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Cover Page Footnote

J.D. Candidate, 2009, Fordham University School of Law. I would like to thank my parents for their encouragement throughout this process.

NOTES

PRUDENTIAL STANDING LIMITATIONS ON LANHAM ACT FALSE ADVERTISING CLAIMS

*Gregory Apgar**

Section 43(a) of the Lanham Act provides a federal cause of action for false advertising. There is considerable disagreement among the federal circuit courts over the proper way to determine standing under this statute. Much of the disagreement centers on how the plaintiff's status as a direct competitor of the defendant should affect the standing inquiry. This Note argues that the five-factor test currently used by the U.S. Courts of Appeals for the Third, Fifth, and Eleventh Circuits is the best approach. Further, this Note argues that an allegation of a commercial injury by a direct competitor of the defendant satisfies this test.

INTRODUCTION

From 1995 to August 2001, McDonald's Corp. ran various promotional games, including "Monopoly Games at McDonald's," "Who Wants to be a Millionaire," and "Hatch, Match and Win."¹ Each of these games offered customers the chance to win a variety of prizes, ranging from small cash awards and free food or beverages to automobiles and cash prizes of \$1 million.² Customers won these prizes by collecting game pieces provided with McDonald's food items.³ McDonald's ran extensive advertising campaigns, representing that all participating customers had a fair and equal opportunity to win the offered prizes.⁴

Around April 2000, the Federal Bureau of Investigation (FBI) began investigating these games.⁵ While the promotions were still running, the FBI informed McDonald's that its game pieces were not being distributed randomly.⁶ Nonetheless, McDonald's continued running the games and publishing advertisements representing that all consumers had a fair and

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1. *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1159 (11th Cir. 2007).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 1160.

6. *Id.*

equal chance to win.⁷ On August 21, 2001, the FBI and U.S. Department of Justice (DOJ) announced that the company that McDonald's hired to run the games criminally diverted "at least \$20 million in high-value prizes by embezzling winning, high-value game pieces."⁸ Subsequently, a Burger King franchisee brought a federal false advertising action under section 43(a) of the Lanham Act. Suing on behalf of himself and approximately 1100 other Burger King franchisees, the franchisee claimed that the promotional games lured customers from Burger King to McDonald's and that the advertisements touting high-value prizes were "literally false."⁹

The U.S. Court of Appeals for the Eleventh Circuit, however, dismissed the claim, holding that the class of plaintiffs lacked prudential standing to bring a false advertising claim against McDonald's.¹⁰ Standing is a doctrine that determines whether a plaintiff is entitled to have his dispute decided by a court.¹¹ Article III of the Constitution forms the basis for one strand of standing requirements, while the other strand—prudential standing—is composed of judicially self-imposed limits on standing.¹² The issue in the case against McDonald's—standing to bring a federal false advertising claim under section 43(a) of the Lanham Act¹³—has generated considerable disagreement among the federal circuit courts. Traditionally, the courts have disagreed whether a plaintiff who is not in competition with the defendant can satisfy prudential standing limitations in a section 43(a) false advertising action.¹⁴ The Eleventh Circuit's decision in *Phoenix of Broward, Inc. v. McDonald's Corp.* added a new aspect to the debate by holding that a direct competitor plaintiff lacked standing.¹⁵

Part I discusses the background and general principles of both Article III and prudential standing and of section 43(a) of the Lanham Act, the federal false advertising statute. This part concludes with an explanation of why prudential standing limitations apply to section 43(a). Part II provides a detailed examination of the three different approaches the courts have taken in determining section 43(a) standing. Part III argues that the five-factor test used by the U.S. Courts of Appeals for the Third, Fifth, and Eleventh Circuits is the best approach. Part III also argues that direct competitor plaintiffs should not be denied standing under the five-factor test. Instead, the test should be employed to determine whether a noncompetitor plaintiff

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 1161, 1173.

11. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). For a detailed discussion of the standing doctrine, see *infra* Part I.A.

12. *See, e.g., Elk Grove*, 542 U.S. at 11. Part I.A.1 of this Note discusses the constitutional standing requirements. Prudential standing is discussed in Part I.A.2.

13. 15 U.S.C. § 1125(a) (2000). The Lanham Act is the common name for the Trademark Act of 1946. *See infra* text accompanying notes 61–62.

14. Part II examines the disagreements among the approaches in detail.

15. *McDonald's*, 489 F.3d at 1173. For further discussion on this topic, see *infra* note 306 and accompanying text.

alleges a sufficient interest and injury to invoke the protection of section 43(a).

I. THE STANDING DOCTRINE AND THE LANHAM ACT

Part I discusses the doctrine of standing and its relation to the Lanham Act. Part I.A discusses both the constitutional requirements for standing under Article III and the judicially self-imposed prudential limitations on standing. Then, Part I.B discusses the history of section 43(a) of the Lanham Act, which creates a federal cause of action for false advertising claims, and demonstrates its advantages over the common law. Finally, Part I.C illustrates why courts have uniformly held that prudential standing limitations apply to section 43(a).

A. *The Standing Requirement Generally*

In every federal case, the plaintiff must establish that he has standing to bring the action.¹⁶ According to the U.S. Supreme Court, the “essence” of the standing inquiry is “whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”¹⁷ To have standing, a litigant must satisfy both constitutional requirements and prudential limitations.¹⁸ Both sets of requirements are “founded in concern about the proper—and properly limited—role of the courts in a democratic society.”¹⁹

1. Standing Requirements Derived from Article III of the Constitution

Article III of the Constitution limits the power of the federal courts to adjudicating actual “cases” and “controversies.”²⁰ In *Flast v. Cohen*,²¹ the Supreme Court stated that taken together, the words “cases” and “controversies” embody two different limitations on the power of federal courts.²² First, they limit federal courts’ power to adjudicate matters to those “presented in an adversary context and in a form historically viewed

16. See, e.g., *Elk Grove*, 542 U.S. at 11.

17. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); see also William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 229 (1988) (framing the “essence” of the standing question as whether “the plaintiff [has] a legal right to judicial enforcement of an asserted legal duty”). In section 43(a) false advertising cases, the focus of this Note, courts have disagreed in their approaches to determining whether a plaintiff has such a right. See generally *infra* Part II. For example, the U.S. Court of Appeals for the Ninth Circuit developed an approach that focuses on the relationship between the parties, while the U.S. Courts of Appeals for the First, Second, and Third Circuits developed standing tests that look to the injury suffered by the plaintiff. See generally *infra* Parts II.A, II.B, II.C.2. The standing requirements for section 43(a) false advertising claims are important for potential plaintiffs due to the emergence of section 43(a) as the preferred vehicle for bringing false advertising claims. See *infra* notes 92–111.

18. See, e.g., *Elk Grove*, 542 U.S. at 11.

19. *Warth*, 422 U.S. at 498.

20. See, e.g., *Allen v. Wright*, 468 U.S. 737, 750 (1984).

21. 392 U.S. 83 (1968).

22. See *id.* at 94–95.

as capable of resolution through the judicial process.”²³ Second, they define the role of the judiciary in the federal government’s “tripartite allocation of power” and assure that the judiciary will not intrude into areas reserved for the executive and legislative branches.²⁴

Consistent with the latter limitation, the Court has stated that Article III does not give the judiciary “unconditioned authority to determine the constitutionality of legislative or executive acts.”²⁵ Instead, its power to adjudicate individual legal rights and to determine governmental authority is proper only as a “last resort” and when necessary to “determin[e] [a] real, earnest and vital controversy.”²⁶ In *Valley Forge Christian College v. Americans United for Separation of Church & State*, the Supreme Court illustrated the separation of powers concerns raised by the exercise of judicial power, discussing the effect of a federal court fulfilling its “ultimate and supreme function” of declaring a legislative or executive act unconstitutional.²⁷ The Court noted that although this function was approved in *Marbury v. Madison*²⁸ and is a powerful means of protecting individual rights, it could also serve as the “ultimate threat” to the judiciary’s effectiveness if exercised without restraint.²⁹ The Court quoted Justice Lewis Powell’s concurring opinion in *United States v. Richardson*³⁰ to explain,

[R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.³¹

Thus, the Court concluded that declaring a legislative or executive act unconstitutional is a “last resort” for the judiciary, to be used only when a party with sufficient interests questions an act’s constitutionality.³²

23. *Id.* at 95.

24. *Id.* Justiciability is the term used to express this dual limitation placed on the federal judiciary by Article III’s case or controversy requirement. *See id.*; *see also* Fletcher, *supra* note 17, at 222 (stating that the standing doctrine ensures that litigants are “truly adverse” and that the parties most directly concerned with an issue are able to litigate it, and prevents the federal judiciary from “usurping the policy-making functions of the popularly elected branches”).

25. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 471 (1982).

26. *Id.* (quoting *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)).

27. *Id.* at 473 (internal quotation marks omitted) (quoting *Chicago & Grand Trunk Ry.*, 143 U.S. at 345).

28. 5 U.S. (1 Cranch) 137, 178–180 (1803).

29. *See Valley Forge*, 454 U.S. at 473–74.

30. 418 U.S. 166 (1974).

31. *Valley Forge*, 454 U.S. at 474 (quoting *Richardson*, 418 U.S. at 188 (Powell, J., concurring)).

32. *See id.*

Standing is one of several Article III doctrines that has developed to define the role of the judiciary in our government.³³ Supreme Court case law demonstrates that there are three well-established Article III standing limitations: (1) that the plaintiff suffered an “injury in fact”—an invasion of a legally protected interest which is . . . concrete and particularized, and . . . actual or imminent, not conjectural or hypothetical”;³⁴ (2) that there is a “causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court’”;³⁵ and (3) that it is “likely” and not “merely speculative” that a favorable decision will redress the injury.³⁶ In *Allen v. Wright*, the Court noted that these requirements lack a definition precise enough to make Article III standing inquiries “mechanical exercise[s].”³⁷ However, the definitions have been somewhat clarified through case law, and in many instances standing questions can be determined primarily by comparing the allegations to those in prior standing cases.³⁸

Though the Article III case or controversy requirement is founded partly on separation of powers concerns,³⁹ the Court has not always viewed Article III standing as a separation of powers doctrine. In *Flast v. Cohen*, the Court stated that standing hinges on whether the plaintiff is “a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable.”⁴⁰ According to the *Flast* Court, the question whether a plaintiff can properly maintain an action does not present separation of powers concerns related to the judiciary interfering in areas reserved for the other governmental branches.⁴¹ Rather, these separation of powers concerns arise only from the substantive matters the plaintiff seeks to have adjudicated, which are not relevant to a standing inquiry.⁴² Thus, the Court concluded that the standing inquiry relates only to “whether the dispute . . . will be presented in an adversary context and in a form

33. See *Allen v. Wright*, 468 U.S. 737, 750 (1984). Others include ripeness—“whether the harm asserted has matured sufficiently to warrant judicial intervention”—and mootness—“whether the occasion for judicial intervention persists.” *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975). The U.S. Supreme Court in *Allen* stated that standing is “perhaps the most important of these doctrines.” 468 U.S. at 750; see also John C. Yang, *Standing . . . In the Doorway of Justice*, 59 *Geo. Wash. L. Rev.* 1356, 1386–87 (1991) (stating that the standing, mootness, ripeness, finality, and exhaustion doctrines all go to the “larger question of justiciability”).

34. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotation marks omitted). The “particularized” limitation requires the injury to affect the plaintiff “in a personal and individual way.” *Id.* at 560 n.1.

35. *Id.* at 560–61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)) (alterations and omissions in original).

36. *Id.* at 561 (internal quotation marks omitted).

37. *Allen*, 468 U.S. at 751.

38. See *id.* at 751–52.

39. See *supra* notes 20–24 and accompanying text.

40. *Flast v. Cohen*, 392 U.S. 83, 99–100 (1968).

41. See *id.* at 100.

42. See *id.* at 100–01.

historically viewed as capable of judicial resolution.”⁴³ Sixteen years later, however, the Court in *Allen* stated that “the law of Art[icle] III standing is built on a single basic idea—the idea of separation of powers.”⁴⁴ The Court has since repeated this sentiment.⁴⁵

Finally, a plaintiff must support his Article III standing with the same “manner and degree of evidence” at each stage of the litigation as any other matter where plaintiffs bear the burden of proof.⁴⁶ Thus, upon ruling on a motion to dismiss for lack of standing, both trial and appellate courts must accept all of the plaintiff’s allegations as true, and must construe the complaint in the plaintiff’s favor.⁴⁷ Therefore, at this stage “general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we ‘presum[e] that general allegations embrace those specific facts that are necessary to support the claim.’”⁴⁸ However, the trial court may allow or require the plaintiff to provide “further particularized allegations of fact deemed supportive of plaintiff’s standing.”⁴⁹ If these particularized facts do not demonstrate adequate standing, the court must dismiss the claim.⁵⁰

2. Prudential Standing Limitations

In addition to the “immutable” Article III standing requirements, federal courts also adhere to a set of prudential limitations on standing, which are “judicially self-imposed limits on the exercise of federal jurisdiction.”⁵¹ In *Warth v. Seldin*, the Court stated that the finding of prudential standing depends essentially on “whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.”⁵² These prudential limitations have not been “exhaustively defined.”⁵³ It is well established, however,

43. *Id.* at 101.

44. *Allen v. Wright*, 468 U.S. 737, 752 (1984).

45. *See, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (quoting *Allen*, 468 U.S. at 752); *Wyoming v. Oklahoma*, 502 U.S. 437, 472 (1992) (Scalia, J., dissenting) (citing *Allen* to demonstrate that a view of standing based on adverseness has been repudiated). For an argument that *Allen* is incorrect in its assertion that standing is a separation of powers doctrine, see generally Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. Pa. L. Rev. 635 (1985) (arguing that the proper view of standing is as a doctrine that focuses on the plaintiff’s stake in the outcome of the controversy).

46. *Bennett v. Spear*, 520 U.S. 154, 167–68 (1997).

47. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

48. *Bennett*, 520 U.S. at 168 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

49. *Warth*, 422 U.S. at 501.

50. *See id.* at 501–02.

51. *Bennett*, 520 U.S. at 162 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

52. 422 U.S. at 500.

53. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004); *see also* Yang, *supra* note 33, at 1387 (stating that prudential requirements are more “flexible” than their Article III counterparts and that the Supreme Court has listed only “nonexclusive” prudential guidelines, which has led to “haphazard” results producing dissension among the circuit courts).

that “prudential standing encompasses ‘the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.’”⁵⁴ The Court in *Warth* stated that, without these judicially self-imposed limitations, which relate to Article III concerns, “the courts would be called upon to decide abstract questions of wide public significance” better suited to other governmental institutions and not requiring judicial protection of individual rights.⁵⁵

Unlike the constitutional requirements, prudential standing limitations can be “modified or abrogated by Congress.”⁵⁶ The prudential limitations, however, are presumed to apply unless Congress “expressly negate[s]” them.⁵⁷ Thus, Congress may grant persons otherwise barred by prudential standing limitations an express right of action.⁵⁸ Because the Article III requirements remain,⁵⁹ parties granted such a right and meeting the constitutional requirements may have standing to obtain relief based on the legal rights of others or to support their claim by “invok[ing] the general public interest.”⁶⁰

B. *False Advertising Under Section 43(a) of the Lanham Act*

The Lanham Act⁶¹ is the common name for the Trademark Act of 1946.⁶² The purposes of the Lanham Act are set forth in 15 U.S.C. § 1127, and include “making actionable the deceptive and misleading use of marks in . . . commerce” and “protect[ing] persons engaged in . . . commerce against unfair competition.”⁶³

Consistent with this intent, section 43(a) of the Lanham Act provides for federal causes of action for false association and false advertising.⁶⁴ It states,

54. *Elk Grove*, 542 U.S. at 12 (quoting *Allen*, 468 U.S. at 751); see also Yang, *supra* note 33, at 1361 (stating that courts frequently address prudential issues with tests that focus on a third party’s ability to assert another’s rights or on whether “a particular plaintiff is within a class Congress intended to protect”).

55. *Warth*, 422 U.S. at 500.

56. *Bennett*, 520 U.S. at 162.

57. See *id.* at 163.

58. See *Warth*, 422 U.S. at 501; see also Fletcher, *supra* note 17, at 251–52 (stating that the idea behind prudential standing “appears to be that in the exercise of ‘prudence,’ the Court may decline to grant standing to a plaintiff, but if Congress explicitly confers standing on such a plaintiff, then the Court’s ‘prudential’ hesitation is overcome”).

59. See *Warth*, 422 U.S. at 501.

60. *Id.*

61. 15 U.S.C. §§ 1051–1072, 1091–1096, 1111–1129 (2000).

62. See, e.g., *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 117 (2004).

63. 15 U.S.C. § 1127.

64. See *infra* notes 66, 68 and accompanying text.

(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.⁶⁵

Section 43(a)(1)(A) provides a cause of action for false association claims.⁶⁶ Such claims require the plaintiff to show that the misuse of its trademark or other distinguishing feature confused consumers as to the origin, endorsement, or approval of its product.⁶⁷ Section 43(a)(1)(B) provides a cause of action for false advertising claims.⁶⁸ To succeed on such a claim, the plaintiff must demonstrate that (1) the defendant's advertisement included a false or misleading statement of fact or representation; (2) "the misrepresentation is material, in that it is likely to influence the purchasing decision"; (3) the misrepresentation actually deceives or at least has the tendency to deceive a substantial portion of its intended audience; (4) "the defendant placed the false or misleading statement in interstate commerce"; and (5) the plaintiff has been or is likely to be injured as a result, either by a loss of sales or loss of goodwill.⁶⁹

In addition to bringing false advertising claims under section 43(a), plaintiffs may also bring common law false advertising claims or claims under state false advertising statutes.⁷⁰ Section 43(a) claims, however, are advantageous for several reasons.⁷¹ False advertising is a component of the

65. 15 U.S.C. § 1125(a).

66. See 5 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §§ 27:9–:10 (4th ed. 2007) (explaining that this subsection covers infringement of marks, trade names, and trade dress); see also *Conte Bros. Auto. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 232 & n.7 (3d Cir. 1998) (referring to such claims as false association claims and this subsection as the false association prong of section 43(a)).

67. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1109 n.9 (9th Cir. 1992). This Note focuses on standing under the false advertising prong of section 43(a), not the false association prong. However, the false association prong is relevant to the Ninth Circuit's development of its false advertising standing rule. See *infra* Part II.A.

68. See McCarthy, *supra* note 66, §§ 27:9–:10 (referring to this subsection as the false advertising prong of section 43(a)).

69. See, e.g., *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310–11 (1st Cir. 2002).

70. See generally McCarthy, *supra* note 66, §§ 27:1–:5, 27:113–:116.

71. See *infra* notes 101–11 and accompanying text.

broader law of unfair competition.⁷² There is not a widely accepted theoretical basis for the law of unfair competition, but three bases for allowing unfair competition actions have been expressed—the promotion of honest and fair dealing, the protection of consumers, and the protection of individual businesses' rights and property.⁷³ Prior to the enactment of section 43(a), however, the unfair competition law developed by courts was not consistent with these principles.⁷⁴

The common law required proof that the defendant's conduct proximately caused actual loss to the plaintiff for the plaintiff to have standing to bring a false advertising claim.⁷⁵ Where the plaintiff was one of many sellers of a particular product, this burden was extremely difficult to overcome, as a plaintiff had to demonstrate that “but for” defendant's false advertising, defendant's customers would have instead bought from the plaintiff and not one of the other sellers.⁷⁶ The common law contained, however, a single source exception: if, other than the defendant, the plaintiff was the only source of the product, then demonstrating that consumers would have purchased from the plaintiff but for the defendant's false advertisements was not difficult.⁷⁷ Otherwise, it was “practically impossible” for plaintiffs to state an actionable claim.⁷⁸

A case illustrative of the above principle is *New York & R. Cement Co. v. Coplay Cement Co.*⁷⁹ There, the plaintiff was one of several cement manufacturers in the town of Rosendale, New York.⁸⁰ The cement manufactured in Rosendale was always marketed as “Rosendale Cement.”⁸¹ The plaintiff sought to enjoin the defendant, who manufactured cement elsewhere, from continuing to use the word “Rosendale” in describing its cement, and sought damages resulting from such use.⁸² Though it was conceded that the public understood the name “Rosendale Cement” to refer to cement manufactured in Rosendale and that the defendant was untruthfully referring to its cement by that name, the court stated that “the question still remains whether [the defendant] can be prosecuted therefor, at the suit of a private party, who is only one of the many who manufacture cement at Rosendale, and truly denominate their cement ‘Rosendale Cement.’”⁸³ The court rejected the plaintiff's claim and stated that

72. See 1 Louis Altman, Callmann on Unfair Competition, Trademarks and Monopolies § 2.3, at 2-16 to -17 (4th ed. 2007) (stating that recent cases recognize false advertising as unfair competition); 44 Am. Jur. 3d *Proof of Facts* § 1 (1997).

73. 1 Altman, *supra* note 72, § 1.14, at 1-87 to -88.

74. See *id.* § 5.2.

75. McCarthy, *supra* note 66, § 27:1.

76. See *id.*

77. See *id.* § 27.4.

78. See *id.* § 27.1.

79. 44 F. 277 (C.C.E.D. Pa. 1890).

80. *Id.* at 277.

81. *Id.* at 278.

82. *Id.* at 277-78.

83. *Id.* at 278.

allowing such a claim would “open a Pandora’s box of vexatious litigation.”⁸⁴

Under the common law, even being the single source of a product was not always enough for a false advertising plaintiff. In the “landmark case”⁸⁵ of *American Washboard Co. v. Saginaw Mfg. Co.*,⁸⁶ the sole manufacturer of aluminum washboards sought to enjoin the defendant—who manufactured washboards made of zinc—from falsely representing that its washboards were made of aluminum.⁸⁷ The court could have distinguished *Coplay* through the single source exception,⁸⁸ but instead denied plaintiff’s request for relief.⁸⁹ The court stated that the plaintiff’s complaint “loses sight of the thoroughly established principle that the private right of action in such cases is not based upon fraud or imposition upon the public, but is maintained solely for the protection of the property rights of complainant.”⁹⁰ The court held that, though defendant’s conduct was “doubtless morally wrong,” no private action arises unless the plaintiff’s property rights are invaded.⁹¹

Section 43(a) of the Lanham Act removes many of these obstacles to plaintiffs.⁹² In enacting the Lanham Act, Congress focused primarily on creating a new federal trademark statute.⁹³ Initially, Congress viewed section 43(a) as a “minor, but useful section” serving as a necessary replacement for the prior federal statute covering protection of unregistered

84. *Id.* at 278–79.

85. 1A Altman, *supra* note 72, § 5.2, at 5-9.

86. 103 F. 281 (6th Cir. 1900).

87. *Id.* at 283.

88. 1A Altman, *supra* note 72, § 5.2, at 5-10.

89. *Am. Washboard*, 103 F. at 287.

90. *Id.* at 285.

91. *Id.* Judge Learned Hand, in discussing these cases, explained that “the law does not allow [the plaintiff] to sue as a vicarious avenger of the defendant’s customers.” *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603, 604 (2d Cir. 1925), *rev’d on other grounds*, 273 U.S. 132 (1927). This “vicarious avenger prohibition” arises out of the common law view that false advertising was based on the property rights of the competitor, not on defrauding consumers. McCarthy, *supra* note 66, § 27.2.

92. See *infra* notes 101–11 and accompanying text. It should be noted, however, that section 43(a) is not a statute directed at unfair competition generally. McCarthy, *supra* note 66, § 27:7. For example, it does not apply to business torts such as “misappropriation, or theft of trade secrets.” *Id.* Instead, it is directed at false advertising claims involving a “false or misleading description or representation of fact, in commercial advertising or promotion, which misrepresents the nature, characteristics, qualities, or geographic origin of goods, services, or commercial activities.” 1A Altman, *supra* note 72, § 5.5 (footnotes omitted).

93. See Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. Rev. 807, 811–12 (1999). There were two primary reasons that Congress deemed a new trademark statute necessary. First, Congress recognized that changes in commerce and business rendered the previous federal trademark statutes inadequate. *Id.* at 812. Second, with the Supreme Court eliminating federal common law in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), Congress was fearful of trademark law becoming subject to state-by-state interpretation, which it viewed as unacceptable given the increasingly interstate nature of commerce. See Burns, *supra*, at 812–13.

trademarks and trade dress.⁹⁴ The view that section 43(a) was of minor importance remained true in practice for nearly thirty-five years,⁹⁵ as litigants rarely invoked the provision and many courts narrowly interpreted its language as covering only cases of traditional trademark infringement.⁹⁶ However, both litigants and the courts eventually realized that the wording of section 43(a) did not warrant such a narrow interpretation and that its language prohibited false advertising, at least in situations where a company made false statements about its own products.⁹⁷ By the 1980s, this view had gained acceptance and courts began to apply section 43(a) to several types of false advertising.⁹⁸ As a result, section 43(a) became a “much-used and potent statute”⁹⁹ and the “favored legal tool for advertisers . . . who felt that a competitor was engaging in false advertising.”¹⁰⁰

Unlike the common law, section 43(a) was designed to protect consumers, in addition to commercial entities, from false advertising.¹⁰¹ As a result, section 43(a) provides plaintiffs with several significant advantages over common law false advertising rules.¹⁰² First, section 43(a) eliminates

94. Burns, *supra* note 93, at 813. The prior statute, section 3 of the 1920 Trademark Act, was “a little known and seldom used provision” that “required proof of willfulness and an intent to deceive.” J. Thomas McCarthy, *Lanham Act § 43(a): The Sleeping Giant Is Now Wide Awake*, 59 *Law & Contemp. Probs.* 45, 46–47 (1996). Section 43(a) eliminated these requirements. *Id.* at 47. It should be noted that the original version of section 43(a) did not explicitly refer to false advertising. It stated,

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

McCarthy, *supra* note 66, § 27:6, at 27-13. Congress amended section 43(a) to its present form in 1988. See Trademark Law Revision Act of 1988, Pub. L. 100-667, 102 Stat. 3935 (effective Nov. 16, 1989) (codified as amended in scattered sections of 15 U.S.C.).

95. See Burns, *supra* note 93, at 816.

96. See *id.*

97. See *id.* at 816–17.

98. See McCarthy, *supra* note 94, at 52.

99. *Id.*

100. *Id.* at 56.

101. McCarthy, *supra* note 66, § 27:25, at 27-47 to -48. Despite this goal, consumers do not have standing to invoke section 43(a). *Id.* Instead, consumer rights embodied by section 43(a) “must be invoked by a competitor of the defendant, not by a buyer from the defendant.” *Id.* at 27-47. Nonetheless, protecting consumers is still viewed as an important purpose of the statute. See, e.g., *Coca-Cola Co. v. Procter & Gamble Co.*, 822 F.2d 28, 31 (6th Cir. 1987) (“Protecting consumers from false or misleading advertising, moreover, is an important goal of [section 43(a)] and a laudable public policy to be served.”); see also Burns, *supra* note 93, at 836–37 (stating that a “vast majority” of courts deny consumer standing, adhering to the view that competitors are the “ultimate beneficiar[ies]” of the statute and consumers will be protected by competitors bringing suit). Professor Jean Wegman Burns goes on to argue that this view is incorrect—that consumer welfare is the “fundamental goal” of the statute and that a competitor’s injury is always derivative of the purchaser’s injury. See *id.* at 874–75.

102. McCarthy, *supra* note 66, § 27:25.

the single source restriction of the common law.¹⁰³ Second, section 43(a) does not require the plaintiff to demonstrate evidence of specific harm to obtain injunctive relief¹⁰⁴—a “mere likelihood of deception will suffice.”¹⁰⁵ Therefore, under section 43(a) plaintiffs need not identify specific individuals that the false or misleading statements reached. Rather, plaintiffs only need to demonstrate that the statements were “disseminated sufficiently to the relevant purchasing public.”¹⁰⁶ Another advantage of section 43(a) over the common law is that under section 43(a) a plaintiff need not show the extent of his actual damages to obtain an injunction.¹⁰⁷ Rather, plaintiffs need only demonstrate a “likelihood of damage.”¹⁰⁸ Other than injunctive relief, remedies available to section 43(a) plaintiffs include monetary damages, defendant’s profits, costs, and, in exceptional cases, attorneys’ fees.¹⁰⁹ Many state false advertising statutes, on the other hand, limit plaintiffs to injunctive relief.¹¹⁰ Thus, for all of these reasons, “private false advertising litigation has shifted almost entirely toward § 43(a) of the Lanham Act.”¹¹¹

C. Prudential Standing Applies to Section 43(a) of the Lanham Act

It is undisputed that the Article III standing requirements apply to section 43(a).¹¹² To determine if prudential standing limitations apply to section 43(a), however, it must be determined if Congress intended to abrogate these limitations in enacting section 43(a).¹¹³ Three circuits have expressly addressed this question, and all have held that prudential limitations apply to section 43(a).¹¹⁴

103. *Id.* § 27:26, at 27-50 to -52. For a discussion of the single source doctrine, see *supra* notes 77–84 and accompanying text. The enactment of section 43(a) created a new federal statutory tort, *sui generis*, which is not subject to common law restrictions. McCarthy, *supra* note 66, § 27:26, at 27-51. Thus, the only limitation on section 43(a) is its statutory language, which simply requires the plaintiff to show he is “likely to be damaged” and does not support the application of the single source restriction. *Id.* at 27-51 to -52.

104. McCarthy, *supra* note 66, § 27:28, at 27-53 to -54.

105. 1A Altman, *supra* note 72, § 5.5, at 5-38 (referring to this lowered requirement as one of the great improvements over the common law).

106. *Id.* at 5-38 to -39.

107. *Id.*

108. McCarthy, *supra* note 66, § 27:31, at 27-57.

109. See 15 U.S.C. § 1117 (2000).

110. See 44 Am. Jur. 3d *Proof of Facts* § 2 (1997); see also McCarthy, *supra* note 66, § 27:114, at 27-277 to -278 (noting that “[a]bout a dozen” state statutes are based on the Uniform Deceptive Trade Practices Act, which does not specifically provide for the recovery of damages).

111. 1A Altman, *supra* note 72, § 5.2, at 5-15 to -16.

112. See, e.g., *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (stating that the Article III standing requirements are “immutable”); *Conte Bros. Automotive v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 225 (3d Cir. 1998) (holding that in a section 43(a) false advertising case Article III standing should be addressed before prudential standing).

113. See *supra* notes 56–57 and accompanying text.

114. See *Phoenix of Broward, Inc. v. McDonald’s Corp.*, 489 F.3d 1156, 1162–63 (11th Cir. 2007); *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 561–62 (5th Cir. 2001); *Conte Bros.*, 165 F.3d at 227.

In *Conte Bros. Automotive v. Quaker State-Slick 50, Inc.*, the Third Circuit explained that, in determining whether Congress intended to negate prudential standing in a given statute, courts look to the statutory text, structure, and legislative history.¹¹⁵ Section 43(a) uses broad language—allowing “any person who believes that he or she is or is likely to be damaged” to bring suit¹¹⁶—that may lead one to conclude that Congress intended to abrogate prudential standing by allowing “any person” with Article III standing to bring suit.¹¹⁷ However, the *Conte Bros.* court explained that Congress’s use of broad language does not necessarily amount to an express negation of prudential standing by Congress.¹¹⁸

The *Conte Bros.* court then looked to two Supreme Court decisions involving statutes with standing language open to a broad interpretation. In “the case most directly on point,”¹¹⁹ *Associated General Contractors of California, Inc. v. California State Council of Carpenters*,¹²⁰ the Supreme Court held that prudential standing limitations apply to the Clayton Act, which gives standing to “[a]ny person who shall be injured in his business or property.”¹²¹ In *Bennett v. Spear*,¹²² the statute at issue was the Endangered Species Act of 1973 (ESA),¹²³ which states that “any person may commence a civil suit on his own behalf.”¹²⁴ In *Bennett*, the Court ultimately held that Congress intended to negate prudential standing limitations for claims brought under the ESA.¹²⁵ However, the Court reached its conclusion only after considering the statute’s broader purposes.¹²⁶ It stated that its “readiness to take the term ‘any person’ at face value [wa]s greatly augmented” by the facts that the statute’s subject matter was the environment—“a matter in which it is common to think all persons have an interest”—and that the “obvious purpose” of the statutory provision was to encourage private enforcement.¹²⁷ Based on the foregoing

115. See *Conte Bros.*, 165 F.3d at 227. Prudential standing limitations apply unless expressly negated by Congress. See *supra* note 57 and accompanying text. The other circuits that have expressly addressed this issue based their conclusions on the Third Circuit’s analysis in *Conte Bros.*, making *Conte Bros.* the only case necessary to examine. See *McDonald’s*, 489 F.3d at 1162–63 (citing *Conte Bros.* in holding that prudential standing limitations apply to the Lanham Act); *Procter & Gamble*, 242 F.3d at 561–62 (same).

116. 15 U.S.C. § 1125(a) (2000).

117. See *McDonald’s*, 489 F.3d at 1162.

118. See *Conte Bros.*, 165 F.3d at 227. Congress must expressly negate prudential standing limitations for the limitations not to apply. See *id.*

119. *Id.* at 228.

120. 459 U.S. 519 (1983).

121. *Conte Bros.*, 165 F.3d at 228 (internal quotation marks omitted).

122. 520 U.S. 154 (1997).

123. Pub. L. 93-205, 87 Stat. 884 (1973) (codified as amended in scattered sections of 16 U.S.C.).

124. *Bennett*, 520 U.S. at 164 n.2.

125. *Id.* at 162–66 (stating that the Endangered Species Act of 1973 negated the zone of interests test, a generally recognized prudential standing doctrine). The zone of interests test requires the “plaintiff’s grievance [to] arguably fall within the zone of interests protected or regulated by the statute or constitutional guarantee invoked in the suit.” *Id.* at 162.

126. See *id.* at 165–66.

127. *Id.*

cases, the *Conte Bros.* court concluded that the plain language of section 43(a) did not negate the applicability of prudential standing limitations.¹²⁸ Further, the court stated that its conclusion did not distort to the plain meaning of the statute because “Congress intends to incorporate prudential standing principles unless it expresses its desire to negate them.”¹²⁹

The *Conte Bros.* court then considered the text of section 43(a) to discern congressional intent.¹³⁰ The ESA, at issue in *Bennett*, allowed “any person [to] commence a civil suit,” and the Supreme Court noted that this was “an authorization of remarkable breadth when compared with the language Congress ordinarily uses.”¹³¹ The Third Circuit found this language broader than the relevant language of section 43(a)—“any person who believes that he or she is or is likely to be damaged” by the proscribed conduct.¹³² It was “significant” to the court that those entitled to sue under section 43(a) must be able to “trace their injury to the anti-competitive conduct proscribed by the Act.”¹³³ Thus, the court concluded that the statutory text supported its finding that Congress did not negate prudential standing in passing section 43(a).¹³⁴

Next, the *Conte Bros.* court found that the structure of the Lanham Act supported its conclusion that Congress did not intend to remove prudential standing limitations.¹³⁵ The Court looked to section 45 of the Lanham Act, where Congress specified its intent in passing the Act¹³⁶:

The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce¹³⁷

The court stated that “[t]his section makes clear that the focus of the statute is on anti-competitive conduct in a commercial context.”¹³⁸ The court therefore reasoned that “[c]onferring standing to the full extent implied by the text of § 43(a)” would contradict the purpose of the Lanham Act by giving standing to parties, such as consumers, that did not suffer a competitive or commercial injury.¹³⁹ Thus, the Third Circuit concluded

128. See *Conte Bros. Auto. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 228 (3d Cir. 1998).

129. *Id.*

130. *Id.*

131. *Bennett*, 520 U.S. at 164–65 (internal quotation marks omitted).

132. *Conte Bros.*, 165 F.3d at 228.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. 15 U.S.C. § 1127 (2000).

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

139. *Id.* The court noted that this would also contradict its precedent—and that of other circuit courts—which holds that consumers lack standing to bring a Lanham Act false advertising claim. *Id.*

that congressional intent in enacting the Lanham Act, “far from indicating an express intent to abrogate prudential standing doctrine, evidences an intent to limit standing to a narrow class of potential plaintiffs possessing interests the protection of which furthers the purposes of the Lanham Act.”¹⁴⁰

Finally, the *Conte Bros.* court concluded its analysis by examining the legislative history of the Lanham Act.¹⁴¹ The court noted that the Senate reports regarding both the Lanham Act and its 1988 amendments focused on commercial, anticompetitive conduct.¹⁴² The court also noted that in enacting the Lanham Act, Congress sought to unify federal trademark law, which previously was governed by several statutes “scattered throughout the United States Code.”¹⁴³ These earlier statutes “defined the class of eligible plaintiffs narrowly” and were “drafted against the backdrop of common law doctrine similar to today’s prudential standing doctrine that limited the eligible plaintiff class.”¹⁴⁴ The court found nothing in the Lanham Act’s legislative history to demonstrate an intention to change significantly the class of plaintiffs entitled to bring suit.¹⁴⁵ Thus, the Lanham Act’s legislative history supported the court’s conclusion that Congress did not intend to abrogate prudential standing limitations of section 43(a) plaintiffs.¹⁴⁶

In sum, courts agree that standing limitations beyond those required by Article III are necessary for section 43(a) false advertising claims. However, prudential standing limitations have not been precisely defined,¹⁴⁷ and there is “no single overarching test” to determine standing under a given statute.¹⁴⁸ Thus, courts are free to develop their own standing tests. This freedom, however, has led to considerable disagreement among the circuit courts as to what constitutes section 43(a) standing. Part II of this Note examines the differing standards applied by the circuit courts.

II. THE THREE APPROACHES TO DETERMINING STANDING FOR SECTION 43(a) FALSE ADVERTISING CLAIMS

This part provides a detailed discussion of the three general approaches to section 43(a) standing currently adopted by the circuit courts. Part II.A covers the approach developed by the U.S. Court of Appeals for the Ninth

140. *Id.* The court further reasoned that the Lanham Act’s commercial subject matter and stated purpose distinguished it from the statute at issue in *Bennett*, where the environmental subject matter “readily admitted of a finding” that Congress intended to broaden standing to its Article III limit. *Id.*

141. *See id.* at 229–30.

142. *See id.*

143. *Id.* at 229.

144. *Id.* at 230.

145. *See id.* at 229.

146. *See id.* at 230.

147. *See supra* note 53 and accompanying text.

148. *See Conte Bros.*, 165 F.3d at 232.

Circuit, which requires the allegation of a discernibly competitive injury.¹⁴⁹ Part II.B discusses the approach taken by both the U.S. Courts of Appeals for the First and Second Circuits. These circuits require a plaintiff to demonstrate a “reasonable interest to be protected’ against the advertiser’s false or misleading claims” and a “causal nexus to the false advertising.”¹⁵⁰ Part II.C examines three circuits’ use of a five-factor standing test, originally used to determine federal antitrust standing.¹⁵¹

A. *The Ninth Circuit’s Discernibly Competitive Injury Approach*

In determining section 43(a) standing, the Ninth Circuit differentiates between section 43(a)(1)(A) false association claims and section 43(a)(1)(B) false advertising claims.¹⁵² A false association plaintiff need only allege an injury to a commercial interest caused by the defendant’s misuse of a trademark or wrongful identification of a product.¹⁵³ False advertising standing, however, is limited to competitors of the defendant—the plaintiff must allege a discernibly competitive injury.¹⁵⁴

The Ninth Circuit clarified this standing rule in *Waits v. Frito-Lay, Inc.*¹⁵⁵ The plaintiff, Tom Waits, was a professional singer, songwriter, and actor, who has a distinctive singing voice.¹⁵⁶ In a commercial for a product manufactured and sold by one of the defendants, the defendants used a newly recorded version of one of Waits’s songs.¹⁵⁷ The defendants hired a singer who did a “near-perfect imitation” of Waits.¹⁵⁸ After hearing the commercial, Waits sued for, among other things, false endorsement under the Lanham Act.¹⁵⁹ The defendants asserted that Waits lacked standing to bring the Lanham Act claim because he was not in competition with the defendants.¹⁶⁰

In resolving this issue, the court noted that two previous Ninth Circuit cases served as conflicting precedent. In *Smith v. Montoro*, the plaintiff was an actor who starred in a movie that the defendant was licensed to

149. See, e.g., *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1109 (9th Cir. 1992).

150. See, e.g., *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994) (quoting *PPX Enters. v. Autofidelity, Inc.*, 746 F.2d 120, 125 (2d Cir. 1984)); *Camel Hair and Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 11–12 (1st Cir. 1986) (requiring a “reasonable interest in being protected against false advertising” and a demonstrated “link or ‘nexus’ between itself and the alleged falsehood”).

151. See, e.g., *Conte Bros.*, 165 F.3d at 233.

152. See *Waits*, 978 F.2d at 1109–10.

153. *Id.*

154. *Id.* at 1109.

155. *Id.* at 1109–10 (holding that, while false association standing is not limited to competitors, false advertising plaintiffs must allege a discernibly competitive injury).

156. *Id.* at 1097–98.

157. *Id.*

158. *Id.* at 1097.

159. *Id.* at 1098. False endorsement is a type of claim encompassed by section 43(a)(1)(A), which is the false association subsection of section 43(a). See *id.* at 1107 & n.7 (reciting and emphasizing the language of this subsection).

160. *Id.* at 1107.

distribute.¹⁶¹ The plaintiff's contract allegedly provided that the plaintiff would receive star billing in both the screen credits and advertisements.¹⁶² The plaintiff alleged that the defendant used another actor's name in both the credits and advertisements and brought multiple claims against the defendant, including "false designation or representation" in violation of section 43(a) of the Lanham Act.¹⁶³ The court analogized the defendant's conduct to trademark infringement,¹⁶⁴ and found that, like cases of trademark infringement, the defendant's conduct was "an attempt to misappropriate or profit from [the plaintiff's] talents and workmanship."¹⁶⁵ The *Smith* court then stated that, to have standing under section 43(a), "the plaintiff . . . need not be in actual competition with the alleged wrongdoer."¹⁶⁶ Instead, the "dispositive" standing question "is whether the party 'has a reasonable interest to be protected against false advertising.'"¹⁶⁷ The court stated that actors have a "vital interest" in receiving proper credit for their work, and thus held that the plaintiff had standing to bring a section 43(a) claim.¹⁶⁸

However, in *H.B. Halicki v. United Artists Communications, Inc.*,¹⁶⁹ the Ninth Circuit reached an opposite conclusion. The plaintiff in that case produced a movie that was designed to appeal to a teenage and young adult audience.¹⁷⁰ The movie was awarded a PG rating, but the defendant film distributors advertised the movie as being rated R.¹⁷¹ The film was a box office failure, and the plaintiff brought a section 43(a) claim alleging that this failure resulted from defendants' misrepresentations of the film's rating.¹⁷² The court noted that the Lanham Act is "directed against unfair competition."¹⁷³ Therefore, the *Halicki* court held that, "[t]o be actionable, [the defendant's] conduct must not only be unfair but must in some discernible way be competitive."¹⁷⁴ The court stated that, in cases of false

161. *Smith v. Montoro*, 648 F.2d 602, 603 (9th Cir. 1981).

162. *Id.*

163. *Id.* at 603–04 (internal quotation marks omitted). It should be noted that section 43(a) had not been amended to its current form at the time of this case. This claim was brought under the original section 43(a), which did not have separate provisions distinguishing false advertising and false association claims. See *supra* note 94 for the original text, which created causes of action for "a false designation of origin, or any false description or representation." However, the amendments did not substantively change the operative standing language. See *Conte Bros. Auto. v. Quaker State-Slick* 50, 165 F.3d 221, 230 n.4 (3d Cir. 1998).

164. *Waits*, 978 F.2d at 1107 (discussing *Smith*).

165. *Smith*, 648 F.2d at 607.

166. *Id.*

167. *Id.* at 608 (quoting 1 Rudolf Callmann, *The Law of Unfair Competition Trademarks and Monopolies* § 18.2(b), at 625 (3d ed. 1967)).

168. *Id.*

169. 812 F.2d 1213 (9th Cir. 1987).

170. *Id.* at 1213.

171. *Id.*

172. *Id.* As in *Smith*, section 43(a) had not been amended to its current form at the time of this case.

173. *Id.* at 1214.

174. *Id.*

designation, if section 43(a) standing was not confined to “injury to a competitor,” section 43(a) would “become[] a federal statute creating the tort of misrepresentation,” which would “dilut[e] . . . the concept of unfair competition.”¹⁷⁵ Thus, because the plaintiff and the defendant were not competitors, the court held that the plaintiff did not state an actionable section 43(a) claim.¹⁷⁶

The *Waits* court, however, reconciled this apparent conflict. It started by noting that “the basic principle” embodied by both cases is that section 43(a) standing exists where the plaintiff asserts a commercial interest protected by the Lanham Act.¹⁷⁷ The court then noted that two purposes of the Lanham Act are “to make ‘actionable the deceptive and misleading use of marks in . . . commerce’ and ‘to protect persons engaged in . . . commerce against unfair competition.’”¹⁷⁸ The court stated that, by providing bases of liability for both false association and false advertising, section 43(a) reflects both purposes.¹⁷⁹

The *Waits* court followed this reasoning and distinguished the two conflicting cases, stating that the claim in *Halicki* was “exclusively” a “false advertising” claim, as it sought to redress “a simple misrepresentation as to a product’s quality” and the “use of trademarks were irrelevant to [the plaintiff’s] claim.”¹⁸⁰ Such a claim, according to the court, is “not related to the Lanham Act’s purpose of preventing the ‘deceptive and misleading use of marks.’”¹⁸¹ Thus, the court concluded that, “where the misrepresentation simply concerns a product’s qualities,” it is only actionable to serve “the Lanham Act’s other purpose of preventing ‘unfair competition,’” and that, “[i]n such cases, *Halicki* counsels that a discernibly competitive injury must be alleged.”¹⁸²

Smith, on the other hand, involved “a false association claim stemming from the misuse of a mark, for it alleged the wrongful removal of the plaintiff’s name and the wrongful substitution of another’s name.”¹⁸³ Because such a claim reflects the Lanham Act’s purpose of preventing the “deceptive and misleading use of marks,” serving the “unfair competition” purpose is unnecessary.¹⁸⁴ Therefore, the *Waits* court held that standing to bring false association claims is not limited to competitors.¹⁸⁵ The alleged injury must still be commercial, however.¹⁸⁶ Thus, the court stated that those with standing to bring a false association claim “include parties with a

175. *Id.*

176. *Id.*

177. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1108 (9th Cir. 1992).

178. *Id.* (omissions in original) (quoting 15 U.S.C. § 1127 (2000)).

179. *Id.*

180. *Id.* at 1109 (internal quotation marks omitted).

181. *Id.* (quoting 15 U.S.C. § 1127).

182. *Id.*

183. *Id.*

184. *See id.* (internal quotation marks omitted).

185. *See id.*

186. *See id.*

commercial interest in the product wrongfully identified with another's mark, as in *Smith*, or with a commercial interest in the misused mark."¹⁸⁷

As just explained, the Ninth Circuit's approach to section 43(a) standing differentiates between false association and false advertising claims. A party bringing a false advertising action must be a competitor of the defendant,¹⁸⁸ while a false association plaintiff need not be—all that is required is an allegation of a commercial injury.¹⁸⁹ Thus, in *Waits*, the Ninth Circuit held that the plaintiff had standing to bring a claim under section 43(a).¹⁹⁰ The plaintiff's claim of false endorsement—based on the misuse of his identity as a celebrity—was a type of false association claim, rendering the noncompetitive relationship of the parties irrelevant for standing purposes.¹⁹¹ The U.S. Courts of Appeals for the Seventh and Tenth Circuits have since adopted the Ninth Circuit's approach.¹⁹² However, other courts and commentators have been critical of the Ninth Circuit's standing rule.

Both cases and commentaries have criticized the Ninth Circuit's approach for distinguishing between the two types of section 43(a) claims and for requiring false advertising plaintiffs to be in competition with the defendant. Professor J. Thomas McCarthy describes *Halicki*—the case that first required the plaintiff to be in competition with the defendant¹⁹³—as an “aberration in the history of court interpretation of § 43(a).”¹⁹⁴ McCarthy rejects the Ninth Circuit's rule requiring a discernibly competitive injury, stating that “[t]he passé semantic argument that there cannot be ‘unfair competition’ without ‘competition’ between the parties has often been rejected.”¹⁹⁵ The Third Circuit explicitly rejected the Ninth Circuit's

187. *Id.* The court noted that competition between the parties is not completely irrelevant. Though it does not affect the standing inquiry, competition is relevant to the court's analysis of the claim's merits. *See id.* at 1109 n.9.

188. *See supra* notes 180–82 and accompanying text.

189. *See supra* notes 185–87 and accompanying text.

190. *Waits*, 978 F.2d at 1110.

191. *Id.*

192. *See Stanfield v. Osborne Indus., Inc.*, 52 F.3d 867, 873 (10th Cir. 1995) (citing *Waits*, 978 F.2d at 1109) (stating that, “to have standing for a false advertising claim, the plaintiff must be a competitor of the defendant and allege a competitive injury”); *L.S. Heath & Son, Inc. v. AT&T Info. Sys., Inc.*, 9 F.3d 561, 575 (7th Cir. 1993) (citing *Waits*, 978 F.2d at 1109) (requiring that a false advertising plaintiff “assert a discernible competitive injury”).

193. *See supra* notes 169–76 and accompanying text.

194. McCarthy, *supra* note 66, § 27:32, at 27-67. J. Thomas McCarthy notes that the Ninth Circuit “candidly admit[ted]” that *Halicki* was inconsistent with circuit precedent, which allowed noncompetitor plaintiffs to bring false representation claims in factually similar situations. *Id.*

195. *Id.*; *see also* James S. Wrona, *False Advertising and Consumer Standing Under Section 43(a) of the Lanham Act: Broad Consumer Protection Legislation or a Narrow Pro-Competitive Measure?*, 47 Rutgers L. Rev. 1085, 1136–38 (1995) (stating that the dichotomy in the Ninth Circuit's approach is “hard to justify” and that *Smith*'s reasonable interest test should govern under both prongs of section 43(a)). Wrona notes that although the Ninth Circuit in *Waits* cited McCarthy in support of its position, McCarthy favors treating both prongs of section 43(a) the same for procedural matters such as standing. *Id.* at 1136. The court in *Guarino v. Sun Co.*, 819 F. Supp. 405, 408–09 (D.N.J. 1993), also noted that

approach in *Conte Bros.*¹⁹⁶ The court stated that the text of section 43(a) provided no support for distinguishing between the two types of claims because the operative standing language was the same for both prongs of the statute.¹⁹⁷ In sum, cases and commentaries have criticized the two defining aspects of *Waits*'s holding—that the two subsections of section 43(a) warrant different standing rules, and that a false advertising plaintiff must be a competitor of the defendant.

B. *The First and Second Circuits' Reasonable Interest Approach*

The First and Second Circuits take nearly identical approaches to section 43(a) standing. Unlike the Ninth Circuit, these circuits do not draw a distinction between the two prongs of section 43(a), nor do they require competition between the parties. Instead, these circuits focus on the nature of the plaintiff's allegedly harmed interest and on the causal connection between the plaintiff's interest and the defendant's false advertising.

1. The First Circuit

In *Quabaug Rubber Co. v. Fabiano Shoe Co.*, the First Circuit addressed a section 43(a) false designation and description claim.¹⁹⁸ The claim alleged that the defendant improperly used the plaintiff's trademarked label on its products.¹⁹⁹ The court stated that the "basis for an action under [section 43(a)] is use of a mark in interstate commerce which is likely to cause confusion or to deceive purchasers concerning the source of the goods."²⁰⁰ The First Circuit then held that parties have standing to sue under section 43(a) if they "may suffer adverse consequences" as a result of a violation of the statute, "regardless of whether [they are] the registrant of a trademark."²⁰¹ In support of this conclusion, the court cited Rudolf Callmann's treatise on unfair competition for the proposition that the "'dispositive question' is whether plaintiff 'has a reasonable interest to be protected against false advertising.'"²⁰² The court then concluded that the plaintiff "showed a sufficient nexus between itself and the alleged conduct of [the defendant] to confer standing to sue."²⁰³

The First Circuit clarified this holding in *Camel Hair & Cashmere Institute of America, Inc. v. Associated Dry Goods Corp.*²⁰⁴ There, the

McCarthy "states flatly" that the same standing criteria should apply to both prongs of section 43(a).

196. 165 F.3d 221 (3d Cir. 1998).

197. *Id.* at 232; see also *infra* text accompanying notes 249–50.

198. *Quabaug Rubber Co. v. Fabiano Shoe Co.*, 567 F.2d 154, 160 (1st Cir. 1977). Like *Smith* and *Halicki*, the claim in this case was brought under the prior version of section 43(a). See *supra* note 94 for the text of this version of the statute.

199. *Id.* at 157.

200. *Id.* at 160.

201. *Id.*

202. *Id.* (quoting 1 Callmann, *supra* note 167, § 18.2(b), at 625).

203. *Id.*

204. 799 F.2d 6 (1st Cir. 1986).

plaintiff was a nonprofit corporation whose goal was to promote and protect the interests of the cashmere and camel hair industry.²⁰⁵ Plaintiff alleged that defendants sold and marketed cashmere coats that had substantially less cashmere than was indicated on their labels.²⁰⁶ Although this case involved marketing of falsely advertised products and *Quabaug* involved the improper use of a trademark, section 43(a) had yet to be amended and thus did not recognize these as two separate causes of action.²⁰⁷ Therefore, the *Camel Hair* court followed *Quabaug* and stated that “the dispositive question in determining whether a plaintiff is a proper person to bring a claim under the Lanham Act, is whether the plaintiff has a reasonable interest in being protected against false advertising.”²⁰⁸ The court noted that this standard does not require the plaintiff to be a competitor of the defendant.²⁰⁹ However, the court stated that the reasonable interest requirement “does not mean that it is sufficient for the plaintiff merely to establish a falsehood in the defendant’s advertising or marketing; the plaintiff must also show a link or ‘nexus’ between itself and the alleged falsehood.”²¹⁰

Applying this rule, the *Camel Hair* court held that, although the plaintiff’s members²¹¹ did not compete with the defendant, their position as manufacturers and marketers of cashmere gave them a “strong interest in preserving cashmere’s reputation as a high quality fibre.”²¹² The court found this a “sufficient nexus to the alleged wrong” to provide the plaintiff’s members standing to sue.²¹³ *Camel Hair* represents the current state of First Circuit law on this issue. Thus, in the First Circuit, standing depends not on the relationship between the parties—as in the Ninth Circuit—but on the interest the plaintiff is seeking to protect and the connection between that interest and the false advertising.

2. The Second Circuit

The Second Circuit’s approach to section 43(a) standing is similar to the First Circuit’s approach. To have standing to bring a section 43(a) false advertising claim in the Second Circuit, a plaintiff “must demonstrate a reasonable interest to be protected against the advertiser’s false or misleading claims, and a reasonable basis for believing that this interest is

205. *Id.* at 7.

206. *Id.* at 7–8.

207. *See supra* note 198.

208. *Camel Hair*, 799 F.2d at 11.

209. *Id.*

210. *Id.* at 11–12.

211. Although the plaintiff was the nonprofit corporation, the Lanham Act standing issue arose in the context of the ability of the plaintiff corporation’s individual members—all cashmere or camel hair marketers or manufacturers—to sue in their own right. *See id.* at 7, 11.

212. *Id.* at 12.

213. *Id.*

likely to be damaged by the false or misleading advertising.”²¹⁴ The reasonable interest prong “includes commercial interests, direct pecuniary interests, and even a future potential for a commercial or competitive injury.”²¹⁵ The reasonable basis prong requires the plaintiff to show “both likely injury and a causal nexus to the false advertising.”²¹⁶ The Second Circuit’s approach to the injury and causation requirements is a flexible one.²¹⁷ A plaintiff is not required to be in direct competition with the defendant and does not have to demonstrate “definite[] lost sales because of the defendant’s advertisements.”²¹⁸ However, a plaintiff “must show more than a ‘subjective belief’ that it will be damaged.”²¹⁹ In addition, “[t]he likelihood of injury and causation will not be presumed, but must be demonstrated in some manner.”²²⁰

The factual circumstances of a particular case play an important role in determining the “type and quantity of proof” needed to show injury and causation.²²¹ In general, the Second Circuit has required a “more substantial showing” where the parties’ products do not compete or where the defendant’s advertisements do not directly compare the products.²²² Thus, in *McNeilab, Inc. v. American Home Products Corp.*, the court held that the district court did not err in presuming harm where the defendant’s advertisement made “[a] misleading comparison to [plaintiff’s] specific competing product.”²²³ Meanwhile, in *Johnson & Johnson v. Carter-Wallace, Inc.*, the court required the plaintiff to make a showing of injury and causation where the parties were indirect competitors and the defendant’s commercial did not compare the parties’ products.²²⁴

214. *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994) (citation and internal quotation marks omitted).

215. *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 169 (2d Cir. 2007).

216. *Ortho Pharm.*, 32 F.3d at 694.

217. *See id.*

218. *Id.*

219. *Id.*

220. *Id.* (alteration in original) (quoting *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 316 (2d Cir. 1982)).

221. *Id.*

222. *Id.*

223. *McNeilab, Inc. v. Am. Home Prods. Corp.*, 848 F.2d 34, 38 (2d Cir. 1988).

224. *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 190 (2d Cir. 1980). The court considered the parties indirect competitors because the plaintiff’s baby oil and lotion—which could be used as shaving cream substitutes and as moisturizers after shaving or use of depilatories—and defendant’s depilatory product competed in the “broad[] hair removal market,” but they did not directly compete in the “narrower depilatory market.” *Id.* Though a showing of injury and causation was required, the court did not require the plaintiff to show “specific evidence that [the defendant’s] ads actually resulted in some definite loss of sales.” *Id.* The court stated that the proper standard “is whether it is *likely* that [the defendant]’s advertising has caused or will cause a loss of [the plaintiff’s] sales.” *Id.* Thus, the plaintiff’s showing of actual loss of sales combined with witness testimony and consumer surveys indicating that consumers thought they would not need to use the plaintiff’s product if they used the defendant’s product—even though the two products were in reality designed to serve different purposes—was sufficient. *See id.* at 190–91; *see also Coca-Cola*, 690 F.2d at 316 n.2 (“[I]n *Johnson & Johnson* the element of competition had to

*C. The Five-Factor Standing Test Used by
the Third, Fifth, and Eleventh Circuits*

In addition to the approaches discussed above, three circuits determine section 43(a) false advertising standing through use of a five-factor test.²²⁵ Though the Third Circuit was the first to employ this test in the context of section 43(a) false advertising, the test was first developed by the Supreme Court to determine standing under federal antitrust law.²²⁶ Part II.C.1 outlines the origins of this test in the antitrust context. Part II.C.2 discusses *Conte Bros.*, where the Third Circuit became the first court to employ the test in a section 43(a) case. Part II.C.3 briefly covers the Fifth Circuit's adoption of the test. Part II.C.4 examines *McDonald's*, where the Eleventh Circuit added to the section 43(a) standing debate by using the five-factor test to deny standing to a direct competitor.

1. The Development of the Five-Factor Standing Test
for Use in Federal Antitrust Law

The Supreme Court case *Associated General* arose out of a dispute over a multiemployer collective bargaining agreement.²²⁷ The issue facing the Court was whether the plaintiffs alleged a sufficient injury under the federal antitrust laws to recover treble damages under section 4 of the Clayton Act.²²⁸ Section 4 defines the class of plaintiffs who may bring a private action for damages under the antitrust laws and provides for the recovery of treble damages.²²⁹ Its relevant standing language is as follows: “[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States”²³⁰ After attempting to discern the congressional intent behind section 4 by scrutinizing its legislative history,²³¹ the Court set forth a list of factors for courts to analyze when determining if a given plaintiff is in the class defined by section 4²³²: (1) whether the nature of the plaintiff's alleged injury is “of a type that Congress sought to redress in providing a private remedy for violations of

be proven because the two products . . . were not obviously competing for the same consumer dollars.”)

225. See *infra* Part II.C.2–4.

226. See *infra* Part II.C.1.

227. *Associated Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 520 (1983).

228. *Id.* at 521.

229. *Id.* at 529; see also 15 U.S.C. § 15 (2000).

230. 15 U.S.C. § 15(a).

231. See *Associated Gen.*, 459 U.S. at 529–35. The Court noted that, read literally, the statute was broad enough to cover any harm directly or indirectly attributable to an antitrust violation. *Id.* at 529. The Court sought to determine whether Congress intended such a broad interpretation. *Id.* at 530. The Court concluded, “It is plain . . . that the question whether the [plaintiff] may recover . . . cannot be answered simply by reference to the broad language of § 4. Instead . . . the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.” *Id.* at 535.

232. See *id.* at 536 n.33.

the antitrust laws,"²³³ (2) "the directness or indirectness of the asserted injury,"²³⁴ (3) the remoteness of the plaintiff to the injurious antitrust violation,²³⁵ (4) whether the damages claim is speculative,²³⁶ and (5) the risk of duplicate recoveries or the complex apportionment of damages.²³⁷

2. The Third Circuit Adopts the *Associated General* Test for Section 43(a) Standing

In *Conte Bros.*, the plaintiffs were a class of retailers that sold products that competed with the defendant's product.²³⁸ The question facing the Third Circuit was whether the plaintiffs had standing to bring a section 43(a) false advertising claim.²³⁹ After finding that plaintiffs had Article III standing,²⁴⁰ the court went through a detailed analysis of section 43(a) and determined that prudential standing limitations applied to section 43(a).²⁴¹

The district court in *Conte Bros.* held that a plaintiff must either be in direct competition with the defendant or acting as a surrogate of a direct competitor to have standing.²⁴² The district court found that the plaintiffs were not in a competitive relationship with the defendant and dismissed the claim.²⁴³ The Third Circuit stated that this holding was "in some tension" with its precedent.²⁴⁴ In *Thorn v. Reliance Van Co.*, the Third Circuit held that the "dispositive question" in determining section 43(a) standing was "whether the party has a reasonable interest to be protected against false advertising."²⁴⁵ The Third Circuit noted that its subsequent decisions maintained the reasonable interest requirement and "grappled with defining the term with greater precision."²⁴⁶ In one such case, the Third Circuit

233. *Id.* at 538.

234. *Id.* at 540. In examining this factor, the Court looked to the causal chain between the alleged injury and alleged antitrust violation. *Id.*

235. *Id.* at 541–42. The Court stated that "[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." *Id.* at 542.

236. *Id.* at 542. The Court noted that in past cases it had stated that "it is appropriate for § 4 purposes 'to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm.'" *Id.* at 543 (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 475 n.11 (1982)).

237. *Id.* at 543–44. The Court noted that prior cases identified the "strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." *Id.* at 543. The Court also stated that "massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits." *Id.* at 545.

238. *Conte Bros. Auto. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 223 (3d Cir. 1998).

239. *Id.*

240. *Id.* at 225.

241. *See Conte Bros.*, 165 F.3d at 227–30; *see also supra* Part I.C (discussing this holding in detail).

242. *Conte Bros.*, 165 F.3d at 224.

243. *Id.*

244. *Id.* at 231.

245. *Thorn v. Reliance Van Co.*, 736 F.2d 929, 933 (3d Cir. 1984) (internal quotation marks omitted).

246. *Conte Bros.*, 165 F.3d at 231.

attempted to clarify its reasonable interest requirement by quoting Callmann's treatise: "Indeed, the statute goes further in recognizing that the plaintiff need not even be 'in . . . competition with defendant'; it will be sufficient . . . that [the plaintiff] believes he is or is likely to be damaged, because, for instance, the parties are doing business on different economic levels."²⁴⁷ As this language conflicted with the district court's holding requiring competition, the *Conte Bros.* court sought to determine the proper test for section 43(a) false advertising standing.²⁴⁸

The Third Circuit began its analysis with a discussion of the Ninth Circuit's "dichotomous" approach.²⁴⁹ The Third Circuit found that section 43(a)'s "operative" standing language—"any person who believes that he or she is or is likely to be damaged"—did not provide support for distinguishing between false advertising and false association claims.²⁵⁰ Further, it noted that subsequent cases and commentaries criticized the Ninth Circuit's reasoning.²⁵¹ In short, the Third Circuit rejected the Ninth Circuit's approach.²⁵²

The *Conte Bros.* court then adopted the Supreme Court's antitrust standing test—developed in *Associated General*—as the test for determining statutory standing under section 43(a), finding it "an appropriate method for adding content to our 'reasonable interest' test."²⁵³ The court also recognized that applying the *Associated General* test to section 43(a) had the support of "two prominent commentators in the area."²⁵⁴ The Third Circuit stated the factors as follows:

- (1) The nature of the plaintiff's alleged injury: Is the injury "of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws"?
- (2) The directness or indirectness of the asserted injury.
- (3) The proximity or remoteness of the party to the alleged

247. *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1176–77 (3d Cir. 1993) (quoting 1 Callmann, *supra* note 167, § 18.2(b), at 625 (footnote omitted)).

248. *See Conte Bros.*, 165 F.3d at 231.

249. *See id.* at 232. For a discussion of the Ninth Circuit's approach, see *supra* Part II.A.

250. *Conte Bros.*, 165 F.3d at 232.

251. *Id.* *See supra* notes 193–97 and accompanying text for a discussion of the criticisms of the Ninth Circuit's approach.

252. *Conte Bros.*, 165 F.3d at 232–33.

253. *Id.* at 233.

254. *Id.* The "two prominent commenta[ries]" the court referred to were McCarthy's treatise on trademarks and unfair competition and the Restatement (Third) of Unfair Competition. *Id.* "In the author's opinion, some limit on the § 43(a) standing of persons remote from the directly impacted party should be applied by analogy to antitrust law, such as use of the criteria listed in *Associated General* . . ." *Id.* (quoting 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 27:32 n.1 (4th ed. 1996)). "In determining whether an asserted injury is sufficiently direct to justify the imposition of liability, the Supreme Court's analysis of similar issues under federal antitrust law may offer a useful analogy." *Id.* (quoting Restatement (Third) of Unfair Competition § 3 cmt. f, reporter's note (1995)).

injurious conduct. (4) The speculativeness of the damages claim. (5) The risk of duplicative damages or complexity in apportioning damages.²⁵⁵

Applying this test, *Conte Bros.* held that the plaintiffs lacked standing.²⁵⁶ For the first factor, the court reasoned that, although there may be situations in which a noncompetitor has standing to sue, “the focus of the Lanham Act is on *commercial* interests [that] have been harmed . . . and in secur[ing] to the business community the advantages of reputation and good will.”²⁵⁷ While the plaintiffs raised a commercial interest, they did not allege either a competitive harm or harm to their goodwill or reputation.²⁵⁸ Thus, the alleged harm was “not of the ‘type that Congress sought to redress’ by enacting the Lanham Act.”²⁵⁹ The court also ruled that the plaintiffs’ remoteness to the harmful conduct weighed against standing because a class of persons existed—manufacturers of the products that compete with the defendant’s product—that were more directly harmed.²⁶⁰ Further, the court found that the damages suffered by the plaintiffs were, if not speculative, avoidable.²⁶¹ The plaintiffs were retailers, and there was no indication that they could not sell defendant’s product, which would have eliminated any damages.²⁶² Finally, the court stated that there was a risk of duplicative damages, as giving a cause of action to every retailer would subject defendants to multiple liability for the same conduct and allow “an enormous number of relatively insignificant cases [to be] litigated in the federal courts.”²⁶³

255. *Id.* at 233 (citations omitted) (quoting *Associated General*, 459 U.S. at 538, 540, 542, 543–44). In the context of section 43(a), the relevant inquiry in the first factor is whether the injury is one that Congress sought to redress for violations of the Lanham Act, not the antitrust laws.

256. *Id.* at 234.

257. *Id.* (alterations in original) (internal quotation marks omitted).

258. *Id.*

259. *Id.* (quoting *Associated General*, 459 U.S. at 538).

260. *Id.*

261. *Id.* at 235.

262. *Id.*

263. *Id.* Note that the analysis under the *Associated General* test is similar in many respects to the analysis under the First and Second Circuits’ reasonable interest approach. Similar inquiries are made when trying to establish a reasonable interest and a reasonable basis as when considering the nature and directness of the injury under the *Associated General* test. See, e.g., *Phoenix of Broward, Inc. v. McDonald’s Corp.*, 489 F.3d 1156, 1169–70 (11th Cir. 2007) (determining the directness factor by analyzing plaintiff’s alleged causal chain); *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994) (stating that the reasonable basis prong requires plaintiff to show a causal nexus to the false advertising); *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 11 (1st Cir. 1986) (requiring a plaintiff to “show a link or ‘nexus’ between itself and the alleged falsehood” to establish a reasonable interest). The *Associated General* test requires that the alleged injury harm either a commercial interest or the goodwill and reputation of the plaintiff. See *McDonald’s*, 489 F.3d at 1167–69. Courts applying the reasonable interest test have also recognized these injuries as the types that provide a plaintiff with a reasonable interest. See *ITC Ltd. v. Punchgini, Inc.*, 482 F.3d 135, 169 (2d Cir. 2007) (explaining that reasonable interests in the Second Circuit include “commercial interests, direct pecuniary interests, and even a future potential for a commercial or competitive injury”); *Camel Hair*, 799 F.2d at 12 (holding that plaintiff’s interest in

There has been a favorable reaction to the Third Circuit's decision to employ the *Associated General* test. Both the Fifth²⁶⁴ and Eleventh²⁶⁵ Circuits have subsequently adopted the test, and commentators have supported its use.²⁶⁶

3. The Fifth Circuit Follows *Conte Bros.* and Adopts the *Associated General* Test

The Fifth Circuit followed *Conte Bros.*'s reasoning in *Procter & Gamble Co. v. Amway Corp.*²⁶⁷ and adopted the *Associated General* test for section

maintaining the reputation of cashmere is a sufficient reasonable interest); *see also supra* text accompanying note 215. Courts applying the reasonable interest test have also considered the speculativeness of the damages factor of the *Associated General* test. *See, e.g., Ortho Pharm.*, 32 F.3d at 694–97 (explaining that the reasonable basis prong requires the plaintiff to demonstrate likely injury and denying standing because plaintiff did not offer sufficient evidence to demonstrate that it lost sales due to defendant's advertising). This is similar to the U.S. Court of Appeals for the Eleventh Circuit's analysis in *McDonald's*, where the damages factor weighed against standing because the plaintiff did not demonstrate that an "ascertainable percentage" of its lost sales were "directly attributable" to defendant's advertisements. *See McDonald's*, 489 F.3d at 1171; *infra* note 291 and accompanying text.

264. *See infra* Part II.C.3.

265. *See infra* Part II.C.4.

266. *See* Thomas L. Casagrande, *Recent Developments in Trademark Law*, 7 Tex. Intell. Prop. L.J. 463, 489 (1999) (stating that the Third Circuit's adoption of the five-factor standing test was sound); Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. Ark. Little Rock L. Rev. 283, 314 (2007) (arguing that courts should adopt the test as articulated in *Conte Bros.*). Professor Lemley writes that false advertising "in its purest form" is supplying the market with misinformation in an attempt to "misinform, influence, and persuade consumers. . . ." *Id.* at 289. In his view, the market contains optimal competitive conditions when some, but not all, of the misinformation is corrected. *See id.* at 310. He argues that "overenforcement" of section 43(a)—allowing it to eliminate all misinformation from the market—would have significant anticompetitive effects, with the end result being the total amount of information in the market dropping below optimal levels. *See id.* at 289–90. Thus, Lemley states that prudential standing limitations on section 43(a) are necessary to make actionable only those claims that help the market maintain optimal levels of accurate information. *Id.* at 311. Specifically, these limitations should address whether the defendant's conduct has caused the accuracy of information in the market to drop to an unacceptable level, and if so, what parties should be entitled to take corrective action and what the corrections should be. *Id.* Lemley argues that the *Associated General* test—which he refers to as the reasonable interest test—"strikes the appropriate balance between securing accurate information in the market and prohibiting anticompetitive conduct through overenforcement of section 43(a)." *Id.* at 310. In addition, he writes that the *Associated General* test serves the "ultimate purpose of section 43(a)" and constructs the proper policy framework "without narrowing false advertising," as it "seeks to grant standing when it would foster procompetitive behavior and to deny standing when it would foster anticompetitive behavior." *Id.* at 306. Further, the test "defined and provided the legal framework of the 'reasonable interest,'" which the Third Circuit's prior test failed to do. *Id.* at 300, 302. Lemley does, however, propose a "slight modification" to the directness of the injury factor. *Id.* at 314. Lemley would have courts consider whether the defendant's market is an information-distressed market—one that is based on and readily accepts misinformation. *See id.* In such cases, Lemley believes that indirect competitor standing is "desirable" since direct competitors will not remedy the misinformation. *See id.*

267. *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 560–63 (5th Cir. 2001).

43(a) standing. The complaint in *Procter & Gamble* alleged that the defendant made “fraudulent misrepresentations . . . to potential employees to convince them to work for and buy from [the defendant].”²⁶⁸ Though the plaintiff and defendant companies had competing products, the plaintiff did not allege a competitive injury; the defendant did not make false statements about its products or the plaintiff’s products, and there were no allegations of loss of goodwill or reputation.²⁶⁹ The court found that each of the five factors weighed against standing.²⁷⁰

4. The Eleventh Circuit Adopts the *Associated General* Test and Denies Standing to a Direct Competitor

The Eleventh Circuit recently added to the disagreement over section 43(a) standing in *McDonald’s* by holding that a direct competitor plaintiff failed to satisfy the *Associated General* test.²⁷¹ The section 43(a) false advertising claim in that case derived from a McDonald’s advertising campaign for several of its promotional games, such as “Monopoly Games at McDonald’s.”²⁷² These advertisements represented that all customers had an equal chance of winning the offered prizes and also stated the “specific odds of winning certain prizes, including the high-value prizes.”²⁷³ At least \$20 million of these high-value prizes were criminally “diverted” from the general public by the marketing company responsible for running the games.²⁷⁴ Before this fraud was exposed, the FBI informed McDonald’s that its prizes were not being distributed randomly.²⁷⁵ McDonald’s, however, continued to run the same advertisements for the games.²⁷⁶ The uncovering of the fraud led to multiple arrests, and in announcing them the U.S. attorney general stated that the “fraud scheme denied McDonald’s customers a fair and equal chance of winning.”²⁷⁷

268. *Id.* at 563.

269. *See id.*

270. *See id.* at 563–64.

271. *Phoenix of Broward, Inc. v. McDonald’s Corp.*, 489 F.3d 1156, 1173 (11th Cir. 2007). Note that the *McDonald’s* court refers to what this Note calls the *Associated General* test as the *Conte Bros.* test.

272. *Id.* at 1159. See *supra* notes 1–4 and accompanying text for an explanation of the games and prizes.

273. *McDonald’s*, 489 F.3d at 1159–60. The high-value prizes included automobiles and cash awards of up to \$1 million. *Id.* at 1159.

274. *Id.* at 1160. The company accomplished this by “embezzling winning, high-value game pieces and distributing them to a network of ‘winners’ who claimed . . . the prizes.” *Id.*

275. *Id.*

276. *Id.*

277. *Id.* In all, approximately fifty people “either pleaded guilty or were convicted in connection with the conspiracy.” *Id.* After the disclosure of this conspiracy, consumers brought multiple class actions against McDonald’s.” *Id.* McDonald’s settled the claims by, among other things, implementing an “Instant Giveaway” of fifteen \$1 million prizes to the general public. *Id.* McDonald’s stated that in total it awarded \$25 million in make-up prizes. See Eric Herman, *Burger King Franchisees Sue McDonald’s over Monopoly*, Chi. Sun-Times, Aug. 24, 2005, at 76.

The plaintiff, a Burger King franchisee, subsequently brought a section 43(a) false advertising claim on behalf of himself and approximately 1100 other Burger King franchisees.²⁷⁸ The plaintiff claimed that the promotional games “lured customers” from Burger King to McDonald’s—leading to an “unnatural” spike in McDonald’s profits, and that the games were “rigged”—specifically that the high-value prizes were diverted from customers, rendering the “advertising campaigns that touted million dollar prizes . . . literally false.”²⁷⁹ McDonald’s moved to dismiss on the ground that the plaintiff lacked prudential standing under the Lanham Act.²⁸⁰ Applying the *Associated General* test, the district court dismissed, and the plaintiff appealed.²⁸¹

This was an issue of first impression in the Eleventh Circuit.²⁸² The court began its analysis by concluding that the plaintiff satisfied the Article III standing requirements²⁸³ and that prudential standing limitations applied to section 43(a).²⁸⁴ In determining the proper prudential standing test for a section 43(a) false advertising claim, the court followed the Third and Fifth Circuits and adopted the *Associated General* five-factor test.²⁸⁵

Applying the factors, the court found that the plaintiff alleged the type of injury the Lanham Act was intended to redress, as the plaintiff asserted that its “commercial interests . . . ha[d] been harmed by a competitor’s false advertising.”²⁸⁶ As for the directness of the injury, the court found that, although the “causal chain [the plaintiff] alleges is similar to that of the typical false advertising claim” where a plaintiff alleges lost sales as a result of the defendant’s false or misleading statements about its own product, the plaintiff’s particular causal chain was too “attenuated” to weigh in favor of standing.²⁸⁷ The court found this causal chain to be tenuous because the only prizes affected by the false advertisements were “rare” high-value prizes.²⁸⁸ Thus, the injury would result from customers who would have eaten at Burger King but were lured to McDonald’s specifically because of the misrepresentations made about the “rare” high-value prizes.²⁸⁹

The third factor weighed in favor of standing, as the court found that there was no potential plaintiff class more proximate to the alleged injury than the class of Burger King franchisees that brought the action.²⁹⁰ The

278. *McDonald’s*, 489 F.3d at 1160.

279. *Id.*

280. *Id.*

281. *Id.* at 1161.

282. *Id.* at 1163.

283. *Id.* at 1161–62.

284. *Id.* at 1162–63.

285. *Id.* at 1163.

286. *Id.* at 1168–69 (quoting *Conte Bros. Auto. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 234 (3d Cir. 1998)).

287. *Id.* at 1169.

288. *See id.*

289. *Id.*

290. *Id.* at 1171. McDonald’s argued that its customers constituted such a class, but the court rejected this argument because consumers do not have Lanham Act standing. *Id.* at

court then stated that finding the fourth factor to favor standing would require a “conclu[sion] that an ascertainable percentage of both the increase in McDonald’s sales and the concomitant decrease in Burger King’s sales . . . is directly attributable to McDonald’s alleged misrepresentations about the chances of winning high-value prizes,” and the court held that the plaintiff’s alleged damages were too speculative to reach this conclusion.²⁹¹ Finally, the court found that giving this plaintiff class standing would create a risk of duplicative damages, as “then every fast food competitor of McDonald’s asserting that its sales had fallen by any amount during the relevant time period would *also* have prudential standing to bring such a claim,” which would “substantial[ly]” impact the federal courts.²⁹²

In the final analysis, two factors favored standing and three weighed against it, and the court held that the plaintiff lacked prudential standing.²⁹³ In reaching its conclusion, the Eleventh Circuit rejected an argument by the plaintiff that “‘direct competitors’ alleging a ‘competitive’ injury ‘invariably satisfy’ the *Associated General* requirements.”²⁹⁴ The court

1170. The court stated that, under this factor, the inquiry is “whether other *commercial entities* were the more appropriate parties to vindicate the competitive harm wrought by the defendant’s alleged misconduct.” *Id.*

291. *Id.* at 1171 (emphasis omitted). The plaintiff argued that at the pleading stage the focus should be on the allegations, and not on whether the plaintiff could “prove the exact number of customers lured to McDonald’s.” *Id.* See also *supra* notes 46–50 and accompanying text for a discussion of the pleading stage. The court rejected this argument, stating that “to ‘presume’ that [the plaintiff’s] allegations ‘embrace those specific facts that are necessary to support’ its claim to an appropriate share of McDonald’s profits from the compromised games requires too much conjecture.” *McDonald’s*, 489 F.3d at 1171 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

292. *McDonald’s*, 489 F.3d at 1172. Note that the analysis under this factor relates to the common law single source doctrine. The common law required proof of actual loss of sales. See *supra* note 75 and accompanying text. Thus, under the single source doctrine, unless the plaintiff and defendant were the only sources of the product subject to false advertising, it was nearly impossible for a plaintiff to state an actionable claim. See *supra* notes 75–78 and accompanying text. Similarly, the *McDonald’s* court held that this factor weighed against standing because of the presence of additional competitors of McDonald’s. See *McDonald’s*, 489 F.3d at 1172–73. Additionally, this factor of the *Associated General* test will weigh in favor of standing when the plaintiff and defendant are the only two sources of the product, as there will be no risk of duplicative damages or difficulties in apportioning the damages. Though this *Associated General* factor is grounded in judicial economy, not proof of causation, the presence of additional potential plaintiffs appears to affect its outcome much the same as under the common law. See *supra* note 237 and accompanying text.

293. See *McDonald’s*, 489 F.3d at 1173. It should be noted that the court would not have required all five factors to be satisfied for the plaintiff to have standing; it decided the case “on balance” of the five factors. *Id.* On the other hand, a plaintiff must meet each requirement of the reasonable interest test to have standing. See, e.g., *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994) (requiring plaintiffs to show both a “reasonable interest to be protected” from the false advertising and a “reasonable basis for believing that this interest is likely to be damaged,” which requires showing “both likely injury and a causal nexus to the false advertising” (internal quotation marks omitted)).

294. *McDonald’s*, 489 F.3d at 1167. The plaintiff argued that *Conte Bros.* adopted the five-factor test to extend prudential standing to parties not in “actual” or “direct” competition. *Id.* at 1164. According to the plaintiff, the five factors “inevitably collapse” into the Ninth Circuit’s approach when a “direct competitor” alleges a “competitive injury,”

stated that the five-factor test, rather than give standing simply because the plaintiff alleges he is a “competitor” with a “competitive injury,” is designed to determine “whether the injury alleged is the type of injury that the Lanham Act was designed to redress—harm to the plaintiff’s ‘ability to compete’” and damage to the plaintiff’s “‘good will and reputation.’”²⁹⁵

In support of this conclusion, the Eleventh Circuit stated that a federal district court—besides the *McDonald’s* district court—had previously denied standing to a “direct competitor[]” plaintiff under the five-factor test.²⁹⁶ In that case, *KIS, S.A. v. Foto Fantasy, Inc.*, the plaintiff and the defendant were both photo booth manufacturers.²⁹⁷ The plaintiff asserted claims under section 43(a) for both misrepresentation and false endorsement.²⁹⁸ The plaintiff based its misrepresentation claim on the defendant’s advertisements, which allegedly claimed that defendant’s photo booths were the only ones legitimately usable in Europe because of a patent.²⁹⁹ For the false endorsement claim, the plaintiff alleged that the defendant used Tom Cruise’s image to market its photo booths, even though the defendant did not own the right to use Tom Cruise’s likeness.³⁰⁰ The court held that the plaintiff failed to satisfy the second, fourth, and fifth factors of the *Associated General* test and lacked prudential standing.³⁰¹

Prior to trial, however, the parties stipulated to the invalidity of the patent at issue in the misrepresentation claim, and the plaintiff withdrew its request for damages for the misrepresentation.³⁰² Thus, a false advertising claim was not at issue in *KIS*, rather the only claim at issue was one of false endorsement under the false association prong of section 43(a).³⁰³ Therefore, the Eleventh Circuit’s statement in *McDonald’s* that *KIS* denied standing to a direct competitor false advertising plaintiff appears to be incorrect.³⁰⁴

and direct competitors therefore “invariably satisfy” the *Associated General* five-factor test. *Id.*

295. *Id.* at 1167 (quoting *Conte Bros. Auto. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 234–36 (3d Cir. 1998)).

296. *See id.* (citing *KIS, S.A. v. Foto Fantasy, Inc.*, 240 F. Supp. 2d 608, 610–11, 616 (N.D. Tex. 2002)).

297. *KIS*, 240 F. Supp. 2d at 610.

298. *Id.* at 609.

299. *Id.* at 609 n.1.

300. *Id.* at 609 n.2.

301. *Id.* at 616. The court refers to the *Associated General* test as the test adopted by the U.S. Court of Appeals for the Fifth Circuit in *Procter & Gamble*. *See id.*; *see also supra* Part II.C.3.

302. *KIS*, 240 F. Supp. 2d at 609.

303. *See, e.g.,* *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1110 (9th Cir. 1992) (describing a false endorsement claim as falling under the false association prong of section 43(a)); *see also* 43(B)log: False Advertising and More, <http://tushnet.blogspot.com/2007/06/mcdonalds-still-lovin-it.html> (June 29, 2007, 3:40 PM) (stating that *KIS* involved a false endorsement claim under section 43(a)(1)(A)—the false association prong).

304. *See* 43(B)log: False Advertising and More, *supra* note 303 (arguing that the Eleventh Circuit misread *KIS*).

McDonald's has been criticized for denying standing to a direct competitor. Professor Rebecca Tushnet argues for the five-factor test and asserts that “*Conte Bros.* depends on a background assumption that competitors enjoy standing and the only question is how much further that extends.”³⁰⁵ In her view, the *McDonald's* court treated the plaintiff’s argument that “direct competition was *sufficient* to create standing as an argument that direct competition was *necessary* to create standing.”³⁰⁶ When addressing this argument, the Eleventh Circuit stated that the five-factor test “is designed to determine whether the injury alleged is the type of injury that the Lanham Act was designed to redress—harm to the plaintiff’s ‘ability to compete’ . . . and . . . ‘good will and reputation’ that has been directly and proximately caused by the defendant’s false advertising.”³⁰⁷ Professor Tushnet, however, argues that the court’s reasons for denying standing relate only to the “directly and proximately caused” language and are in actuality questions of materiality and consumer effect³⁰⁸—two elements that a plaintiff must prove to succeed on the merits.³⁰⁹ Therefore, Tushnet argues that these questions should have been addressed at a later stage of the litigation where evidence could be considered, not at the pleadings stage where judges rely solely on their “hunches.”³¹⁰

305. 43(B)log: False Advertising and More, <http://tushnet.blogspot.com/2006/08/mcdonalds-is-lovin-it-burger-king.html> (Aug. 13, 2006, 7:41 AM).

306. 43(B)log: False Advertising and More, *supra* note 303. Rebecca Tushnet notes that the circuit courts disagree over whether direct competition is necessary for standing, but until this case had agreed that direct competition was sufficient to establish standing. *Id.*

307. *Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1167 (11th Cir. 2007).

308. 43(B)log: False Advertising and More, *supra* note 303. The *McDonald's* court found the second factor—directness of the injury—to weigh against standing because the plaintiff’s alleged causal chain was “tenuous” and “attenuated,” and the fourth factor—speculativeness of the damages—to weigh against standing because concluding that an ascertainable percentage of the plaintiff’s loss in sales was “directly attributable” to the misrepresentations in the advertisements would “require[] too much speculation.” *McDonald's*, 489 F.3d at 1169–71; *see also supra* notes 287–89, 291 and accompanying text.

309. *See Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 310–11 (1st Cir. 2002) (stating that the elements of a false advertising claim are that “the misrepresentation is material, in that it is likely to influence the purchasing decision,” and that “the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its intended audience”); *see also supra* notes 68–69 and accompanying text.

310. 43(B)log: False Advertising and More, *supra* note 303. In addressing the directness of the injury, the Eleventh Circuit stated that it was “[t]aking care not to conflate the prudential standing inquiry with the ‘materiality’ element [the plaintiff] must establish to succeed on the merits of its claim.” *McDonald's*, 489 F.3d at 1170. However, Tushnet argues that the court did exactly that. 43(B)log: False Advertising and More, *supra* note 303. To support this, she points to the court’s statement that the outcome might have been different “if, for example, the facts were such that McDonald’s had falsely advertised the odds of winning all of its prizes . . . or if McDonald’s were only giving away a single prize and falsely represented the odds of winning.” *McDonald's*, 489 F.3d at 1173. Tushnet notes that neither of these hypothetical facts related to the factors that weighed against standing—directness of the injury, speculativeness of the damages, and risk of duplicative damages—

The ultimate outcome in *McDonald's* may have resulted from its “unusual set of facts” in which (1) the McDonald’s advertisements did not address any attributes of their own products, plaintiff’s products, or any other product; (2) no ongoing advertisements were at issue; and (3) no injunctive relief was sought.³¹¹ If plaintiff had sued while the advertisements were still running and was requesting injunctive relief in addition to damages, the court would have had to change its analysis of the two damages factors in the *Associated General* test.³¹² Even though the plaintiff would still have had a difficult time proving its exact damages, this would not provide a reason for the court to deny plaintiff standing to sue for an injunction.³¹³ However, this result—that a section 43(a) plaintiff may have standing to sue for an injunction but not for damages—potentially serves as further evidence of the incorrectness of denying a direct competitor standing under the five-factor test.³¹⁴

III. SECTION 43(a) FALSE ADVERTISING STANDING SHOULD BE GOVERNED BY THE *ASSOCIATED GENERAL* TEST BUT COURTS SHOULD NOT USE THE TEST TO DENY STANDING TO DIRECT COMPETITORS

Section 43(a) of the Lanham Act has become an important and frequently invoked statute.³¹⁵ Its statutory language provides for a potential plaintiff class that is quite broad.³¹⁶ While courts have uniformly agreed that some prudential limitations on section 43(a) standing must exist,³¹⁷ there is

and states that the court reached its decision based on its view of materiality. 43(B)log: False Advertising and More, *supra* note 303. A similar criticism argues that the *McDonald's* decision is “troubling conceptually” and that applying the five-factor test to deny a direct competitor standing “seems unsound.” Lawrence Weinstein & Alexander Kaplan, *Barring Direct Competitor from Standing to Claim False Advertising*, N.Y. L.J., Oct. 1, 2007, at S6. The authors did not necessarily disagree with the end result of the case, but suggested that it should have been decided under materiality, not standing. *See id.* (“[The] plaintiff’s theory of causation and damages was highly dubious . . . and it was . . . highly unlikely that the ads contributed materially to any decline in the plaintiff[s] sales. But achieving this result by a questionable application of the prudential standing doctrine could cause further confusion in an already unsettled area.”). Additionally, though Lemley does not discuss *McDonald's*, he does state, in a general discussion of section 43(a) standing, that a competitor “clearly” has standing to bring a claim against another competitor based on the statutory language. Lemley, *supra* note 266, at 290.

311. Weinstein & Kaplan, *supra* note 310.

312. *See id.*

313. *See id.*

314. *See id.* (“[T]he notion that a party could have standing to sue for an injunction but not damages runs afoul of the statutory language and more than a half-century of Lanham Act jurisprudence.”). Lawrence Weinstein and Alexander Kaplan disagreed with the holding of *McDonald's*, but they noted that “[f]ortunately” the Eleventh Circuit made clear that its holding was limited to the “unusual” set of facts before it. *Id.*; *see also* 43(B)log: False Advertising and More, *supra* note 303 (predicting that future courts will limit *McDonald's* to its facts).

315. *See supra* notes 99–100, 111 and accompanying text.

316. The operative standing language is “any person who believes that he or she is or is likely to be damaged by such act.” 15 U.S.C. § 1125(a)(1) (2000).

317. *See supra* Part I.C.

considerable disagreement over the proper scope of these limitations.³¹⁸ Part II of this Note examined the three approaches to section 43(a) false advertising standing currently in use in the federal circuits. Part III advocates that courts should adopt the *Associated General* five-factor standing test because it is consistent with the purposes of the Lanham Act and strikes an appropriate balance between the Ninth Circuit's discernibly competitive injury approach and the reasonable interest approach employed by the First and Second Circuits.³¹⁹ In addition, this part argues that direct competitors should not be denied standing under the five-factor test.³²⁰

A. *The Associated General Test Is Consistent with the Lanham Act's Purposes and Is Flexible Enough to Handle Varying Factual Scenarios*

The Ninth Circuit's discernibly competitive injury approach and the reasonable interest approach of the First and Second Circuits are nearly polar opposites. The Ninth Circuit's approach is rigid and leaves little to the court's discretion: a competitor alleging a discernibly competitive injury will have standing and a noncompetitor can never have standing.³²¹ This approach is designed to serve the Lanham Act's purpose of preventing unfair competition, which the Ninth Circuit viewed as requiring a competitive injury.³²² Leading commentators, however, have rejected this view, and the Ninth Circuit's approach has been subject to significant criticism.³²³

The First and Second Circuits' approach, on the other hand, is a flexible one.³²⁴ Under this approach, standing does not depend on the label placed on the parties' relationship, but on the nature of the interest the plaintiff is seeking to protect, the likelihood of injury to this interest, and the alleged injury's causal connection to the defendant's false advertising.³²⁵ These factors are analyzed under a reasonableness standard, which gives the courts discretion to allow a broader class of plaintiffs to bring suit.³²⁶ Where the plaintiff is a direct competitor, this approach functions in substantially the same way as the Ninth Circuit's approach, as direct competitors are treated extremely favorably and are only required to make a minimal showing to have standing.³²⁷ The reasonable interest approach differs from the Ninth Circuit's competitive requirements in that it allows

318. See generally *supra* Part II.

319. See *infra* Part III.A.

320. See *infra* Part III.B.

321. See *supra* Part II.A.

322. See *supra* notes 180–82 and accompanying text.

323. See *supra* notes 193–97 and accompanying text.

324. See *supra* text accompanying note 217. See generally *supra* Part II.B (explaining the similarities between the First and Second Circuits' approaches).

325. See *supra* notes 208–10, 214–16 and accompanying text.

326. See *supra* notes 208–20 and accompanying text (explaining that this approach allows noncompetitor plaintiffs to have standing).

327. See *supra* notes 221–24 and accompanying text.

noncompetitors to have standing, though they are at a disadvantage in establishing the necessary injury and causation.³²⁸

This approach better comports with the purposes of section 43(a) than the Ninth Circuit's approach. Section 43(a) was designed to protect both commercial entities and consumers.³²⁹ Under the Ninth Circuit's test, however, only competitive interests are given the protection of section 43(a).³³⁰ The reasonable interest approach, meanwhile, recognizes that noncompetitors can have sufficient commercial interests to warrant standing, and in certain cases, this recognition can lead to consumer protection that would not exist under the Ninth Circuit's approach.

In *Camel Hair*,³³¹ for example, the First Circuit reached a fair result in line with the congressional intent behind section 43(a) by granting standing to a noncompetitor plaintiff. The plaintiff organization's members—cashmere and camel hair manufacturers or marketers—had a clear interest in preventing retailers from falsely indicating that their products contained high amounts of cashmere.³³² If the defendant retailers continued their conduct, lower quality goods would continue to be passed off as high quality cashmere. This would likely have had a detrimental effect on cashmere's reputation among consumers, and thus a detrimental effect on the plaintiff's members' commercial interests. Further, by overpaying for low quality goods, the consumers of cashmere were significantly injured by these false representations, more so than in a case of a defendant simply making false statements about a plaintiff's competing product, which would pass the Ninth Circuit standing test. If, for example, the mislabeling of cashmere content was standard practice among retailers, it would take a noncompetitor such as any of the plaintiff's members in *Camel Hair* to protect consumers' interests, since no competitor would have the motivation to bring suit.³³³ Thus, it seems fair to allow the plaintiff's

328. See *supra* notes 208–10, 218–24 and accompanying text.

329. See *supra* note 101 and accompanying text.

330. See *supra* notes 180–82 and accompanying text; see also McCarthy, *supra* note 66, § 27.32, at 27-67 (stating that “[t]he passé semantic argument that there cannot be ‘unfair competition without ‘competition’ between the parties has often been rejected”); Burns, *supra* note 93, at 836–39 (arguing that focusing on competitive interests and not on consumer interests decreases the quality of section 43(a) false advertising suits by “open[ing] the door” to “numerous” lawsuits with no connection to consumer injury).

331. For a discussion of this case, see *supra* notes 204–213 and accompanying text.

332. The plaintiff was a nonprofit corporation with the goal of protecting and promoting the interests of the cashmere and camel hair industry, and its individual members were cashmere and camel hair manufacturers and marketers. See *supra* notes 205, 211 and accompanying text.

333. This hypothetical demonstrates an example of an information-distressed market, as discussed by Professor Lemley, *supra* note 266. Lemley supported granting noncompetitors standing in such circumstances, though his discussion was in the context of the *Associated General* test. See *supra* note 266. Lemley proposed modifying the directness factor of the *Associated General* test to account for these markets. See *id.* This idea is consistent with what is being proposed here—that standing should not be limited to direct competitors, because in certain situations direct competitors with the ability to bring a false advertising claim may not be motivated to do so. Note that the third factor of the *Associated General* test—the proximity or remoteness of the plaintiff to the false advertising—already takes this

members in *Camel Hair* who, though not competitors, had a commercial interest in stopping the defendants' behavior, to bring suit to protect their interests as well as to protect consumers from continued exposure to the defendants' wrongful conduct.

The reasonable interest approach is not without its problems, however. There is no set rule defining what constitutes a reasonable interest, reasonable basis, or sufficient causal nexus.³³⁴ District courts are given little guidance as to what is sufficient to satisfy each of these requirements, and in many instances, courts can only look to past cases to try to determine whether the current plaintiff's interest is reasonable.³³⁵ In deciding to replace its reasonable interest test with the *Associated General* test, the Third Circuit noted that its past cases "grappled with defining [reasonable interest] with greater precision."³³⁶ The Third Circuit adopted the *Associated General* test because it felt the test was an "appropriate method for adding content to [the court's] 'reasonable interest' test."³³⁷ Thus, unsurprisingly, there are similarities between the two tests. The first two *Associated General* factors—nature of the injury and directness of the injury—require inquiries similar to the reasonable interest and reasonable basis requirements.³³⁸ In addition, reasonable interest courts have also considered the fourth factor of the *Associated General* test: the speculativeness of the damages.³³⁹

An advantage of the *Associated General* test, however, is that it divides these analyses into separate inquiries, providing courts with clearer guidance.³⁴⁰ Though some of the individual factors may not provide a clear

into account by advising courts to inquire whether there is "an identifiable class of persons [more proximate to the harm] whose self-interest would normally motivate them to vindicate the public interest" by bringing an action. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 542 (1983). In cases involving information-distressed markets, such a class would not exist since the direct competitors would not be motivated to bring suit against one another.

334. *See Conte Bros. Auto. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 230–31 (3d Cir. 1998) (explaining that, prior to adopting the five-factor test, the Third Circuit applied the reasonable interest test and "grappled with defining the term with greater precision"). The court further stated that it "never precisely defined the critical term 'reasonable interest.'" *Id.* at 230; *see also* Lemley, *supra* note 266, at 302 (arguing that the Third Circuit's previous test did not provide a proper framework for the term reasonable interest).

335. *See Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694–95 (2d Cir. 1994) (examining the facts and holdings of several past cases to determine what constituted a sufficient demonstration of injury and causation for the present case); *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1173–77 (3d Cir. 1993) (undergoing an extensive discussion of prior case law and commentary to answer questions regarding what qualifies as a reasonable interest).

336. *Conte Bros.*, 165 F.3d at 231.

337. *Id.* at 233.

338. *See supra* note 263.

339. *See id.*

340. Certain factors are more clear-cut than others. For example, the third factor—proximity to the harmful conduct—instructs courts to identify whether there is an "identifiable class" of potential plaintiffs more proximate to the conduct motivated to bring suit. *See Phoenix of Broward, Inc. v. McDonald's Corp.*, 489 F.3d 1156, 1170 (11th Cir. 2007). Meanwhile, the second and fourth factors are more open-ended—whether the alleged

test for the court,³⁴¹ the overall analysis under the test is significantly more structured.³⁴² In addition, the five-factor test gives courts more flexibility than the reasonable interest approach, as failure to satisfy one or more of the five factors does not automatically preclude standing.³⁴³ Courts have recognized this flexibility as a significant advantage of the *Associated General* test, and they have found that it is easily adaptable to “disparate factual scenarios.”³⁴⁴ This flexibility, for example, allows courts to deny standing on a particular set of facts and to recognize standing on a slight variation of those same facts if the circumstances warrant it.³⁴⁵

Finally, the *Associated General* test is consistent with the purposes of section 43(a). The test is focused on commercial injury, and the first factor specifically questions whether the alleged injury is one that the Lanham Act was designed to protect. Like the reasonable interest approach, standing under the test is not limited to competitors, which can increase consumer protection, another goal of section 43(a). One commentator has stated that the five factors “serve the ultimate purpose” of section 43(a) and “construct[] the proper framework to serve the policy [underlying section 43(a)] without narrowing false advertising.”³⁴⁶

B. *Direct Competitors Bringing Section 43(a) False Advertising Claims Should Satisfy the Associated General Prudential Standing Test*

In *McDonald's*, the Eleventh Circuit applied the *Associated General* test and held that a direct competitor failed to meet the prudential standing requirements.³⁴⁷ In addressing the argument that direct competitors “invariably satisfy” the five-factor test, the *McDonald's* court rejected the argument that the Third Circuit adopted the test “to extend prudential standing to parties who are not in direct or actual competition.”³⁴⁸ This part argues that direct competitors alleging a competitive injury should always satisfy the *Associated General* test.

In support of its position, the *McDonald's* court noted that prior to *Conte Bros.*, the Third Circuit used a version of the reasonable interest test, which did not require plaintiffs to be the defendants’ competitors.³⁴⁹ However,

injury is sufficiently direct and whether the damages are too speculative. See *supra* text accompanying note 255.

341. See *supra* note 340.

342. See Lemley, *supra* note 266, at 302, 300 (stating that the Third Circuit’s reasonable interest test, prior to *Conte Bros.*, “failed to provide a proper framework for evaluating reasonable interest” and that the adoption of the five-factor test “defined and provided the legal framework of the ‘reasonable interest’”).

343. See *supra* note 293 and accompanying text.

344. *McDonald's*, 489 F.3d at 1173 (calling this flexibility a “salient virtue” of the test).

345. See *id.*

346. Lemley, *supra* note 266, at 306.

347. See *supra* Part II.C.4.

348. *McDonald's*, 489 F.3d at 1166–67 (internal quotation marks omitted); see also *supra* notes 294–95 and accompanying text.

349. See *McDonald's*, 489 F.3d at 1166–67. The court also quoted *Conte Bros.* and stated that, under the five-factor test, “standing . . . does not turn on the label placed on the

the *Conte Bros.* court also stated that it was adopting the *Associated General* test not because it wanted to replace its reasonable interest test, but rather because the *Associated General* test “provide[d] an appropriate method for adding content” to its reasonable interest test.³⁵⁰ When the Third Circuit first adopted the reasonable interest test in *Thorn v. Reliance Van Co.*, the court was considering whether a noncompetitor had standing to sue under section 43(a).³⁵¹ After concluding that “the mere fact that [the plaintiff] is not a competitor of [the defendant] does not, in and of itself, preclude him from bringing suit under section 43(a),” the court considered whether there were “any prudential reasons which support a judicial determination that [the plaintiff] is without standing.”³⁵² The court then adopted the reasonable interest test as the “dispositive question” in determining a party’s prudential standing, and held that the noncompetitor plaintiff had standing.³⁵³ A later Third Circuit case stated that the *Thorn* court’s determination that the plaintiff had standing “permitted a false advertising suit by one who, while not in his own person a competitor . . . was . . . so situated that he could quite reasonably be regarded as a surrogate for such competitor.”³⁵⁴ Taken together, these cases imply that the Third Circuit developed its reasonable interest test to extend prudential standing beyond direct competitor plaintiffs and that the Third Circuit was not concerned with the issue of direct competitors satisfying the prudential standing requirements.³⁵⁵

The Eleventh Circuit’s decision to deny standing has also been criticized for conflating section 43(a) false advertising standing with the merits of a false advertising claim.³⁵⁶ The *McDonald’s* court recognized that the plaintiff was the most appropriate party to bring a false advertising claim and that it alleged an injury of the type the Lanham Act was designed to protect.³⁵⁷ It denied plaintiff standing primarily because plaintiff’s alleged causal chain was tenuous, which led to a speculative damages claim.³⁵⁸ The *McDonald’s* court did not believe that the advertisements’ misrepresentations about the chance of winning one of the “rare” high-value prizes would lure customers from Burger King to McDonald’s and lead to an “ascertainable” loss in Burger King’s sales.³⁵⁹ However, as the criticisms note, this skepticism relates to the materiality element necessary

relationship between the parties.” *Id.* at 1164 (quoting *Conte Bros. Auto. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221, 235 (3d Cir. 1998)).

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

351. *Thorn v. Reliance Van Co.*, 736 F.2d 929, 931–32 (3d Cir. 1984).

352. *Id.* at 933.

353. *See id.* (internal quotation marks omitted).

354. *Serbin v. Ziebart Int’l Corp.*, 11 F.3d 1163, 1175 (3d Cir. 1993).

355. *See supra* note 305 and accompanying text.

356. *See supra* notes 308–10 and accompanying text.

357. *See supra* notes 286, 290 and accompanying text.

358. *See supra* notes 287–89, 291 and accompanying text; *see also supra* note 293 and accompanying text.

359. *See Phoenix of Broward, Inc. v. McDonald’s Corp.*, 489 F.3d 1156, 1169–71 (11th Cir. 2007).

to succeed on the merits of a section 43(a) false advertising claim, and should have been considered at a later stage of the litigation where the plaintiff could have introduced evidence as to its lost sales.³⁶⁰ The Lanham Act focuses on preventing unfair competition, and where a direct competitor is alleging a competitive injury of the type the Lanham Act was designed to protect, that plaintiff should be given an opportunity to present his case at trial.

CONCLUSION

Courts should determine prudential standing for false advertising claims brought under section 43(a) of the Lanham Act with the five-factor *Associated General* test. This test better conforms to the purposes of the Lanham Act than the Ninth Circuit's discernibly competitive injury approach by not limiting standing to competitive injuries. Section 43(a) aims to protect commercial interests, and the case law and commentaries demonstrate that noncompetitors can allege sufficient commercial interests to invoke the protection of the statute. Additionally, the *Associated General* test is more likely to lead to results in line with the purposes behind section 43(a) because it requires courts to focus on the nature of the injury the plaintiff is alleging, not solely on the relationship between the parties. Though the reasonable interest approach of the First and Second Circuits also focuses on the plaintiff's alleged injury, the *Associated General* factors provide courts with clearer guidance. Additionally, the *Associated General* test provides courts with the flexibility to reach proper outcomes in cases covering a wide variety of factual scenarios.

While the proper focus of a section 43(a) standing inquiry is on the nature of the plaintiff's alleged injury, courts applying the *Associated General* test should incorporate one aspect of the Ninth Circuit's approach: direct competitors alleging a competitive injury of the type the Lanham Act was designed to protect should have standing. To deny standing to a plaintiff alleging a commercial injury caused by the conduct of a direct competitor distorts section 43(a)'s purpose of preventing unfair competition in commerce. In *McDonald's*, the court recognized that the class of Burger King franchisees was alleging the type of harm the Lanham Act was designed to address and was the most appropriate class to bring a section 43(a) claim. Yet the court dismissed the lawsuit for lack of standing, primarily because it doubted that the plaintiff would be able to prove an ascertainable amount of damages, which goes to the claim's merits, not standing. Additionally, the Third Circuit first adopted the *Associated General* test to clarify and add content to its version of the reasonable interest test, not to abandon the test's underlying principles. Courts applying versions of the reasonable interest test have traditionally been quite deferential to direct competitor plaintiffs' allegations of damages and causation. Further, case law reveals that the Third Circuit's reasonable

360. See *supra* notes 308–10 and accompanying text.

interest test was originally adopted as a way of extending section 43(a) standing beyond direct competitors. Courts should apply the *Associated General* test in the same context and should not use the test to deny standing to direct competitors.