore*, 788 F. Supp. at 811.

79. *See* Alpo Petfoods v. Ralston Purina Co., 913 F.2d 958, 962 (D.C. Cir. 1990).

80. *See* Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272, 274 (2d Cir. 1981).

81. *See* ANTHONY R. PRATKANIS & ELLIOT ARONSON, AGE OF PROPAGANDA: THE EVERYDAY USE AND ABUSE OF PERSUASION 93 (1992).

82. The consumer may reason that the celebrity would not associate herself with a substandard product, that the general public would not continue to purchase an inferior good, or that the seller of lesser quality goods could not afford the additional advertising expense required to obtain survey evidence or celebrity testimonials. *Cf.* Nelson, *supra* note 48, at 745 ("The primary information content of advertisements for experience goods is the information that the brand advertises."); Multi-Tech Sys. v. Hayes Microcomputer Prods., 800 F. Supp. 825, 849 (D. Minn. 1992) (allowing misrepresentations regarding marketshare into evidence because of its relationship, in consumers' eyes, to the "inherent quality of the product").

83. It is not a sufficient answer that the objective features of the falsely advertised product may be satisfactory. If false surveys or testimonials induce consumers to purchase the dishonest seller's goods, competition on the merits of each producer's respective product would no longer dictate marketplace success. The honest competitor may be injured, the consumer may pay more for the product than she would have paid otherwise and a misallocation of resources may result. *See* Schecter, *supra* note 8, at 70.

84. *See* Dhruv Grewal & Larry Compeau, *Comparative Price Advertising: Informative or Decep-*

ments with claims for credence attributes.[85] When credence claims are defined more broadly to encompass more than just claims about objective features of the goods, forty-eight, or eighty percent of the reported cases, are properly classified as raising challenges to credence claims—potentially material claims that consumers cannot cost-effectively verify.[86]

As a theoretical matter, consumer detection of false advertising, whether of search, experience, or credence attributes, might be enhanced by competitor counter-advertising. As the casual viewer or reader is aware, however, few companies engage in counter-advertising. There are several explanations. First, in markets with many sellers, the impact of counter-advertising on an individual competitor's market share cannot justify its cost. In smaller markets, fear of mutually disadvantageous negative advertising may dissuade a firm from initiating such a program.[87] In all markets, consumers simply may not believe anyone, or worse yet, may view the honest competitor as a mudslinger and punish it accordingly.[88] Counter-advertisements, particularly advertisements that critique survey methodology, are likely to be boring and ineffectual,[89] and in any event, result in an unnecessary and inefficient expenditure of resources.[90]

The second problem with the critics' free-market model is that deceptive advertising may be profitable and pursued by sellers even if the false claims seem to be detectable. Some consumers who are not fully attentive to the false advertising may only remember that the product was claimed to be superior without remembering the reason.[91] They will not discover, and therefore not respond to, the deception. Others, already at the store, may choose to purchase the falsely advertised goods rather than incur additional shopping or search costs. Once a consumer is induced to buy the seller's goods, the consumer may continue to use that brand despite discovery of the seller's deception either because the brand's remaining attributes are satisfactory or because the consumer does not want to engage

---

tive?, 11 J. PUB. POL'Y & MARKETING 52, 55-56 (1992) ("[T]he lower the selling price relative to the internal reference price, the larger the perceived value. In other words, consumers attach value to saving money.").

85. *See infra* app.

86. *See infra* app.

87. *See* Pitofsky, *supra* note 4, at 666.

88. Given the current climate toward negative political campaigning, the risk that the counter-advertiser will be viewed as overly aggressive and have its reputation diminished is greater than ever.

89. Schecter, *supra* note 8, at 72 n.55.

90. *Id.*

91. Some might suggest that any loss suffered by such careless or inattentive consumers is deserved. That value judgment might be defensible if only the careless consumers were harmed. However, false advertising also injures innocent competitors and, by dislocating resources, all of society. *See supra* notes 35-39 and accompanying text.

in an additional search. As McDonald's and Holiday Inn know, consumers value knowing the quality of what they purchase, even if the product is not the best available on the market.

Economists might respond that even if all of the above is true, as long as enough deceived consumers respond with hostility, sellers will not have an incentive to falsely advertise. That is, the attentive and reactive consumers may protect everyone.[92] In many situations, however, the seller need not fear retribution by the attentive consumer and will therefore continue to have an incentive to falsely advertise. Typically, the deceived consumer would not have purchased the seller's product absent the false advertising.[93] The risk of losing business, which the seller would not have had without the deception, should not affect the seller's incentives.[94] Of course, absent judicial intervention, the fly-by-night company or those selling to nonrepeat purchasers like transients and tourists, also will not be deterred from falsely advertising.[95]

(c) The Effects of Consumer Skepticism

Finally, the critics of competitor actions underestimate the threat posed by false advertising by overestimating the effect of consumer skepticism on sellers' incentives. According to the critics' model, sellers will not make false credence or experience claims because sellers realize that such claims will be disbelieved.[96] As even Professor BeVier acknowledges, this part of the critics' model is not an accurate description of reality.[97] Businesses routinely make credence claims. Indeed, the majority of reported cases in the past ten years involved credence claims.[98] Companies would not spend millions of dollars on advertisements trumpeting consumer survey results or celebrity endorsements if the companies did not believe that such ads influence consumers.[99] Nonverifiable claims may be

92. *See* George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1347 (1981); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638 (1979).

93. Craswell, *supra* note 2, at 723.

94. A department store or conglomerate seller, however, may be concerned that the effects on reputation from a discovered deception may impact sales of its other products.

95. The reported cases do not contain many instances of deception by fly-by-night companies or businesses selling to transient consumers. However, cases against such companies probably settle or otherwise terminate quickly, without any reported decision. In any event, with the increase in low-overhead mail order and telemarketing sales, deception by such companies can be expected to increase in the 1990s.

96. *See supra* notes 11-12 and accompanying text.

97. BeVier, *supra* note 7, at 13 n.39.

98. *See supra* text accompanying notes 85-86.

99. Even if one assumes, as did Professor Nelson, that it is the amount, not the substance, of advertising that conveys the most information to consumers, *see* Nelson, *supra* note 48, at 744-45,

persuasive because some consumers are basically trusting individuals. Other consumers may assume that advertisements undergo elaborate government scrutiny and would not be permitted if the ad's claims were false.[100]

False advertising may be influential even to those consumers wary of sellers' claims. If competing goods are essentially identical, even the slightest possibility that one seller's credence claim is true may be enough to win the sale. In effect, consumers would face a choice analogous to paying one dollar for product *A* or one dollar for both product *A* and a one in a million chance of winning the lottery. The rational consumer will choose the latter option even if it is unlikely that they will win the lottery. In short, "wariness is hardly the same thing as disregarding advertisements entirely."[101]

Another disturbing aspect of the critics' model is its reliance on consumer skepticism as a substitute for ridding the marketplace of lies and misrepresentations. Moral judgments aside, by accepting universal consumer skepticism, the model restricts the market for information, or at least requires costly additional search activity. Even honest sellers cannot convey useful information because consumers will refuse to believe the sellers' claims.

Given the cost of litigation and the extreme rarity of winning a damage award,[102] competitors are unlikely to bring suit if the market will self-correct.[103] Yet, competitors frequently file false advertising lawsuits

---

businesses still would be acting irrationally if they spent their advertising budget on false credence claims. The company could purchase more advertisements and gain greater exposure by eliminating fees for celebrities and survey takers and instead, focusing on truthful experience or search traits. Moreover, truthful claims would not risk the cost of government prosecution.

100. *See* Schecter, *supra* note 8, at 77-78.

101. *Id.* at 76; *cf.* Best, *supra* note 8, at 9 (stating that on a scale of totally believable, scored as 5, to totally unbelievable, scored as 1, the average consumer rated advertisements with credence claims as between 2.3 and 2.4, not 1.0).

102. *See infra* notes 200-03 and accompanying text.

103. Professor BeVier opines that a competitor may bring suit not to stop false advertising but to prevent comparative claims by newer rivals that get a "free-ride" on the competitor's brand name. *See* BeVier, *supra* note 7, at 44-45. By making use of consumers' existing knowledge and past experience concerning the competitor's brand, knowledge created by and at the expense of the competitor, comparative advertising enables the rival to economically convey information "about the nature of consumer tastes that they are positioning themselves to satisfy." *Id.*

Although most false advertising claims brought in the past ten years challenged comparative ads, the empirical evidence does not support Professor BeVier's hypothesis. In only 25 of the 60 cases catalogued did the defendant explicitly refer to the plaintiff by name. *See* cases cited *infra* app. The defendant was a new entrant and the plaintiff a large established company in only five of those 25 cases. *See infra* app. Thus, in less than 9% of the reported cases in the past 10 years does Professor BeVier's free-rider speculation provide a credible explanation for the competitor's decision to bring a false advertising lawsuit. In any event, a competitor cannot prevent the newer rival from free-riding on the competitor's brand; it can only stop false comparative claims.

under section 43(a).[104] The conclusion seems inescapable. The world does not work the way the critics postulate. Rather, sellers have an incentive to falsely advertise, and the market does not self-correct. Many misrepresentations cannot be easily detected, consumers often are persuaded by nonverifiable claims, and discovered falsehoods do not lead inexorably to seller punishment. Quite simply, false advertising poses a serious threat to society.

B. *The Ability of Competitor Suits to Reduce the Injuries Caused by False Advertising*

Professor BeVier further argues that even if false advertising does pose a systematic threat to consumer welfare, private suits by competitors are unlikely to efficiently provide relief.[105] Specifically, Professor BeVier challenges courts' willingness to presume liability once they find that a defendant has made a false statement of fact. Professor BeVier finds this presumption particularly inappropriate given the difficult interpretation issues posed by most advertising.[106] According to Professor BeVier, the courts' failure to demand that a plaintiff demonstrate that a substantial number of consumers will be deceived and that those consumers would find the misrepresentation to be material, guarantees that competitor incentives to sue are not correlated with the likelihood of consumer injury.[107] Competitor suits, therefore, at best haphazardly further consumer welfare.

Again, Professor BeVier's focus on consumer welfare, or at least her narrow definition of that interest, excludes consideration of other important interests.[108] In particular, she ignores the honest competitors' interest in compensation for their injuries[109] and society's interest in an ethical and moral marketplace.[110] In any event, the willingness of many courts to presume deception and materiality when a defendant has made a false statement is easily justified. It is reasonable to presume that advertisers

104. *See supra* note 7 and accompanying text.

105. *See* BeVier, *supra* note 7, at 3.

106. *Id.* at 27-31.

107. *Id.* at 3, 27-28.

108. *See supra* text accompanying notes 15-16.

109. Competitor injury frequently will be derivative of consumer injury. However, that is not always the case. For example, if Alpo and Purina are similarly priced identical dog foods and consumers buy Alpo based upon false claims that Alpo is preferred by veterinarians, consumers will not be injured. They incur no physical or economic injury and because consumers will not be able to discover the deception they do not suffer psychological injury. However, Purina will have lost a substantial amount of sales and profits. If Purina's costs of production are lower than Alpo's, there also could be a misallocation of resources and a classic consumer welfare loss. *See* Craswell, *supra* note 2, at 684.

110. This article does not suggest that there is a right to absolute truth, assuming absolute truth exists. *See id.* at 714-17. Rather, this article demands that the interest of society in a truthful and ethical marketplace be an ingredient or factor in any consumer welfare balance.

would not include false statements of fact unless they thought it would have an effect on consumers. Companies do not want to buy useless advertising time or needlessly invite litigation. Correspondingly, given the cost of litigation and the rarity of damage awards, competitors will not often bring false advertising actions unless the challenged advertisement had an effect on consumers.[111] The empirical evidence is instructive. Of the sixty reported cases in the past ten years, only two or three involved claims that do not seem material to the reasonable buyer.[112] In only one of those cases did the plaintiff prevail.[113] Thus, the error cost resulting from the judicial presumption of deception and materiality appears slight. On the other hand, the presumption benefits the parties and the court system by avoiding potentially difficult, costly, and time consuming litigation.[114]

Thus, contrary to the critics' assertions, false advertising does pose a systematic threat to consumer welfare, and competitors' incentives to sue are correlated with consumer injury. Whether competitor suits are a useful means to combat false advertising, however, depends on more than those facts. The succeeding sections address two elements that also must enter the equation: The availability and relative effectiveness of other means to reduce the incidence of false advertising and the costs of competitor suits.

IV. THE ALTERNATIVES TO COMPETITOR ACTIONS

Consumers, the FTC, State Attorneys General, the National Advertising Division/National Advertising Review Board (NAD/NARB),[115] and the television networks review advertising to ensure its accuracy. The availability of so many avenues for reviewing commercial advertising alone suggests that policymakers recognize the negative effects of false advertising. Yet, the question remains, do we really need competitor suits as a supplemental form of review? Although the plethora of review tribunals makes the necessity of competitor suits less immediate, none of the

111. *But see supra* notes 102-03 and accompanying text.

112. *See infra* app.

113. *See infra* app.

114. The difficult interpretation issues identified by Professor BeVier, and the resulting difficulty in proving an advertisement true or false, do not undermine the desirability of the courts' presumption. The only additional harm that the interpretation problem and its consequent uncertain liability introduces is the possibility that truthful claims that do not influence consumers will be silenced. Speech that does not persuade, whether true or false, has at most, limited value to the advertiser. Although any inappropriate injunction has its costs, *see infra* part V.B., the error costs result primarily from the interpretation problem itself, not from the presumption that false statements are material.

115. The NAD/NARB is a self-regulatory system founded by major advertising associations and the Council of Better Business Bureaus. *See* Gordon E. Miracle & Terence R. Nevett, *Improving NAD/NARB Self-Regulation of Advertising*, 7 J. PUB. POL'Y & MARKETING 114, 115 (1988).

alternative reviewing mechanisms alone or combined is a sufficient substitute for competitor suits.

Even though consumers injured by false advertising may bring suit under state consumer protection statutes[116] or the common law,[117] consumers rarely exercise those rights. Consumer injury is usually too small to justify hiring an attorney, much less to support individual resort to the judicial system. Consumer class actions are uncommon because of roadblocks built by federal procedural law[118] and the impracticality of maintaining a class action in many states.[119] Moreover, although competitor injury is usually derivative of consumer injury, that is not always the case.[120] Thus, in some cases, competitors will be injured and no consumer will have a reason to sue.[121]

Review of commercial advertising by the FTC provides unique benefits. Public interests, not parochial private concerns, guide FTC enforcement decisions. The FTC often pursues cases that competitors have no incentive to bring, either because the false advertisement has little impact on any individual competitor or because the falsity benefits the entire industry. For example, if an individual cigarette company or an industry association advertises that studies have proven cigarettes safe, no competitor would bring suit, yet FTC review is probable. The remedial options available to the FTC also are more varied than those that can be pursued by competitors.[122]

Nevertheless, although FTC review provides a valuable service, it does not eliminate the need for competitor actions. FTC resources are limited and subject to the whims of Congress and each new administration.[123] The FTC primarily targets cases of fraud or industry-wide deception and rarely challenges national or comparative advertising campaigns.[124] Competitor suits fill that void.[125] Equally important, agency relief is often untimely. The FTC requires time to investigate a case and decide whether to

116. *See, e.g.*, FLA. STAT. § 817.41 (1993).

117. Possible common-law actions for false advertising include breach of contract, breach of warranty, and fraud.

118. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178-79 (1974) (requiring plaintiffs to bear the cost of individual notice to each class member); Zahn v. International Paper Co., 414 U.S. 291, 302 (1973) (requiring each individual class member to meet the amount in controversy requirement in diversity actions).

119. *See* Pitofsky, *supra* note 4, at 667-68.

120. *See supra* text accompanying notes 35-39.

121. *See supra* text accompanying notes 4, 35-39.

122. *See* Petty, *supra* note 7, at 365-67.

123. *See, e.g., id.* at 351 (reporting that FTC resources for advertising enforcement were cut 42% from fiscal years 1978 to 1987).

124. *See id.* at 375, 392.

125. Section 43(a) false advertising actions most commonly challenge national comparative advertising claims. *See* cases cited *infra* app.

seek relief. Proceedings and subsequent appeals may take years.[126] By the time the FTC obtains relief, the advertiser's campaign may have already ended. By contrast, a competitor can seek and obtain preliminary injunctive relief under the Lanham Act within weeks.[127]

Over the past few years, state attorneys general have dramatically increased their enforcement efforts against false advertising.[128] State enforcement, however, suffers from many of the same problems that limit federal enforcement, as well as difficulties unique to state review. Resources are limited and too often relief is delayed. Additionally, some states are inactive, while others pursue actions of questionable benefit.[129] Finally, most state actions involving national advertising are resolved through voluntary agreements, which, unlike FTC orders, do not subject the violator to sanctions.[130] In short, state regulation does little to limit the desirability of competitor actions.

Industry self-regulation, mostly enforced by the NAD/NARB and the television networks, has marginally reduced the incidence of false advertising. The NAD, funded by dues advertisers and advertising agencies pay to the Council of Better Business Bureaus,[131] seeks voluntary compliance from the company whose advertisement the organization finds to be misleading.[132] If the NAD is unable to resolve a case to the advertiser's satisfaction, the case can be appealed to the NARB.[133] If the advertiser does not comply with the NARB order, the NARB refers the case to the FTC.[134] Understandably, faced with the threat of government prosecution, advertisers generally comply with the NARB's orders.[135] Nonetheless, as an industry funded voluntary system, consumers and competitors cannot rely upon the NAD/NARB review process to provide comprehensive relief. Industry self-regulation may be designed more to forestall government intervention than to protect consumers and honest competitors.[136] Network review also does not significantly protect consumer welfare. Networks face a tight advertising market and are aware of the increasing number of competitive marketing options. Few stations are

126. *See* Best, *supra* note 8, at 46-47; Petty, *supra* note 7, at 371.
127. *See* Petty, *supra* note 7, at 371.
128. *See* Beales, *supra* note 26, at 101.
129. *Id.*
130. *Id.*
131. *See* Petty, *supra* note 7, at 393-94.
132. *See id.* at 395.
133. *See id.* at 394.
134. *See id.* at 394 n.240.
135. *Id.* at 394.
136. *See* Miracle & Nevett, *supra* note 115, at 114; Herbert J. Rotfeld, *Power and Limitations of Media Clearance Practices and Advertising Self-Regulation*, 11 J. PUB. POL'Y & MARKETING 87 (1992).

willing to lose revenue by rejecting questionable advertising, especially when such advertising would likely appear on cable channels or in local markets anyway.[137] All forms of industry self-regulation also fail to provide the broad discovery powers available to private litigants through the judicial process.[138]

Granting standing to competitors to challenge false advertising provides benefits that no other existing review mechanism can provide. Competitors often have the greatest incentive and resources to bring suit[139] and frequently are the most efficient enforcers. Competitors are knowledgeable about the kinds of products they and their rivals manufacture and regularly perform market research.[140] Thus, competitors generally are best able to judge the probable truthfulness of a rival's advertising claims and how consumers will perceive and react to it.[141]

For example, in *Grove Fresh Distributors v. New England Apple Products Co.*,[142] the defendant advertised its product as "100% Florida" orange juice.[143] The plaintiff, convinced that the defendant could not sell pure orange juice for the price that the defendant charged, had the product analyzed by a testing laboratory.[144] In fact, the juice was adulterated with sugar and pulpwash.[145] Few other parties had the price knowledge necessary to question the defendant's claim or the motivation and resources to have the product independently tested.

Often, a competitor's pre-existing product knowledge can save substantial investigative costs that other enforcers would incur before bringing suit. Private actions for a preliminary injunction also provide the most immediate relief, an especially important benefit given the limited duration of most advertising campaigns. Most fundamentally, competitor actions are necessary if, as this article has argued,[146] society values compensating victims of tortious conduct and ensuring that competitors feel that the

---

137. Herbert J. Rotfeld et al., *Self-Regulation and Television Advertising*, J. ADVERTISING, 19:4, at 18, 20-21.

138. *See* Bruce Buchanan & Doron Goldman, *Us vs. Them: The Minefield of Comparative Ads*, HARV. BUS. REV., May-June 1989, at 38, 48, 50.

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

140. *See* Best, *supra* note 8, at 58.

141. *See id.*; Robert S. Saunders, Note, *Replacing Skepticism: An Economic Justification For Competitors' Actions for False Advertising Under Section 43(a) of the Lanham Act*, 77 VA. L. REV. 563, 595 (1991). In 53 of the 60 reported cases surveyed, the plaintiff competitor was in the best position, if not the only possible party, to bring suit. *See infra* app. In 15 of the cases, other knowledgeable potential suitors may have existed, but in eight of those 15 cases, the other potential suitors probably had insufficient injury to justify litigation. *See infra* app.

142. 969 F.2d 552 (7th Cir. 1992).

143. *Id.* at 553.

144. *Id.* at 554.

145. *Id.* at 555.

146. *See supra* text accompanying notes 71-74.

marketplace and the judicial system have treated them fairly.

Even though competitor suits provide unduplicated benefits, it does not guarantee that competitor suits are worth the cost, particularly given the array of alternative policing mechanisms.[147] The critics of competitor actions have provided their most valuable contribution by making explicit the variety of costs associated with competitor suits for false advertising, costs which some of the commentators advocating an expanded reach for section 43(a) have failed to acknowledge.[148]

V. THE COSTS ASSOCIATED WITH COMPETITOR SUITS

There are at least three costs associated with active competitor enforcement of false advertising law: (1) the chilling of truthful, informative advertising; (2) enforcement and error costs; and (3) the encouragement of anticompetitive litigation raising rivals' costs and restricting market entry. The wisdom of competitor suits depends on the seriousness of each of these costs and the extent to which they are preventable. This article contends that although the costs created by granting competitors standing to sue for false advertising are very real, critics of competitor actions have exaggerated the extent of those costs. Equally important, those costs can be reduced by the proposals suggested in part VI of this article.

A. *Chilling Truthful Speech*

Truthful information about goods and services increases competition in the marketplace.[149] It reduces search costs and improves the quality of decisionmaking.[150] If the threat of liability for false advertising deters advertisers from providing truthful information, society suffers.

The problem lies in the difficulty that the judicial system, and consequently the advertiser, has in determining whether an advertisement should be considered deceptive. To prevail in a section 43(a) false advertising action, a plaintiff must prove that the defendant's advertising claims are either literally false or likely to mislead a substantial number of consumers.[151] The advertising claims also must be "material in their effects on buying decisions, connected with interstate commerce, and actually or likely injurious to the plaintiff."[152] Complications arise because an adver-

147. *See supra* text accompanying note 115 (listing several alternative policing mechanisms).

148. *See, e.g.*, Bauer, *supra* note 8, at 706.

149. *See supra* note 25 and accompanying text.

150. *See supra* text accompanying notes 22-24.

151. *See* Castrol, Inc. v. Quaker State Corp., 977 F.2d 57, 62 (2d Cir. 1992); Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 228-29 (3d Cir. 1990); Coca-Cola Co. v. Tropicana Prods., 690 F.2d 312, 317 (2d Cir. 1982).

152. Alpo Petfoods v. Ralston Purina Co, 913 F.2d 958, 963-64 (D.C. Cir. 1990). Courts presume

tisement, or even a single phrase in an advertisement, may be interpreted by different consumers, or even the same consumer, in different ways.[153] Additionally, the "not insubstantial number of consumers" requirement for implied deception is not self-defining,[154] and courts have not agreed on the proper standard to judge literal truthfulness or to determine the validity of studies claiming to reveal either consumer reactions or the truthfulness of challenged claims.[155]

The uncertain results of section 43(a) litigation can chill the production of truthful advertising. Rather than face possible damages, an injunction, or even unnecessary litigation costs, an advertiser may prefer to modify or eliminate its advertising campaign. Comparative advertising, the most frequent target of section 43(a) actions, may be especially prone to this effect.[156] Because comparative advertising is unusually informative, the risk of chilling this information is a matter of considerable concern. *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.* is illustrative.[157] In *McNeil*, the plaintiff challenged the defendant's claim that "Aspirin-Free Excedrin relieves pain better than Extra-Strength Tylenol."[158] Although the defendant's studies arguably supported its claims, the lower court enjoined the advertising campaign, finding that the study was not properly

---

materiality if the misrepresentation concerns an inherent quality or characteristic of the product, *see* Cincinnati Sub-Zero Prods. v. Augustine Medical, 800 F. Supp. 1549, 1558 (S.D. Ohio 1992), and harm if the false advertisement makes a comparison between competing products. *See* American Express Travel Related Serv. Co. v. Mastercard Int'l, 776 F. Supp. 787, 791 (S.D.N.Y. 1991). Thus, most litigation focuses on the proper interpretation of the challenged ad and proof of falsity and deception. For damages, a plaintiff must demonstrate actual, not merely likely, deception and injury. *See infra* note 197.

153. *See, e.g.*, Johnson & Johnson*Merck Consumer Pharmaceuticals Co. v. Smithkline Beecham Corp., 960 F.2d 294 (2d Cir. 1992) (stating that the defendant-advertiser's truthful list of ingredients for competitors' antacids may imply that the competitors' antacids are unsafe because they contain aluminum or not as healthy because they do not provide calcium like TUMS); Gillette Co. v. Wilkinson Sword, No. 89 Civ. 3586, 1989 U.S. Dist. LEXIS 8276, at *4-5 (S.D.N.Y. July 6, 1989) (stating that the defendant advertiser's claim that its razor strip is six times smoother may imply that the actual strip is smoother or that the resulting shave is closer, or something else entirely); Craswell, *supra* note 2, at 672-76.

154. *See, e.g.*, Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Rhone-Poulenc Rorer Pharmaceuticals Co., No. 91-7099, 1993 U.S. Dist. LEXIS 1016, at *34-35 (E.D. Pa. Jan. 28, 1993); Singdahlsen, *supra* note 8, at 356-57.

155. *See, e.g.*, *Smithkline*, 960 F.2d at 300 (finding insufficient proof of implied deception because a consumer survey, although suggesting consumers were misled, was improperly conducted); *Sandoz Pharmaceuticals*, 902 F.2d at 225 n.5 (discussing whether disease-state or cough-induced studies are the best measure of cough medicine effectiveness); *Alpo Petfoods*, 913 F.2d at 960-62 (finding that an ambiguous study insufficiently supported the defendant's claim that its product lessened the severity of canine hip dysplasia).

156. *See* Schecter, *supra* note 8, at 81.

157. 938 F.2d 1544 (2d Cir. 1991).

158. *Id.* at 1545.

conducted.[159] The court of appeals, acknowledging that the study's validity was "a close factual question," affirmed.[160] A similarly situated future advertiser rationally may choose to make "soft claims"[161] about its product, rather than rely on a factfinder's judgment about the validity of the advertiser's supporting studies.[162] The resulting loss to the public of information about the effectiveness of drug products not only threatens economic injury, but also raises health risks.

Postjudgment effects from active competitor enforcement of false advertising laws also may remove truthful information from the marketplace. Compliance with any injunctive order rarely can be immediate. During the time necessary to rethink and reshoot its advertising campaign, the defendant may be unable to effectively communicate the merits of its product to the public. Some commentators also suggest that the modified advertisement may create a state of information overload, which effectively results in less, rather than more, information reaching the consumer.[163]

Nevertheless, the risk of chilling truthful advertising, although real, may be smaller than first appears. A court's injunction prohibits only false claims, not all advertising, and the advertiser can eliminate much false advertising without disturbing truthful speech. Contrary to Professor BeVier's assumption, not all advertisers act in good faith.[164] In the ease of blatant falsehoods,[165] uncertainty and a resulting chilling of speech should not be a major problem. Advertisers should know to refrain from making outright lies. Seemingly more innocent advertisers also should not face chilling uncertainty. Advertisers are professionals who make their livings by knowing the effect that word choice has on consumer perceptions. Often, ambiguities or misleading messages are deliberate, even if not blatantly untrue.[166] Advertisers engaging in deliberate deception, like

159. *Id.* at 1545-46.

160. *Id.* at 1551.

161. "Soft claims" are claims with limited informational value. *See* Nelson, *supra* note 48, at 745.

162. *See* Richard M. Schmidt, Jr. & Robert C. Burns, *Proof or Consequences: False Advertising and the Doctrine of Commercial Speech*, 56 U. CIN. L. REV. 1273, 1293 (1987-88).

163. Although subsequent studies have cast doubt on the information overload theory, those studies were conducted in a high involvement experimental environment. Craswell, *supra* note 2, at 690. In situations in which there is low consumer attentiveness, the theory may have merit. *Id.*

164. BeVier, *supra* note 7, at 8; *see supra* text accompanying notes 66-70.

165. *See, e.g.*, *Grove Fresh Distribs.*, 969 F.2d at 554-55 (finding that the defendant labeled juice adulterated with sugar and pulpwash as "100% Florida" orange juice); Genderm Corp. v. Biozone Labs., No. 92 C 2533, 1992 U.S. Dist. LEXIS 13521, at *19 (N.D. Ill. Sept. 2, 1992) (finding that the defendant falsely labeled a drug as containing capsaicin and stated a product effectiveness claim based on results of tests done on a different product); *Gore*, 788 F. Supp. at 805 (finding a complete lack of support for the defendant's claim that its product allows "seven times more air and sweat vapor to pass through" than the competition's product).

166. *See, e.g.*, Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 940 (3d Cir. 1993) (stating that the defendant based its claims of viscosity breakdown on a test known not to be the industry standard);

those disseminating blatant falsehoods, should not be surprised by a challenge to their advertising. Equally important, experiments suggest that ambiguous or deliberately misleading copy can be easily rewritten to prevent deception without sacrificing truthful information.[167]

The risk of chilling effects caused by competitor suits for false advertising may be overstated even in the case of the completely innocent advertiser. As First Amendment law recognizes, commercial speech is more durable than other forms of speech.[168] Many advertising claims can be objectively measured allowing the prospective defendant to know the truthfulness of its claims.[169] Moreover, the competitor has the economic incentive to speak rather than remain silent.[170] Given the benefit of advertising to the competitor and the rarity of damages in section 43(a) actions,[171] the cost-benefit calculus for the commercial advertiser seems to make its speech especially resistant to chilling effects.[172] Even if a particular advertiser is risk averse and unusually susceptible to having its speech chilled, the threat of FTC, consumer, or state attorney general actions may already silence it. The possibility of a competitor's suit under section 43(a) may only have marginal effects, at least outside the comparative advertising context.

Finally, even if competitor suits for false advertising chill some truthful speech, competitor suits still should result in a net improvement in the market for information. Competitor suits may increase consumer trust and improve sellers' ability to communicate the attributes of its products.[173]

Rhone-Poulenc, 1993 U.S. Dist. LEXIS 1016, at *6-7 (stating that the defendant used an acid neutralizing rating that the FDA and the defendant's own expert did not view as necessarily indicating effectiveness); Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 13-14 (7th Cir. 1992) (finding a misleading use of a term of art despite a warning by the World Health Organization); *Gillette*, 1989 U.S. Dist. LEXIS 8276, at *6 (stating that the defendant's studies, conducted before its razor commercial aired, indicated that a substantial number of consumers were misled, yet the defendant still ran the advertisement unchanged).

167. *See* Ivan Preston & Jef Richards, *The Costs of Prohibiting Deceptive Advertising—Are They as Substantial as Economic Analysis Implies?*, 16 ADVANCES CONSUMER RES. 209 (1989).

168. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976).

169. *See, e.g.*, *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24.

170. *Id.*

171. *See infra* note 202 and accompanying text.

172. Advertisers, however, may change the content of their ads to avoid increased risk of liability. *See supra* text accompanying note 167. Admittedly, that change may be nearly as injurious to consumer welfare as the complete chilling of the advertiser's speech. *See* Singdahlsen, *supra* note 8, at 382-83.

173. *See* Craswell, *supra* note 2, at 695-96. The possibility remains that consumers, aware of the potential for competitor enforcement, may become too trusting of advertiser's claims. In that event, competitor suits actually may increase consumer deception. Nevertheless, no evidence exists that this would be the likely result of increased competitor enforcement of the false advertising laws.

If consumers view seller claims with skepticism, the seller may be unable to effectively disseminate information, whether truthful or not. In any event, the deterrent effect that competitor suits have on future false advertising may more than offset any reduction in truthful speech created by such suits.

B. *Enforcement and Error Costs*

Possible chilling effects aside, competitor enforcement of section 43(a) is hardly cost-free. False advertising litigation often demands substantial time and expense. Given the requirement of consumer surveys in implied falsehood cases[174] and the difficulty of proving injury if damages are claimed,[175] federal discovery may be very broad and the trial very lengthy.

Just as ex-ante uncertainty creates a chilling effect, ex-poste uncertainty results in possible error costs. Specifically, it is possible that an injunction will be improperly issued when the advertisement does not deceive consumers. Injunctive relief, even if appropriate, may result in a waste of economic resources. To comply with a judicial order, the defendant may have to rethink or reshoot its advertising campaign. Those costs often are considerable[176] and may not outweigh the benefit produced by the injunctive decree.

The existence of enforcement and error costs in competitor suits for false advertising is undeniable. The inevitability of such costs in all litigation, however, makes error and enforcement costs a less than persuasive reason to criticize competitor actions under section 43(a). Moreover, such costs may be less for competitor false advertising suits than for other legal claims. Many false advertising cases are decided at the preliminary injunction hearing. Because courts rarely grant damages[177] and the advertiser's campaign may end naturally before trial is complete, plaintiffs frequently choose not to pursue cases through trial on the merits.[178] Thus, the litigation costs for false advertising suits are significantly less than might be anticipated.

Error costs also are not as great as critics of competitor enforcement

---

174. *See, e.g., Smithkline*, 960 F.2d at 298; *Sandoz Pharmaceuticals*, 902 F.2d at 228-29.

175. *See supra* note 152.

176. Borden, Inc. v. Kraft, Inc., 224 U.S.P.Q. (BNA) 811, 823 (N.D. Ill. 1984) (stating that the defendant's "five ounces of milk in every slice of cheese" campaign cost over nine million dollars); *see also* Beales, *supra* note 26, at 112 n.14 (stating that the average cost of producing a television commercial, pre-1990, was $168,000).

177. *See infra* note 202 and accompanying text.

178. *See* Best, *supra* note 8, at 32. The preliminary injunction decision was the last reported opinion for 27 of the 60 reported cases surveyed. Another five cases were dismissed before trial. *See infra* app.

suggest. Their estimates are based upon the assumption that defendants typically act in good faith and face uncertain liability. As already indicated, this often is not the case.[179] Furthermore, some courts are already sensitive to the costs imposed by their decrees[180] and the law can encourage other courts to similarly consider compliance costs when shaping relief. Finally, the recommendations discussed in part VI can reduce whatever costs remain.

C. *Anticompetitive Effects*

Several commentators also have argued that competitor suits may restrict market entry by new competitors.[181] New entrants may need to advertise more than established firms and are more likely to engage in comparative advertising.[182] Comparative claims, however, are most likely to invite a legal response. The resulting litigation expenses may disproportionately increase the entrant's costs[183] and potentially deter future entry.

Despite the possible theoretical appeal of the critics' arguments, competitor enforcement of section 43(a) does not raise significant competitive concerns. Certainly, litigation costs arising from an established rival's false advertising claim may harm new entrants. However, new entrants are no more entitled to compete through false claims than any other company. Competitor enforcement should be deemed anticompetitive only in those cases in which the established plaintiff's claim against the new entrant lacks merit. Few cases satisfy that condition. Only twelve of the sixty reported cases catalogued were filed by established plaintiffs against a new entrant.[184] Of those cases, the defendant prevailed in only two, or less than four percent of the cases studied.[185] Moreover, even if competitors were precluded from bringing false advertising claims, established com-

179. *See supra* text accompanying notes 66-70.

180. *See, e.g.*, American Home Prods. Corp. v. Abbott Labs., 522 F. Supp. 1035, 1046-47 (S.D.N.Y. 1981).

181. *See, e.g.*, BeVier, *supra* note 7, at 34; Jordan & Rubin, *supra* note 8, at 540, 548-49; Petty, *supra* note 7, at 407-11; Singdahlsen, *supra* note 8, at 394.

182. *See* Pechmann & Stewart, *supra* note 7, at 188. Experimental evidence suggests that direct comparative claims are most effective for low share brands. *See id.* Comparative claims allow new entrants to economically inform consumers of the entrant's target market. *Id.* By contrast, comparative claims by market leaders do not attract additional attention, may increase awareness of the comparison brand and are more likely to create sponsor misidentification. *Id.*

183. Although both the new entrant and the established competitor will incur litigation costs, the established firm is able to spread those costs over a greater number of units. Additionally, if comparative claims are deterred, new entrants will have to spend more on advertising to inform the public of the merits of its product.

184. *See infra* app.

185. *See infra* app.

panies could raise rivals' costs by filing other nonmeritorious allegations.[186] In the false advertising context, as elsewhere, the law should rely on antitrust actions[187] or attorneys' fees awards to deter harassing, anticompetitive litigation.[188] It should not restrict all parties' access to the judicial system.

Although the chilling effects of competitor suits may not be as great as first appears, they are not insubstantial. Enforcement and error costs also must be acknowledged, particularly given the variety of alternative methods of policing false advertising. The possibility of anticompetitive use of section 43(a), although remote, does exist. Nevertheless, this article suggests that these costs are less than some commentators indicate and do not outweigh the benefits of competitor enforcement under section 43(a). However, consumer welfare could be improved further if such costs can be effectively reduced. The proposals recommended in part VI are designed, in part, to achieve this goal.

VI. PROPOSALS FOR REFORM

This article recommends two proposals to reduce the costs attendant to competitor lawsuits: (1) All prevailing parties should recover attorneys' fees, at least absent exceptional circumstances, and (2) courts, following FTC practice, should be permitted to find implied falsity without consideration of consumer surveys. The first proposal should decrease uncertainty, lower litigation costs and eliminate the threat of harassing filings. The proposal also provides some semblance of compensation to victims of false advertising who are unable to meet the high evidentiary standard required for recovery of damages. The second recommendation will lower litigation costs. Most commentators recommend that the courts strictly enforce the requirement of survey evidence, arguing that its elimination would increase uncertainty and chilling effects.[189] This article contends, however, that these increases are largely illusory.

---

186. Indeed, other claims would be more likely to present anticompetitive concerns. A § 43(a) action typically results only in an injunction against the offending advertisement. *See supra* note 178. Thus, the new entrant will not face a potentially bankrupting damage award, but only must terminate or change the challenged ad.

187. *See* James D. Hurwitz, *Abuse of Government Processes, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 93-109 (1985) (discussing the antitrust claim for "sham litigation").

188. *See* 15 U.S.C. § 1117 (1988) (permitting the award of attorneys' fees in Lanham Act cases under exceptional circumstances); FED. R. CIV. P. 11; *infra* part VI.

189. *See, e.g.*, Best, *supra* note 8, at 34-35; Craswell, *supra* note 2, at 677 n.59, 682; Ernest Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 KAN. L. REV. 559, 564-67 (1969); Singdahlsen, *supra* note 8, at 347-54.

A. *Awarding Attorneys' Fees*

Under existing law, a prevailing party can recover attorneys' fees only in "exceptional cases."[190] The courts have interpreted this provision as requiring fraudulent, malicious, deliberate, or willful conduct.[191] Purposeful actions are not enough. To receive attorneys' fees, a movant must show that the losing party acted in bad faith.[192]

There are several justifications for the American Rule requiring each litigant to pay its own attorneys' fees. Each justification, albeit reasonable in some contexts, seems weak or inapplicable in the case of competitor suits for false advertising. The English "fee shifting" rule is clearly preferable for false advertising cases.

The primary argument in favor of the American Rule is that a " 'loser pays' rule deters risk-adverse plaintiffs from pursuing meritorious claims, especially against rich defendants who can afford expensive counsel."[193] Although this concern may be valid for tort or consumer actions, in section 43(a) litigation, which is typically between large, well-funded corporations, it is inapposite. Similarly, the fear that a fee shifting rule would deprive plaintiffs of contingent fee representation has little application to competitor suits for false advertising. Businesses usually do not engage counsel on a contingent fee basis. Given the rarity of damage awards,[194] contingent fee representation is especially unlikely in competitor false advertising suits. Even if contingent fee representation was more common, a fee shifting rule would not deprive plaintiffs of the opportunity to hire counsel on a contingency basis. Counsel could charge a higher percentage contingent fee and agree to pay the opposition's attorneys' fees if the opposition prevailed.[195]

Some may view a fee shifting rule as being inefficient. It introduces litigation over the amount of fees; litigation that may be unnecessary if

190. *See* 15 U.S.C. § 1117 (1988).

191. *See, e.g.*, Gillette Co. v. Wilkinson Sword, 89 Civ. 3586, 1992 U.S. Dist. LEXIS 1265, at *23 (Jan. 31, 1992) (citing S. REP. NO. 1400, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7132, 7133); Cuisinarts, Inc. v. Robot-Coupe Int'l Corp., 580 F. Supp. 634, 640 (S.D.N.Y. 1984) (quoting S. REP. NO. 1400, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7132, 7135).

192. *See* Alpo Petfoods v. Ralston Purina Co., 913 F.2d 958, 971 (D.C. Cir. 1990); Tambrands, Inc. v. Warner-Lambert Co., 673 F. Supp. 1190, 1199 (S.D.N.Y. 1987).

193. Bradley Smith, Note, *Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 MICH. L. REV. 2154, 2155 (1992); *see also* Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

194. *See infra* note 202 and accompanying text.

195. At some point, the increase in the contingency fee might have to be so large that no plaintiff would choose to bring suit or no counsel would offer to take the case. However, that would generally occur when the plaintiff's claim appeared nonmeritorious. In that event, deterring the filing of such a suit would be a benefit of the proposal, not a disadvantage.

damage awards tacitly incorporate that expense. Admittedly, fee litigation is an additional cost. However, courts have become increasingly experienced with fee determinations and fee issues are no longer litigation intensive. Certainly, there is no reason to believe that fee litigation in section 43(a) actions would be any more difficult than for antitrust or civil rights cases where some form of fee shifting has been adopted.[196] Moreover, contrary to civil rights or antitrust cases, plaintiffs rarely win damages in false advertising cases.[197] An attorneys' fee award would not duplicate an amount tacitly included in a damage verdict and might, at least partially, make victims of false advertising whole.

Critics also may object that a fee shifting rule is unfair to the losing party when a good faith dispute exists. A defeated party may have been reasonable and justified in pursuing litigation, even if ultimately unsuccessful. As suggested earlier, however, many false advertising cases do not involve a good faith defendant.[198] In those cases that do, someone must bear the costs of trial. Given their respective equities, it seems appropriate to have the losing party bear that expense, particularly given the difficulty plaintiffs face in proving damages. The attorneys' fee award often will be the plaintiff's only recovery. Moreover, a fee shifting system probably even benefits the good faith defendant. The risk of an award of attorneys' fees should discourage plaintiffs from bringing doubtful cases which disproportionately involve good faith defendants. If the policymaker is still concerned that a fee shifting rule will deter a party from pursuing an important or novel good faith claim or defense, the policymaker can modify the English Rule to allow the court to deny fees in exceptional circumstances.[199]

Compared to the American Rule, a fee shifting system increases the stakes of litigation and may encourage increased trial costs. The greater

196. *See* 15 U.S.C. § 15 (1988) (antitrust); 42 U.S.C. § 1988 (Supp. IV 1992) (civil rights).

197. *See, e.g.*, BeVier, *supra* note 7, at 16-17; Craswell, *supra* note 2, at 701; Petty, *supra* note 7, at 358; *infra* note 202 and accompanying text. For damages, a plaintiff must demonstrate actual, not merely likely, deception and injury. *See, e.g.*, U.S. Healthcare v. Blue Cross, 898 F.2d 914, 922 (3d Cir.), *cert. denied*, 498 U.S. 816 (1990). The "actual deception and injury" standard has proven exceedingly difficult to meet. In some cases, plaintiffs are unable to show harm because sales have increased despite the rival's false advertising. In other cases, the plaintiff cannot establish that the false advertising, rather than the defendant's recent entry or increased advertising budget, has cost the plaintiff sales. Thus, courts have awarded damages in only five reported decisions during the past ten years. *See infra* note 202.

198. *See supra* text accompanying notes 66-70.

199. This modified English Rule would effectively reverse the presumption existing under current law. *See* 15 U.S.C. § 1117 (1988). Attorneys' fees would be presumptively recoverable, rather than nonrecoverable in the absence of exceptional circumstances. If the policymaker anticipates that few cases with exceptional circumstances will arise, a mandatory fee provision may be preferable. A mandatory provision would avoid time-consuming, case-by-case litigation regarding whether exceptional circumstances exist.

the stakes, the more likely parties will incur incremental attorneys' fees. This is especially true when the party is aware that they may not be responsible for the fees if they prevail.[200] Nevertheless, net trial costs may decrease under a fee shifting rule because fee shifting can encourage settlement.[201] With an increased stake and possibly higher trial costs, settlement promises greater savings, particularly for the risk averse. Most importantly, fee shifting would discourage nonmeritorious litigation, lowering net costs to the judicial system and the parties. That savings might be enhanced if a plaintiff who unsuccessfully seeks damages is not considered a prevailing party. Such a rule might be justified to discourage what are generally fruitless claims for damages. Of the sixty cases catalogued, plaintiffs sought damages in twenty-four cases, but received awards in only five.[202] Creating a disincentive to such claims could eliminate unnecessary trial costs and messy discovery fights.[203]

Not only do the customary rationales for the American Rule fail to justify the Rule in the context of competitor suits for false advertising, but affirmative benefits to fee shifting in competitor false advertising litigation exist as well. In a regime in which damages are rarely granted and compensation of innocent victims of misconduct is valued, awards of attorneys' fees will come closer to making injured parties whole.[204] More

200. One commentator has raised a related criticism of the fee shifting rule. Professor Wolfram suggests that the English Rule may create an unseemly divergence of interest between the attorney and client. *See* Charles W. Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 L. & CONTEMP. PROBS. 293, 319-20 (1984). Although fee shifting can create ethical conflicts, such conflicts exist under any payment rule. For example, a lawyer charging an hourly rate has a personal economic incentive to increase billings rather than settle. Ultimately, one relies on attorneys to act ethically and follow the Code of Professional Responsibility. *See* MODEL CODE PROFESSIONAL OF RESPONSIBILITY EC 5-1 (1980). Moreover, the apparent conflict probably is less severe in the case of competitor suits than in many other types of actions. Section 43(a) suits typically involve sophisticated commercial enterprises. Unlike cases brought by individuals, such corporate parties generally maintain greater control over litigation decisions. If the sophisticated client exercises control over the litigation process, the attorneys' apparent conflict becomes moot.

201. *See* Smith, *supra* note 193, at 2161-62. *But see* Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEG. STUD. 55, 65-66 (1982) (stating that a fee shifting rule produces a lower settlement rate when parties' expected judgments are equal).

202. *See infra* app. In two of the five cases, the court of appeals reversed and remanded the case for a redetermination of the appropriate damage award. *See* Alpo Petfoods v. Ralston Purina Co., 913 F.2d 958 (D.C. Cir. 1990); PPX Enters. v. Audiofidelity Enters., 818 F.2d 266 (2d Cir. 1987).

203. This article recommends against completely eliminating damage claims. Damage actions are a necessary deterrent to bad faith advertisers. In the absence of potential damage awards, unscrupulous businesses would view false advertising as a worthwhile investment. The advertiser would benefit in the interim until the plaintiff filed suit, would face no threat of a damage award, and often would have voluntarily changed its campaign by the time the court issued an injunction. This article also recognizes compensation of innocent victims of false advertising as a worthy goal. *See supra* notes 72-74 and accompanying text.

204. *See* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*,

importantly, a fee shifting rule creates an incentive scheme that promotes consumer welfare. An attorneys' fee award to the prevailing party encourages filing of meritorious claims and discourages companies from bringing unworthy or harassing lawsuits.[205] Because the Lanham Act is at least partially endowed with protecting the public's interest, encouraging "private attorneys general" to enforce false advertising laws is sound policy. Competitors often are in the best position to detect deceptive advertising, and the fee incentive may be especially important to them. Businesses typically evaluate options by their bottom line effect. Currently, plaintiffs in section 43(a) actions cannot expect to win damage awards.[206] Thus, without the fee incentive, many meritorious cases may not be brought.

Attorneys' fee awards also reduce many of the costs associated with competitor actions. By discouraging the most marginal cases and increasing the number of cases challenging clear wrongdoing, a fee shifting rule removes some of the uncertainty inherent in section 43(a) prosecutions. The advertiser can feel safer making good faith claims and knows that bad faith claims are likely to be challenged. This results both in a decrease in chilling effects and an increase in general deterrence. To the extent that critics are concerned that competitor suits have anticompetitive effects,[207] a fee shifting rule directly addresses that concern. Harassing lawsuits brought to increase rivals' costs obviously are discouraged if the plaintiff would have to pay the prevailing defendant's attorneys' fees.

Finally, a fee shifting rule should reduce error and enforcement costs. By increasing the proportion of meritorious to nonmeritorious actions brought, fewer cases in which courts mistakenly enjoin truthful advertisements should result. Litigation costs also should decrease. With more meritorious claims and clearer liability, fewer difficult issues should arise. If damage claims are discouraged, costs will further decrease.[208] A fee shifting rule also may result in less trial time if the incentive for settlement increases.[209]

Adoption of this article's proposal would not force the law to embark on unchartered waters. In Germany, competitors can privately enforce false advertising law, and attorneys' fees are awarded to the prevailing party. The experience there has been positive.[210] Attorneys' fees are

---

1982 DUKE L.J. 651, 657; Smith, *supra* note 193, at 2154-55.

205. *See* Shavell, *supra* note 201, at 59. Technically, it is not the merits of the lawsuit that is critical, but the plaintiff's view of the suit's merits. Given that the more worthy the claim, the higher the plaintiff's evaluation of the case, this distinction should not affect the analysis in the text.

206. *See supra* note 202 and accompanying text (discussing the rarity of damage awards).

207. *See supra* notes 181-88 and accompanying text.

208. *See supra* text accompanying notes 202-03.

209. *See supra* text accompanying note 201.

210. Warren S. Grimes, *Control of Advertising in the United States and Germany: Volkswagen*

awarded in antitrust and civil rights cases. There is no reason similar awards cannot be made in Lanham Act false advertising suits.

B. *Reduced Reliance on Consumer Surveys*

This article's second proposal, permitting courts to forego use of consumer surveys when interpreting an advertisement's message, is a more modest, but highly controversial, idea. Unlike the fee shifting proposal, reduced reliance on consumer surveys does not have unequivocally positive effects on the costs associated with competitor enforcement of section 43(a). Rather, reduced reliance on consumer surveys will lower some costs, but potentially raise others. However, this article concludes that the positive effects will dominate and result in a net benefit to society.

Under current law, to prevail on a claim alleging implied misrepresentation, a plaintiff is virtually required to present a carefully designed and conducted consumer survey.[211] The survey requires considerable time and expert expenses that are not reimbursable as part of an award of costs.[212] Surveys also inevitably trigger substantial and costly litigation about their validity.[213] If surveys invariably led to more accurate decisionmaking, the increased accuracy might justify the cost. However, the survey is often unnecessary and sometimes counterproductive.

In many instances, the court, or any objective reader, can determine whether an advertisement makes the implied claim challenged. For example, in *Rhone-Poulenc*, the defendant advertised its product, Extra Strength Maalox Plus (Maalox), as "the strongest antacid there is."[214] The plaintiff alleged that this claim falsely implied that Maalox was the most effective antacid on the market.[215] It is difficult to imagine why the defendant would make the challenged claim if not to convey that Maalox offered

---

Has a Better Idea, 84 HARV. L. REV. 1769, 1769-70, 1800 (1971).

211. *See, e.g.*, Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 14 (7th Cir. 1992); Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 229 (3d Cir. 1990); Avis Rent A Car Sys. v. Hertz Corp., 782 F.2d 381, 386 (2d Cir. 1986); Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Rhone-Poulenc Rorer Pharmaceuticals Co., No. 91-7099, 1993 U.S. Dist. LEXIS 1016, at *27 (E.D. Pa. Jan. 28, 1993) (stating that "the success of the claim usually turns on the persuasiveness of a consumer survey").

212. *See, e.g.*, Gillette Co. v. Wilkinson Sword, No. 89 CV 3586, 1992 U.S. Dist. LEXIS 1265, at *32-33 (S.D.N.Y. Jan. 31, 1992).

213. *See infra* notes 215-21, 224-25 and accompanying text.

214. *Rhone-Poulenc*, 1993 U.S. Dist. LEXIS 1016, at *3.

215. *Id.* Although the advertisement appears to be challengable as literally false, the claim was supported by laboratory tests indicating that Maalox had the highest acid neutralizing capacity (ANC) rating. *Id.* at *6. However, all experts stated and the court found that the ANC test does not measure antacid effectiveness. *Id.* at *7. The FDA also excluded ANC ratings from product labels fearing unwarranted consumer reliance on such information. *Id.* at *6. Hence, the plaintiff filed the implied falsehood claim.

superior relief. Yet, the court required the plaintiff to present survey or substitute evidence proving consumer perceptions of the advertisement. In cases like *Rhone-Poulenc*, it is inefficient to require the plaintiff to conduct a proper consumer survey to prove the obvious.[216] Worse, if the plaintiff neglects to present a suitable survey, the court must either reach a questionable result[217] or disingenuously find that the implied message is really a literal falsehood.[218] The decision in *Rhone-Poulenc* is illustrative. Despite percentages suggesting that a substantial number of consumers extracted the seemingly obvious misleading message, the court refused to grant relief because it found that the surveys presented were not sufficiently objective.[219]

The threat of inappropriate decisions may be compounded by the inability of parties to complete an adequate consumer survey in time for the preliminary injunction hearing.[220] Erroneous rulings at that critical stage of the litigation process often are irreversible.[221] Thus, the survey requirement certainly increases litigation costs and may even increase error costs.

Nevertheless, the pivotal question in false advertising litigation is how consumers react to a challenged advertisement.[222] Undeniably, a properly

216. *See Gillette*, 1992 U.S. Dist. LEXIS at 1265 (requiring a survey to prove that consumers interpreted the claim that Wilkinson's blade strip is six times smoother than Gillette's to mean that Wilkinson's razor would give a smoother shave); Playskool, Inc. v. Product Dev. Group, 699 F. Supp. 1056 (E.D.N.Y. 1988) (requiring a survey to prove that consumers interpreted the defendant's claim that its product could be used in conjunction with the plaintiff's goods to mean that consumers could use the products and goods together safely and without additional equipment). Courts should not need survey evidence to prove that a "strongest antacid" claim communicates superior effectiveness anymore than it is necessary to demand consumer reaction tests to show that the public does not really believe that "Exxon puts a tiger in your tank." Fear of judicial activism should not justify a presumption of complete judicial incompetence.

217. *See, e.g.*, Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Smithkline Beecham Corp., 960 F.2d 294, 299-300 (2d Cir. 1992) (admitting that the advertisement played upon consumers' misperceptions about the effects of aluminum in antacids and that survey figures suggested that consumers were misled, but denying relief because the court found that the survey was improperly conducted); *Gillette*, 1992 U.S. Dist. LEXIS 1265, at *1 (denying preliminary relief based upon lack of authentication for a consumer survey supporting the allegation that the six times smoother claim implies a smoother shave, but granting a permanent injunction after trial on the merits).

218. *See, e.g.*, *Abbott Labs.*, 971 F.2d at 9-11 (finding that the "Ricelyte" name expressly imparted the message that the product contained nonhydrolyzed rice carbohydrates, not merely rice syrup solids); Tambrands, Inc. v. Warner-Lambert Co., 673 F. Supp. 1190, 1193-94 (S.D.N.Y. 1987) (finding the claim that a pregnancy test would produce results "in as fast as ten minutes" literally false because only some women got results in just ten minutes); BeVier, *supra* note 7, at 29. Alternatively, some courts seem to rely on their personal reading of an advertisement to decide survey issues. *See, e.g.*, *Tambrands*, 673 F. Supp. at 1194. Thus, the survey requirement becomes little more than an expensive sham.

219. *Rhone-Poulenc*, 1993 U.S. Dist. LEXIS 1016, at *33-35.

220. *See, e.g.*, *Abbott Labs.*, 971 F.2d at 16; E.R. Squibb & Sons v. Stuart Pharmaceuticals, No. 90-1178, 1990 U.S. Dist. LEXIS 15788, at *47 (D.N.J. Oct. 16, 1990).

221. *See supra* part V.B.

222. *See, e.g.*, Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 950-51 (3d Cir. 1993) (Roth, J., dis-

constructed and conducted survey provides the most direct evidence of that fact. Allowing a court to substitute its judgment for such direct evidence of consumer reactions may increase error costs and the uncertainty that can chill truthful speech.[223]

These possible negative effects of this article's proposal, however, may not be as severe as first appears. Reliance on consumer surveys does not guarantee a predictable or accurate result. The probative value of a consumer survey is a highly fact-specific determination. The objectivity of a survey depends on a variety of factors: "properly defining the 'universe' of the survey; a representative sampling of individuals from that universe; sound interviewing procedures; questions framed in a clear, precise, and non-leading manner; and data accurately reported and analyzed."[224] No survey is completely objective and reliable.[225] Accordingly, litigants routinely challenge survey evidence. Thus, even under current law, no party can be entirely confident that a court will find that its survey supports its advertised claim. In any event, this article recommends eliminating the requirement of consumer survey evidence; it does not recommend prohibiting courts from considering such evidence. Parties would still be free to conduct and submit consumer surveys. If the message conveyed by an advertisement is unclear, parties still would be well advised to present consumer survey evidence.[226] The proposal merely would eliminate the conclusive presumption that surveys are needed whenever an advertisement is literally true. Like the FTC,[227] a court only would require the use of extrinsic evidence when it was unsure of the message conveyed by a challenged advertisement.

The unwillingness to allow judges to interpret advertisements for themselves demeans judicial expertise and experience. Courts are well-trained in interpreting language and its effects. Contract interpretation and statutory construction regularly require judges to finely parse language. In the field of libel, "trial courts have a significant role in establishing the meaning of challenged communications."[228] In trademark cases under

---

senting); *Sandoz Pharmaceuticals*, 902 F.2d at 229.

223. *See* Kraft, Inc. v. FTC, 970 F.2d 311, 327-28 (7th Cir. 1992) (Manion, J., concurring); Best, *supra* note 8, at 58.

224. *Rhone-Poulenc*, 1993 U.S. Dist. LEXIS 1016, at *30.

225. *See, e.g.*, *Castrol*, 987 F.2d at 952-53 (Roth, J., dissenting). The dissenting judge stated that the survey evidence suggested that consumers did not extract even the literal meaning of the challenged advertisement. *See id.* at 953.

226. Thus, the cost-saving produced by this article's proposal would inure disproportionately to plaintiffs with the clearest cases of misrepresentation—precisely the type of cases the law should seek to encourage.

227. *See Kraft*, 970 F.2d at 315-16, 318.

228. Best, *supra* note 8, at 43 (stating that the court determines whether words are reasonably capable of or demand a particular interpretation and decides whether the meaning of the communica-

section 43(a) of the Lanham Act, courts routinely find a likelihood of confusion without considering survey evidence.[229] In advertising cases involving the FTC, the judicial system reviews, albeit deferentially, the agency's findings of fact concerning an advertisement's message.

The FTC's purported expertise[230] cannot justify denying courts the power of interpretation that is granted to the FTC. False advertising cases comprise only a small part of the FTC's workload. Moreover, FTC Commissioners' average tenure is only four years, and most have had little prior experience in advertising.[231] More importantly, the relevant question in false advertising litigation is the nonexperts' view of the message conveyed by the challenged advertisement. A jury would seem to be better equipped than five expert Commissioners to decide that issue. In any event, whatever errors a judge or jury makes in interpreting the effects of the challenged advertisement might be more than offset by the errors survey failures now produce.[232]

In an ideal world with perfect and cost-free information, consumer surveys should be required in every case. However, the world is not perfect, and information is not cost-free. Decreasing reliance on consumer surveys and limiting their use to cases in which implied messages are not clear would reduce litigation costs and, contrary to prevailing wisdom, may even lead to more accurate judgments.

VII. CONCLUSION

False advertising deprives the public of information that is necessary for the proper working of a free market. It harms the economic interests of consumers and competitors and undermines the moral and ethical standards of society. No one questions that false advertising may be invidious and damaging. Rather, the dispute concerns the extent to which false advertising poses a substantial threat to society and whether competitor lawsuits can cost-effectively reduce that threat.

Recent critics of competitor actions have suggested that false advertising presents a de minimis harm to the public, and competitor actions are more likely to have anticompetitive effects than to improve consumer welfare. They view the free-market as capable of self-correcting any distortions created by false advertising. Critics argue that consumers are able to detect and punish misrepresentations and disbelieve claims they cannot

---

tion is defamatory).

229. *See* 2 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 23.20, at 23-132 to -133 (3d ed. 1992).

230. *See, e.g., Kraft*, 970 F.2d at 316; *Sandoz Pharmaceuticals*, 902 F.2d at 228.

231. *See Kraft*, 970 F.2d at 319.

232. *See supra* notes 214-19, 224-25 and accompanying text.

verify. They further argue that although some false advertising exists, it is as inevitable as industrial accidents are to the manufacturing process. They thus assert that falsehoods can be eliminated only by ceasing communication just as accidents can be avoided only by ceasing production. Neither result recommends itself to the critics. In short, they conclude that competitor suits for false advertising results in costly overdeterrence.[233]

This article has argued that the critics of competitor actions for false advertising have overestimated the ability of the market to self-correct and have overstated the costs imposed by competitor suits. Consumers cannot always detect falsehoods and do not always punish deceptions that they discover. Consumer skepticism offers some protection against the effects of false advertising, but does not provide the level of protection accorded to it by the critics of competitor suits. The critics also mistakenly assume that most, if not all defendants, act in good faith,[234] an assumption that distorts their analysis of the costs of competitor enforcement of section 43(a).[235] Their suggestion of a negligence or intent standard for liability[236] would also introduce its own unpredictability and guarantee difficult and costly litigation issues.

The review of the reported cases during the last ten years supports this article's position. Contrary to the critics' assumptions, many defendants knowingly stretched the truth, or lied outright. Moreover, competitors were in the best position to detect the deception and bring suit in virtually all cases because most involved credence claims not easily verified by consumers. When plaintiffs prevailed, the falsehood almost always was material, and damages were rarely granted. Without injunctive relief, advertisers would have had the incentive to engage in further deception. Few competitor cases illustrated the types of costs feared by the critics. Thus, little empirical evidence exists that proves competitor suits for false advertising result in overdeterrence. In fact, most evidence points to the contrary conclusion.

Admittedly, competitor suits for false advertising create costs. But only in the economist's fantasy land does competitor enforcement of the false advertising laws fail to provide substantial benefits. Competitor suits can greatly enhance consumer welfare and further some of the

233. *See* BeVier, *supra* note 7, at 30-31; Singdahlsen, *supra* note 8, at 340-42, 394-95.

234. *See supra* text accompanying notes 66-70.

235. The critics also give insufficient weight to the effect of the limited availability of damage awards on the competitor's risk calculus. Even if advertisers acted in good faith, given the prevalence of injunctive relief only, the appropriate analogy might not be to liability for industrial accidents, but to the contract principle of mutual mistake of fact. When there is a mutual mistake of fact, no damages are awarded for breach, but the contract is unenforceable and it would be improper for one of the parties to make the same representation of fact in the future.

236. *See, e.g.*, BeVier, *supra* note 7, at 30-31; Singdahlsen, *supra* note 8, at 340-42, 394-95.

nonquantifiable interests that critics fail to acknowledge. These benefits include interests in fair treatment; ethical and moral standards; and compensation for victims. In any event, this article indicates how the cost-benefit analysis could be further tilted in favor of competitor actions. By freely awarding attorneys fees to prevailing parties and permitting courts to find implied deception without the use of consumer surveys, the potential costs of competitor suits can be reduced without sacrificing any of the benefits of competitor enforcement.

APPENDIX

A. *Cases Considered*

1. Castrol Inc. v. Pennzoil Co., 987 F.2d 939 (3d Cir. 1993)
2. Castrol, Inc. v. Quaker State Corp., 977 F.2d 57 (2d Cir. 1992)
3. Telecredit Serv. Corp. v. Electronic Transaction Corp., No. 91-55686, 1992 U.S. App. LEXIS 20972 (9th Cir. Sept. 4, 1992)
4. Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6 (7th Cir. 1992)
5. Grove Fresh Dist. v. New England Apple Prods. Co., 969 F.2d 552 (7th Cir. 1992)
6. Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Smithkline Beecham Corp., 960 F.2d 294 (2d Cir. 1992)
7. McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co., 938 F.2d 1544 (2d Cir. 1991)
8. Resource Developers v. Statue of Liberty-Ellis Island Found., 926 F.2d 134 (2d Cir. 1991)
9. Alpo Petfoods v. Ralston Purina Co., 913 F.2d 958 (D.C. Cir. 1990)
10. Cook, Perkiss & Liehe, Inc. v. Northern Cal. Collection Serv., 911 F.2d 242 (9th Cir. 1990)
11. Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc., 902 F.2d 222 (3d Cir. 1990)
12. U.S. Healthcare v. Blue Cross, 898 F.2d 914 (3d Cir.), *cert. denied*, 498 U.S. 816 (1990)
13. Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Rhone-Poulenc Rorer Pharmaceuticals Co., No. 91-7099, 1993 U.S. Dist. LEXIS 1016 (E.D. Pa. Jan. 29, 1993)
14. Genderm Corp. v. Biozone Labs., No. 92 C 2533, 1992 U.S. Dist. LEXIS 13521 (N.D. Ill. Sept. 2, 1992)

15. Coors Brewing Co. v. Anheuser-Busch Co., 802 F. Supp. 965 (S.D.N.Y. 1992)

16. Multi-Tech Sys. v. Hayes Microcomputer Prods., 800 F. Supp. 825 (D. Minn. 1992)

17. Cincinnati Sub-Zero Prods. v. Augustine Medical, 800 F. Supp. 1549 (S.D. Ohio 1992)

18. Allen Organ Co. v. Galanti Organ Builders, 798 F. Supp. 1162 (E.D. Pa. 1992)

19. Gillette Co. v. Wilkinson Sword, No. 89 CV 3586, 1992 U.S. Dist. LEXIS 1265 (S.D.N.Y. Jan. 31, 1992)

20. Media Arts Int'l v. Trillium Health Prods., No. 92-2928, 1992 U.S. Dist. LEXIS 9092 (E.D. Pa. June 23, 1992)

21. W.L. Gore & Assocs. v. Totes, Inc., 788 F. Supp. 800 (D. Del. 1992)

22. American Express Travel Related Serv. Co. v. Mastercard Int'l. 776 F. Supp. 787 (S.D.N.Y. 1991)

23. Critical Vac Filtration Corp. v. Northland Filter Sys. Int'l, No. 90-CV-1189, 1991 U.S. Dist. LEXIS 8607 (N.D.N.Y. June 24, 1991)

24. Energy Four v. Dornier Medical Sys., 765 F. Supp. 724 (N.D. Ga. 1991)

25. Performance Indus. v. Koos Inc., 18 U.S.P.Q.2d (BNA) 1767 (E.D. Pa. 1990)

26. Weight Watchers Int'l v. Stouffer Corp., 744 F. Supp. 1259 (S.D.N.Y. 1990)

27. E.R. Squibb & Sons v. Stuart Pharmaceuticals, No. 90-1178, 1990 U.S. Dist. LEXIS 15788 (D.N.J. Oct. 16, 1990)

28. C & R Clothiers v. The Men's Warehouse, No. C-90-1378, 1990 U.S. Dist. LEXIS 10424 (N.D. Cal. July 17, 1990)

29. Guardsmark, Inc. v. Pinkerton's, Inc., 739 F. Supp. 173

(S.D.N.Y.), *aff'd without op.*, 923 F.2d 845 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2893 (1991)

30. Nikkal Indus., Ltd. v. Salton, Inc., 735 F. Supp. 1227 (S.D.N.Y. 1990)

31. Princeton Graphics Operating, L.P. v. NEC Home Elecs., 732 F. Supp. 1258 (S.D.N.Y. 1990)

32. Valu Eng'g v. Nolu Plastics, 732 F. Supp. 1024 (N.D. Cal. 1990)

33. Workplace Corp. v. Office Depot, No. 89-1485-CIV-T-13A, 1990 U.S. Dist. LEXIS 9280 (M.D. Fla. June 5, 1990)

34. PPX Enters. v. Audiofidelity Enters., 818 F.2d 266 (2d Cir. 1987)

35. U-Haul Int'l v. Jartran, Inc., 793 F.2d 1034 (9th Cir. 1986)

36. Avis Rent A Car Sys. v. Hertz Corp., 782 F.2d 381 (2d Cir. 1986)

37. Proctor & Gamble Co. v. Chesebrough-Ponds, Inc., 747 F.2d 114 (2d Cir. 1984)

38. Hobart Corp. v. Welbilt Corp., No. 1:89CV1726, 1989 U.S. Dist. LEXIS 14447 (N.D. Ohio Oct. 4, 1989)

39. Oil Heat Inst. v. Northwest Natural Gas, 708 F. Supp. 1118 (D. Or. 1988)

40. Playskool, Inc. v. Product Dev. Group, 699 F. Supp. 1056 (E.D.N.Y. 1988)

41. McNeilab, Inc. v. American Home Prods. Corp., 675 F. Supp. 819 (S.D.N.Y. 1987)

42. Fruit of the Loom v. Sara Lee Corp., 674 F. Supp. 1020 (S.D.N.Y. 1987)

43. Tambrands, Inc. v. Warner-Lambert Co., 673 F. Supp. 1190 (S.D.N.Y. 1987)

44. Tyco Indus. v. Lego Sys., 5 U.S.P.Q.2d (BNA) 1023 (D.N.J. 1987)

45. Stiffel Co. v. Westwood Lighting Group, 658 F. Supp. 1103 (D.N.J. 1987)

46. McNeilab, Inc. v. Bristol-Myers Co., 656 F. Supp. 88 (E.D. Pa. 1986)

47. American Home Prods. Corp. v. Johnson & Johnson, 654 F. Supp. 568 (S.D.N.Y. 1987)

48. Grant Airmass Corp. v. Gaymar Indus., 645 F. Supp. 1507 (S.D.N.Y. 1986)

49. Upjohn Co. v. Riahom Corp., 641 F. Supp. 1209 (D. Del. 1986)

50. American Rockwool v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986)

51. Littlefuse, Inc. v. Parker-Hannifin Corp., 230 U.S.P.Q. (BNA) 654 (N.D. Ill. 1986)

52. Ulick v. PC World Communications, 230 U.S.P.Q. (BNA) 713 (N.D. Ill. 1986)

53. Max Daetwyler Corp. v. Input Graphics, 608 F. Supp. 1549 (E.D. Pa. 1985)

54. Southern Shows v. Exposition Enters., 226 U.S.P.Q. (BNA) 351 (W.D.N.C. 1985)

55. Upjohn Co. v. American Home Prods. Corp., 598 F. Supp. 550 (S.D.N.Y. 1984)

56. Williams Elecs., v. Bally Mfg. Corp., 568 F. Supp. 1274 (N.D. Ill. 1983)

57. Eastern Air Lines v. New York Air Lines, 559 F. Supp. 1270 (S.D.N.Y. 1983)

58. Camel Hair & Cashmere Inst. v. Associated Dry Goods Corp., 799 F.2d 6 (1st Cir. 1986)

59. Linotype Co. v. Varityper, Inc., 89 Civ. 4747, 1989 U.S. Dist. LEXIS 9105 (S.D.N.Y. July 31, 1989)

60. Thomas Medical Co. v. Ciba-Geigy Corp., 643 F. Supp. 1190 (E.D.N.Y. 1986)

B. Cases Plaintiff Won (35 total)—1, 2, 4, 5, 7, 9, 14, 17, 19, 20, 21, 24, 25, 26, 27, 31, 32, 34, 35, 38, 40, 41, 43, 44, 45, 47, 49, 51, 52, 54, 55, 57, 58, 59, 60

C. Cases Defendant Won (18 total)—3, 6, 8, 10, 11, 13, 15, 18, 22, 23, 28, 29, 30, 36, 37, 42, 46, 53

D. Undecided Cases (7 total)—12, 16, 33, 39, 48, 50, 56

E. Cases Making Comparative Claims (43 total, with 23 making explicit (e) comparative claims)—1, 2, 3, 4(e), 6(e), 7(e), 9, 11, 12, 13, 14, 15(e), 16, 17, 19(e), 20(e), 21(e), 22(e), 25(e), 27(e), 28(e), 32, 33, 35, 36(e), 37, 38(e), 39, 40, 41(e), 42(e), 43, 44(e), 45(e), 46(e), 48(e), 50, 53, 55, 56(e), 57(e), 59(e), 60(e)

F. Cases With Larger Plaintiff And New Entrant Defendant (12 total, 2 won by defendant (d))—4, 5, 11(d), 14, 30(d), 35, 40, 44, 45, 49, 57, 60

G. Damages Sought (24 total, with 5 awards (a), of which 2 awards were remanded (ar) for proof of the amount of plaintiff's injury)—1, 3, 5(a), 8, 9(ar), 12, 16, 17, 18, 19(a), 26, 27, 30, 33, 34(ar), 35(a), 39, 43, 47, 48, 50, 53, 57, 58

H. Good Faith (22 total)—2, 7, 8, 9, 10, 11, 15, 18, 20, 22, 23, 26, 28, 29, 30, 36, 37, 41, 46, 53, 55, 57

I. Questionable Faith (at least in part) (34 total)—1, 3, 4, 5, 6, 9 (counterclaim), 13, 14, 17, 19, 21, 24, 25, 27, 31, 32, 34, 35, 38, 39, 40, 42, 43, 44, 45, 47, 48, 49, 50, 51, 54, 58, 59, 60

J. Insufficient Facts to Determine if in Good Faith (5 total)—12, 16, 33, 52, 56

K. Noncompetitor Plaintiff Available (15 total, of which 8 probably had insufficient stake to sue (?))—3, 10, 11(?), 28(?), 30, 31, 33(?), 34(?), 39, 40(?), 43(?), 44(?), 54(?), 56, 57

L. Credence Claim (48 total, of which 14 do not concern credence attribute (c))—1, 2, 4, 5, 6, 7(c), 8, 9, 12, 13, 14, 15(c), 16, 17, 18(c),

19(c), 20(c), 21(c), 22, 23, 24, 25, 26, 27, 29, 32, 35, 36, 37(c), 38(c), 39(c), 41, 42(c), 43(c), 45, 46, 47, 48, 49, 50, 51, 52, 53(c), 54(c), 55, 58, 59(c), 60

M. Not Material (3 total—those not listed were material)—18, 36, 52

N. Last Reported Opinion Is Preliminary Injunction Decision (27 total)—2, 4, 11, 13, 14, 15, 17, 20, 21, 22, 23, 24, 25, 27, 28, 32, 37, 38, 40, 41, 45, 49, 51, 52, 54, 55, 59

O. Final Judgment Entered Before Trial (5 total)—3, 8, 10, 30, 53