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The Justiciability of State Consumer Protection Claims in Federal Courts: A Study of Named Plaintiffs who Cease Using the Disputed Product yet Seek Injunctive Relief

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THE JUSTICIABILITY OF STATE CONSUMER PROTECTION CLAIMS IN FEDERAL COURTS: A STUDY OF NAMED PLAINTIFFS WHO CEASE USING THE DISPUTED PRODUCT YET SEEK INJUNCTIVE RELIEF

*Meaghan Millan**

In recent years, there has been an increase in consumer protection class action litigation in federal courts. These suits arise from a group of consumers who have felt deceived by a particular product, ceased using that product, and then tried to sue a defendant manufacturer through state consumer protection statutes. Often, these individuals seek to enjoin the defendant's use of an allegedly unfair business practice, such as "all natural" labeling. Since the plaintiff no longer uses the product, however, many district courts have refused to recognize that they may be at risk of a future injury and have held that these plaintiffs do not have standing to seek an injunction in the federal forum.

This Note discusses the tension between the purposes and aims of state consumer protection statutes and the heavily ingrained—yet vague—Supreme Court precedent regarding Article III standing. While many lower courts continue to conservatively interpret the Court's decisions on standing, some California district courts have bucked this trend and begun granting consumer plaintiffs standing. This Note ultimately concludes that consumer classes must begin relying on individuals who continue to use the disputed product throughout litigation or redefine the scope of their future injury to better conform to current Supreme Court precedent.

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INTRODUCTION

Steven Robinson once regularly purchased and drank Arizona-brand "all natural" iced teas.[1] In April 2011, Robinson learned that Arizona included high-fructose corn syrup in its beverages, an ingredient that Robinson believed to be unnatural.[2] Robinson did not even finish the bottle he was

1. Robinson v. Hornell Brewing Co., No. 11-2183 (JBS-JS), 2012 WL 1232188, at *1 (D.N.J. Apr. 11, 2012).
2. *Id.*

drinking at the time and ceased purchasing beverages from Arizona.[3] He then filed suit against Arizona in federal court to stop Arizona's use of all-natural labeling.[4] The district court, however, held that Robinson did not have standing to seek an injunction in federal court.[5] Therefore, the court deemed itself unable to hear Robinson's claim.[6]

The Supreme Court has interpreted Article III of the Constitution to require that a plaintiff seeking an injunction in federal court suffer from a threat of future injury.[7] This ensures that a court's enjoinment of a practice is likely to redress a significant potential harm. For plaintiffs who file suit under state consumer protection statutes, this often means that the plaintiffs must show that the defendant's allegedly deceptive business practice is likely to harm the plaintiffs in the future.[8] But what if a consumer discovered this allegedly deceptive practice, ceased using the product or service, *and then* filed a lawsuit? If an individual no longer uses a product, one would intuitively assume that there is no threat of future injury. Therefore, the consumer would not have standing to seek a court order enjoining the defendant's continued use of deceptive business practices.

This does not often cause a problem in individual litigation. After all, an individual consumer who has become informed of the problem and stopped using the product does not need the court-mandated protection of injunctive relief. This situation does, however, present a serious problem for class actions, since injunctions are commonly sought as a form of class-wide relief. Often, a consumer class representative is an individual who has become aware of the allegedly deceptive practice and feels sufficiently wronged to stop using the product and commence a lawsuit against the defendant company.[9] Yet these plaintiffs often cannot show that they suffer from a threat of future injury—a requisite standing requirement. Therefore, plaintiffs often find themselves unable to assert protections afforded to them by state statutory provisions in the federal forum.[10]

This Note addresses the tension between the remedial purposes of state consumer protection statutes and the well-established Article III standing

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3. *Id.* at *2.

4. *Id.*

5. *Id.* at *6. The court has since dismissed the complaint. Robinson v. Hornell Brewing Co., No. 11-2183 (JBS-JS), 2012 WL 6213777 (D.N.J. Dec. 13, 2012).

6. *Robinson*, 2012 WL 1232188 at *6–7.

7. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992); *see infra* notes 84–85 and accompanying text.

8. *See* 3 JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, NEW YORK CIVIL PRACTICE ¶ 901.10, at 145 n.30 (2d ed. 2005) (noting that class actions originally filed in federal court increased after the enactment of the Class Action Fairness Act of 2005).

9. *See infra* Part II.

10. If standing requirements continue to be an insurmountable burden for plaintiffs, the result may be fewer class actions. *See* Daniel D. DeVougas, Note, *Without a Leg To Stand On? Class Representatives, Federal Courts, and Standing Desiderata*, 97 CORNELL L. REV. 627, 656 (2012) ("The net effect of fewer class suits will likely be powerful, sophisticated defendants (like corporations) escaping liability for their mass harms—a socially undesirable outcome.").

requirements for injunctive relief espoused by the U.S. Supreme Court. Part I discusses the purposes of state consumer protection statutes, highlights a number of these statutes,[11] and explains the current state of the law regarding Article III standing and injunctive relief.[12]

Part II discusses conflicting cases in which courts address the ability of a consumer to seek an injunction in federal court. Many courts remain strictly committed to Supreme Court standing precedent. Since the Court has only addressed the threat of future injury in narrow contexts,[13] these courts interpret this requirement in a conservative manner.[14] A few courts, however, have distinguished consumer protection cases and held that consumer plaintiffs have Article III standing to seek an injunction.[15]

Part III concludes that a consumer protection class will either need to be represented by plaintiffs who continue to use the disputed product or service[16] or who redefine the scope of their future injury to better conform with current Article III requirements.[17] The alternative to these solutions would require overhauling Article III standing requirements, which is unlikely to happen in the near future.[18]

I. AN OVERVIEW OF STATE CONSUMER PROTECTION STATUTES AND FEDERAL STANDING DOCTRINE

This Part first explains the role, language, and purpose of consumer protection statutes, focusing on their scope and remedies. It shows how state legislatures intended to create an easy-to-meet cause of action to remedy injuries caused by defendants who engage in deceptive marketing. Next, this part discusses the limitations on federal court jurisdiction created by Article III and the Supreme Court's standing doctrine, as well as exceptions to these limitations, such as the "capable of repetition, yet evading review"[19] and the "relation back"[20] doctrines.

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11. CAL. BUS. & PROF. CODE §§ 17200–17210, 17500–17509 (West 2008), CAL. CIV. CODE §§ 1750–1784 (West 2009), N.Y. GEN. BUS. LAW § 349 (McKinney 2012), and N.J. STAT. ANN. §§ 56:8-1 to -20 (West 2012), will be highlighted because these statutes arise in many of the cases discussed throughout this Note.

12. *Infra* Part I.

13. *E.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); City of L.A. v. Lyons, 461 U.S. 95 (1983).

14. *Infra* Part II.A.

15. *Infra* Part II.B.

16. *Infra* Part III.A.2.

17. *Infra* Part III.B.1.

18. *Infra* Part III.B.2.

19. *See* City of L.A. v. Lyons, 461 U.S. 95, 109 (1983) (declining to apply the "capable of repetition, yet evading review" exception).

20. *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 398 (1980).

A. The Role, Language, and Purpose of State Consumer Protection Statutes

Every state has enacted at least one consumer protection statute.[21] This section first describes common characteristics of consumer protection statutes and then highlights three particular states' statutes: California, New York, and New Jersey.

1. Common Features of State Consumer Protection Statutes

By enacting consumer protection statutes, state legislatures intended to create a right of action that could effectively remedy the injuries that private citizens suffer due to deceptive marketing.[22] These statutes (1) enable a private citizen to file suit against a defendant who allegedly engages in unfair practices; (2) permit the plaintiff to request an injunction against the defendant's use of these practices; (3) include a low bar for causation; and (4) contain provisions to further penalize the defendant.

The most notable feature of these statutes is a consumer's ability to bring a suit against a company who allegedly engaged in deceptive business practices.[23] Some states do not even require the plaintiff to have purchased the disputed product; it is enough to be someone who *may* buy that product in the future.[24]

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21. Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 12 (2010) ("Every state in the nation has some kind of consumer protection statute."). The Federal Trade Commission Act (FTC Act) is a federal statute that prohibits unfair business practices, but consumers cannot rely on this statute because the FTC Act only permits the FTC, not private citizens, to bring a suit. 15 U.S.C. § 45 (2006). Generally, states found that the FTC was ineffective in preventing and prosecuting consumer fraud, and the states enacted consumer protection statutes in response. Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs To Allege Reliance As an Essential Element*, 43 HARV. J. ON LEGIS. 1, 15–16 (2006).

22. *See* Joseph M. Price & Rachel F. Bond, *Litigation As a Tool in Food Advertising: Consumer Protection Statutes*, 39 LOY. L.A. L. REV. 277, 280 (2006) ("Consumer protection laws . . . tend to dilute, or even eliminate, some of the key requirements of traditional tort law."); *see also* Butler & Johnston, *supra* note 21, at 13–14 (detailing the "public interest reasons" for the enactment of consumer protection statutes); Scheuerman, *supra* note 21, at 20 (explaining that courts relaxed traditional fraud requirements for public actions brought by an Attorney General. Then, "with little thought given to the different purposes of public and private actions, state courts incorporated the deterrence objective of government suits for injunctions and loosened the traditional reliance-causation requirement in private claims for damages." (citations omitted)).

23. Scheuerman, *supra* note 21, at 14 (noting every state had enacted a consumer protection statute permitting private citizens to seek damage awards by the 1970s); Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act As Rule Model*, 52 OHIO ST. L.J. 437, 448 (1991) (discussing how states permitted private citizens to file suit because consumer agencies were unable to address every consumer fraud).

24. *See* ME. REV. STAT. tit. 10, § 1213 (2009) ("A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it . . . . Proof of monetary damage, loss of profits or intent to deceive is not required."); MINN. STAT. ANN. § 325F.69(1) (West 2011) (stating that any misrepresentation is a violation, "whether or not any person has in fact been misled, deceived, or damaged thereby.").

The second common factor is the consumer's ability to request that the court enjoin the defendant company from engaging in deceptive practices in the future.[25] This suggests that these statutes are not only intended to protect the individual consumer who brings the suit but also the wider group of consumers who purchase (or may potentially purchase) this product due to viewing the deceptive advertising.

The third common feature is a low standard of causation. Unlike common-law fraud, some consumer protection statutes do not mandate that a plaintiff show that she *relied* on the deceptive business practice.[26] In fact, some states do not even require consumers to actually be misled by the allegedly unfair practice.[27]

The fourth characteristic is the punitive nature of these statutes. In addition to compensatory damages, a consumer can often recover punitive[28] and treble[29] damages under a consumer protection statute. For instance, the New Jersey statute mandates an award of treble damages if a plaintiff can prove "both an unlawful practice . . . and a resulting ascertainable loss."[30] Under a New York statute, a court may award treble damages if the defendant "knowingly or willfully engage[d] in a deceptive practice."[31]

2. Statute Case Studies: California, New York, and New Jersey

California's consumer protection law actually arises from three statutes. These statutes are (1) the Unfair Competition Law (UCL),[32] (2) the False Advertising Law (FAL),[33] and (3) the Consumer Legal Remedies Act (CLRA).[34] California courts apply the "reasonable consumer" test to

25. DEL. CODE ANN. tit. 6, § 2533(a) (2011); GA. CODE ANN. § 10-1-373(a) (2009); 815 ILL. COMP. STAT. 510/3 (West 2008); MINN. STAT. ANN. § 325D.072 (West 2011).

26. *See, e.g.*, N.Y. GEN. BUS. LAW § 349 (McKinney 2012); *see also* Emilia L. Sweeney & Rudy A. Englund, *The Class Action Fairness Act's Impact on State Consumer Protection Laws: An Overview of the Act's Effect on Forum-Shopping*, 72 DEF. COUNS. J. 233, 236 (2005) (citing Stutman v. Chem. Bank, 731 N.E.2d 608 (2000)).

27. Sweeney & Englund, *supra* note 26, at 236 n.19 (citing Smoot v. Physicians Life Ins. Co., 87 P.3d 545 (N.M. Ct. App. 2003); KAN. STAT. ANN. § 50-626(b) (2004)); *cf.* Holeman v. Neils, 803 F. Supp. 237, 242 (D. Ariz. 1992) (holding that reliance can be met even if it was unreasonable reliance); Dix v. Am. Bankers Life Assurance Co., 415 N.W.2d 206, 209 (Mich. 1987) (holding that a Michigan statute does not require individual reliance, provided reliance was reasonable considering the circumstances.).

28. *See, e.g.*, CONN. GEN. STAT. § 42-110g(a) (2012) (stating that punitive damages may be awarded at the court's discretion).

29. *See, e.g.*, Dist. Cablevision Ltd. P'ship v. Bassin, 828 A.2d 714, 728 (D.C. 2003) ("Treble damages and reasonable attorneys' fees are recoverable in order to encourage the private bar to take such cases." (citation omitted)).

30. Bishop v. GMC, 925 F. Supp. 294, 300 (D.N.J. 1996) (citing N.J. STAT. ANN. § 56:8-19 (West 2012)).

31. Stutman v. Chem. Bank, 731 N.E.2d 608, 611 (N.Y. 2000) (citing N.Y. GEN. BUS. LAW § 349(h)) (noting the court has discretion when awarding treble damages up to $1,000).

32. CAL. BUS. & PROF. CODE §§ 17200–17210 (West 2009).

33. *Id.* §§ 17500–17509.

34. CAL. CIV. CODE §§ 1750–1784 (West 2009).

determine if a practice is deceptive, which means that a plaintiff must "show that members of the public are likely to be deceived."[35]

The UCL prohibits unfair business practices and advertisements.[36] This statute empowers a private plaintiff to request that a court enjoin a defendant who engages in "unfair competition,"[37] as well as obtain restitution.[38] To prevail on a UCL claim, a plaintiff must show that the unfair practice caused the individual to suffer an economic injury, such as having lost money or property.[39] The UCL's causation prong requires a showing of reliance similar to the showing necessary to establish common-law fraud.[40] The allegedly unfair practice need not, however, be "the sole or even the decisive cause of the injury-producing conduct."[41]

Similarly, the FAL prohibits untrue, misleading, or deceptive advertising.[42] Like the UCL, the FAL permits private individuals to sue for injunctions and restitution from those who engage in false advertising.[43]

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35. Williams v. Gerber Prods. Co., 552 F.3d 934, 938 (9th Cir. 2008) (quoting Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995)). This standard is applied to FAL and CLRA claims as well. *Id.*

36. CAL. BUS. & PROF. CODE § 17200.

37. *Id.* §§ 17200, 17204 ("[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."). To obtain an injunction under either the UCL or FAL, a plaintiff must display "a threat that the wrongful conduct will continue." Colgan v. Leatherman Tool Grp., 38 Cal. Rptr. 3d 36, 64–65 (Ct. App. 2006) (noting that the defendant continued to falsely advertise products as "Made in the U.S.A."); *cf.* Cal. Serv. Station Etc. Ass'n v. Union Oil Co., 283 Cal. Rptr. 279, 285 (Ct. App. 1991) ("Injunctive relief will be denied if at the time of the order of judgment, there is no reasonable probability that the past acts complained of will recur." (citations omitted)).

38. Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937, 943 (Cal. 2003) (noting that the plaintiffs can receive restitution but cannot recover damages under the UCL).

39. *See* Kwikset Corp. v. Superior Court, 246 P.3d 877, 885–86 (Cal. 2011); Aron v. U-Haul Co. of Cal., 49 Cal. Rptr. 3d 555, 559 (Ct. App. 2006) (holding that the defendant's practice of causing the plaintiff to purchase excess fuel when retuning his truck constituted a loss of money sufficient to constitute an injury in fact). Prior to the 2004 amendment (enacted through Proposition 64), "any person" included even those who were uninjured by the deceptive practice, provided they were acting for the interests of the general public. *See* Catherine L. Rivard, *Federal Court Standing in Unfair Competition Law Litigation: The Stricter Requirements May Make Suing in or Removal to Federal Court Unavailable*, 24 L.A. LAW. 16, 16 (2001). Proposition 64's purpose was to eliminate the "[f]il[ing of] frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit." Cal. Sec'y of State, Text of Proposed Laws: Proposition 64, VOTE 2004 (Nov. 2004), http://vote2004.sos.ca.gov/voterguide/propositions/prop64text.pdf. This proposition was premised on the idea that the "unaffected plaintiff" was the cause of these abuses. *See* Anunziato v. eMachines, Inc., 402 F. Supp. 2d 1133, 1138–39 (C.D. Cal. 2005) (citing People ex rel. Lockyer v. Brar, 9 Cal. Rptr. 3d 844, 845–46 (Ct. App. 2004)).

40. *See In re* Tobacco II Cases, 207 P.3d 20, 39 (Cal. 2009).

41. *Id.* at 40.

42. CAL. BUS. & PROF. CODE § 17500; *see also* Nat'l Council Against Health Fraud, Inc. v. King Bio Pharms., Inc., 133 Cal. Rptr. 2d 207, 211 (Ct. App. 2003) (quoting CAL BUS. & PROF. CODE § 17500).

43. CAL. BUS. & PROF. CODE § 17535; *see also Nat'l Council Against Health Fraud*, 133 Cal. Rptr. 2d at 211; *supra* note 37 and accompanying text.

The CLRA prohibits a wide array of false advertising methods, but many of the cases discussed in this Note allege violations of section 1770(a) of the CLRA.[44] This provision prohibits a number of acts, including "[r]epresenting that goods . . . [have] characteristics, ingredients, uses, [or] benefits . . . which they do not have"[45] and "[r]epresenting that goods . . . are of a particular standard, quality, or grade . . . if they are of another."[46]

Like the other California statutes, the CLRA enables a private individual to bring an action if they suffer "any damage *as a result of*" unlawful business practices.[47] The CLRA is unique among the California statutes because it permits private plaintiffs to recover monetary damages from a defendant.[48]

New York uses a number of consumer protection statutes as well, but the primary statute is New York General Business Law section 349.[49] Section 349 declares that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state" are unlawful.[50] Generally, section 349 is intended to provide relief for consumer-focused conduct that does not meet the elements of common-law fraud.[51] This is because causes of action under section 349 are not subject to the heightened pleading requirements necessary for common-law fraud claims.[52]

Section 349 enables any individual who has been injured by a deceptive practice to bring a suit to enjoin the act and recover damages.[53] New York courts have interpreted this to require three elements: that (1) the practice was aimed at consumers,[54] (2) the act was materially misleading,[55] and

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44. CAL. CIV. CODE §§ 1750–1784 (West 2009).

45. *Id.* § 1770(a)(5).

46. *Id.* § 1770(a)(7).

47. Meyer v. Sprint Spectrum L.P., 200 P.3d 295, 298 (Cal. 2009) (emphasis added) (quoting CAL. CIV. CODE § 1780(a)).

48. *See* Colgan v. Leatherman Tool Grp., 38 Cal. Rptr. 3d 36, 43 (Ct. App. 2006). The CLRA includes a statutory minimum damages award of $1,000. CAL. CIV. CODE § 1780(a)(1). Additionally, a private plaintiff can seek punitive damages under the CLRA. *Id.* § 1780(a)(4).

49. N.Y. GEN. BUS. LAW § 349 (McKinney 2012). Section 350 is commonly used in tandem with section 349. The primary difference between these two statutes is that section 350 requires that a plaintiff show reliance, while section 349 does not. *See* Scheuerman, *supra* note 21, at 24. For this reason, plaintiffs rely upon section 349 more frequently than section 350.

50. N.Y. GEN. BUS. LAW § 349(a).

51. *See* Gaidon v. Guardian Life Ins. Co. of Am., 725 N.E.2d 598, 603 (N.Y. 1999). In his memorandum approving section 349, then-Governor Nelson A. Rockefeller explained, "Consumers have the right to an honest market place where trust prevails between buyer and seller. The power to obtain injunctions against any and all deceptive and fraudulent practices will be an important new weapon in New York State's long standing efforts to protect people from consumer frauds." Memorandum of Governor Nelson A. Rockefeller, *reprinted in* 1970 N.Y. ST. LEGIS. ANN. 472.

52. *See* Joannou v. Blue Ridge Ins. Co., 735 N.Y.S.2d 786, 786 (N.Y. App. Div. 2001).

53. N.Y. GEN. BUS. LAW § 349(h).

54. Although a plaintiff need not prove that the deceptive acts occurred repeatedly, it is necessary to show that those acts will affect the larger consumer population. Oswego

(3) "the plaintiff suffered injury as a result of the deceptive act."[56] Although reliance is not one of these elements, the plaintiff must show that the deceptive practice caused her injury.[57] Further, while merely being deceived by the business practice does not constitute an injury under section 349,[58] plaintiffs are not required to show actual pecuniary harm.[59]

New Jersey's consumer protection statute is titled the Consumer Fraud Act (CFA).[60] Like the California and New York statutes, CFA enables a private individual to bring a lawsuit.[61] A private plaintiff must show (1) that the defendant violated a provision of the statute, (2) that she has suffered "an ascertainable loss," and (3) "a causal relationship between" the act and the loss.[62] It is important to note that intent is not always required,[63] and the ascertainable loss need not be an "actually suffered loss."[64] Like New York's section 349, this statute does not require a showing of reliance.[65] Finally, like the California and New York statutes, CFA also permits private plaintiffs to seek an injunction.[66]

Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 647 N.E.2d 741, 744 (N.Y. 1995).

55. When determining whether an act is misleading, a court uses a "reasonable consumer acting reasonably under the circumstances" standard. *See id.* at 745 (noting this standard complements the federal antifraud statute, upon which section 349 is modeled).

56. Stutman v. Chem. Bank, 731 N.E.2d 608, 611 (N.Y. 2000).

57. *Id.* at 612 (distinguishing reliance from causation). In *Stutman*, the New York Court of Appeals explained that, because reliance is not required, a plaintiff "need not additionally allege that they would not otherwise have entered into the transaction"; simply showing that a deceptive act caused them to pay a fee "they . . . believe[d] was not required" was sufficient. *Id.* at 612–13.

58. Small v. Lorillard Tobacco Co., 720 N.E.2d 892, 898 (N.Y. 1999) (rejecting the plaintiffs' "deception as injury" argument).

59. *Oswego*, 647 N.E.2d at 744–45.

60. N.J. STAT. ANN. §§ 56:8-1 to -20 (West 2012).

61. *Id.* § 56:8-19. William Cahill, the then-Governor of New Jersey, announced that this amendment would "provide easier access to the courts for the consumer, [and would] increase the attractiveness of consumer actions to attorneys" and "give New Jersey one of the strongest consumer protection laws in the nation." Cox v. Sears Roebuck & Co., 647 A.2d 454, 460 (N.J. 1994) (quoting Governor's Press Release for Assembly Bill No. 2402, at 1–2 (Apr. 19, 1971)); *see also* Gennari v. Weichert Co. Realtors, 691 A.2d 350, 364 (N.J. 1997) ("The history of the [CFA] is one of constant expansion of consumer protection.").

62. Bosland v. Warnock Dodge, Inc., 964 A.2d 741, 749 (N.J. 2009) (citing Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc., 929 A.2d 1076, 1086 (N.J. 2007)).

63. *Id.* at 748–49. The court explained that CFA claims are divided into three categories: claims based upon affirmative acts, omissions, and regulatory violations. *Id.* (citing *Cox*, 647 A.2d at 462). Intent is not necessary for claims based upon affirmative acts or regulatory violations, but claims based upon omissions do require a showing of intent. *Id.*

64. *Id.* at 750; *cf.* Price & Bond, *supra* note 22, at 284 ("The benefits to plaintiffs and their lawyers are obvious: defining the injury as purely economic allows a plaintiff to escape the complicated and difficult burden of proving that the product caused . . . physical harm." (citation omitted)).

65. *Gennari*, 691 A.2d at 366 (citing N.J. STAT. ANN. § 56:8-2) (noting that reliance is not an element of a claim under CFA); *see also* Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 606 (3d Cir. 2012).

66. *See* Weinberg v. Sprint Corp., 801 A.2d 281, 293 (N.J. 2002).

B. Article III Standing Requirements

This section focuses on the federal aspect of standing. Contemporary standing doctrine arises from Article III of the Constitution.[67] Though the language of Article III does not expressly espouse a requirement of "standing,"[68] the Supreme Court has interpreted the terms "cases" and "controversies"[69] to require "a relationship between a plaintiff's individual harm and the scope of the claims that she seeks to litigate."[70] The Court has placed additional requirements on standing when a plaintiff seeks an injunction, because federal courts can only order an injunction to prevent future harm.[71] These enhanced requirements have created a minimum risk requirement that plaintiffs must meet to have a case heard in federal court.[72]

1. An Overview of Supreme Court Standing Precedent

The Supreme Court has interpreted "cases" and "controversies" to require that a plaintiff meet three elements to have constitutional standing: the plaintiff must demonstrate (1) an injury in fact, (2) that the defendant's conduct caused the alleged harm, and (3) that the requested relief is likely to redress the injury.[73] Standing helps narrow the types of disputes that courts may address. There are a number of values that standing helps protect, such as the separation of powers, preserving the concrete nature of cases, and ensuring that parties possess a personal stake in the litigation.[74]

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67. *See* Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 186–87 (2012) ("[T]he Court has insisted that [standing] requirements . . . are mandated either by the Judicial Power Clause of Article III, the Case or Controversy Clause of Article III, the original intentions of the Framers, or some combination of these.").

68. *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 49 (6th ed. 2009) (explaining that the Constitution does not discuss the concept of standing and does not even define "cases" and "controversies"). The Constitutional Convention does not provide a definition of standing either. F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 65–66 (2012); *cf.*, Lee & Ellis, *supra* note 67, at 232–34 (suggesting that the record of the Constitutional Convention does not support the conclusion that the Framers intended for rigid standing requirements).

69. U.S. CONST., art. III, § 2, cl. 1.

70. 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 2:6 (5th ed. 2011); *see also* Flast v. Cohen, 392 U.S. 83, 95 (1968).

71. *See infra* Part I.B.3.

72. *See* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 265 (1990) ("actual injury is the constitutional minimum that a party seeking a federal forum must meet" (citing Warth v. Seldin, 422 U.S. 490, 499 (1975))).

73. Allen v. Wright, 468 U.S. 737, 751 (1984); *see also* James Leonard & Joanne C. Brant, *The Half-Open Door: Article III, the Injury-in-Fact Rule, and the Framers' Plan for Federal Courts of Limited Jurisdiction*, 54 RUTGERS L. REV. 1, 23–24 (2001) (stating that *Allen v. Wright* expressed the modern Court's dedication to the separation of powers doctrine and understood "cases" and "controversies" to "confine[] the courts to their 'proper–and properly limited–role'" (quoting *Allen*, 468 U.S. at 750)).

74. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988) (discussing the "numbingly familiar" purposes of standing); *see also* FALLON ET AL., *supra* note 68, at 114–15 (discussing the purposes of standing).

When articulating the three-part standing test in *Allen v. Wright*,[75] the Supreme Court used standing as a tool to help courts meet the basic goal of separation of powers set by Article III.[76] Further, standing ensures that a plaintiff has "a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues."[77] These requirements reflect the Court's belief that the disputes presented in the adversary context are often the type best resolved by the judiciary.[78]

2. Federal Courts' Standards for Issuing an Injunction

A federal court can order an injunction when other forms of redress—such as damages—are not available or when the alleged injury is irreparable.[79] To state this rule negatively, a federal court cannot order an injunction to redress past wrongs.[80] Rather, injunctions are used to provide "preventive, protective, or restorative relief."[81] To obtain an injunction in federal court, a plaintiff generally must show the court that she is at risk of future injury.[82]

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75. *See supra* note 73 and accompanying text.

76. *Allen*, 468 U.S. at 770 (Brennan, J., dissenting) (citing Baker v. Carr, 369 U.S. 186, 204 (1962)). The *Allen* Court announced that "the law of Art[icle] III standing is built on a single basic idea—the idea of separation of powers." *Id.* at 752; *see also* Bandes, *supra* note 72, at 262 ("However, it emphasizes the limits of the Court's power rather than the Court's role of insuring that the political branches do not exceed *their* powers." (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803))).

77. Baker v. Carr, 369 U.S. 186, 204 (1962); *see also* FALLON ET AL., *supra* note 68, at 115 ("The Court termed the requirement of injury a 'rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.'" (quoting Sierra Club v. Morton, 405 U.S. 727 (1972))).

78. The Court explained that the phrase "cases" and "controversies" is a way to "identify those disputes which are appropriately resolved through the judicial process." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted); *accord* Bandes, *supra* note 72, at 260 (citing Flast v. Cohen, 392 U.S. 83, 95 (1968)). This is consistent with the Court's historical adherence to the "private rights model" of adjudication, or the idea that a case is "retrospective (based on a set of completed events), self-contained, party-initiated and controlled, and in which the remedy flows ineluctably from the violation." *Id.* at 276 n.335 (citing Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281–84 (1976)). Conversely, the "public rights model" of adjudication, an idea that appears inherent in many state consumer protection statutes, embraces a "sprawling and amorphous party structure . . . [which] create[s] complex and ongoing remedies which do not flow ineluctably from the violation, and engendering widespread effects on persons and organizations beyond the parties to the case." *Id.*; *see also* Matthew R. Ford, *Adequacy and the Public Rights Model of the Class Action After* Gratz v. Bollinger, 27 YALE L. & POL'Y REV. 1, 8–9 (2008) (discussing how the Court rejected the use of the public rights model in both *Lyons* and *Lujan*).

79. *See* City of L.A. v. Lyons, 461 U.S. 95, 111 (1983).

80. Lacassagne v. Chapuis, 144 U.S. 119, 124 (1892).

81. 13 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 65.02 (3d ed. 2012); *see* United States v. Or. State Med. Soc'y, 343 U.S. 326, 333 (1952) ("The sole function of an action for injunction is to forestall future violations.").

82. *See* United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) ("The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive."); *Or. State Med. Soc'y*, 343 U.S. at 333 ("All it takes to make the cause of action for relief by injunction is a real

The standard is a bit different, however, when a federal court hears a case on diversity jurisdiction. If the applicable state law permits an injunction as a form of relief, a federal court will usually apply state law to determine the appropriateness of a requested injunction.[83]

3. Supreme Court Precedent on Standing To Prevent Future Injury

Although a federal court may use state law to decide whether an injunction is the appropriate relief, a plaintiff still must meet federal standing requirements to have the case heard.[84] When seeking an injunction, a plaintiff must show that she suffers from a threat of future injury that is "actual or imminent," opposed to "conjectural or hypothetical."[85] While the Supreme Court has clearly articulated this standard, it has proven difficult to apply in practice.[86]

About a decade after *Allen*, the Supreme Court clarified the Article III standing requirements to seek injunctive relief in *Lujan v. Defenders of Wildlife*.[87] The Court held that when a plaintiff alleges future injury and seeks an injunction, she must show:

> (1) [She] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[88]

In *Lujan*, the Secretary of the Interior promulgated a regulation reducing the protection offered to endangered species in foreign countries.[89] The plaintiffs sought an injunction that would require the secretary to issue a revised regulation affording protection to this group of animals.[90]

The Court requested affidavits from the plaintiffs that would allege with specificity how the regulation would affect them, aside from their mere

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threat of future violation or a contemporary violation of a nature likely to continue or recur.").

83. *See* 13 MOORE ET AL., *supra* note 81, § 65.07 (noting that the Rules of Decision Act dictates that state law control situations where the nature of relief is intertwined with the law being enforced (citing 28 U.S.C. § 1652 (2006); Lauf v. E.G. Shinner & Co., 303 U.S. 323, 327–28 (1938) (using Wisconsin law to deny injunction))).

84. *See* Duchek v. Jacobi, 646 F.2d 415, 419 (9th Cir. 1981) ("[T]he states have no power directly to enlarge or contract federal jurisdiction.").

85. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted).

86. *See* Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 77 (1984) (arguing that "the Court has inconsistently applied the threat of future harm as a measure of injury"); *see also* Daniel A. Farber, *A Place-Based Theory of Standing*, 55 UCLA L. REV. 1505, 1538 (2008) (noting that standing doctrine "has an unpredictable effect in limiting the kinds of claims brought before the Court").

87. 504 U.S. 555 (1992).

88. 1 RUBENSTEIN, *supra* note 70, § 2:4 (citing *Lujan*, 504 U.S. at 560–61).

89. The Secretary of the Interior promulgated this regulation under the authority granted to him by the Endangered Species Act of 1973. *Lujan*, 504 U.S. at 558–59.

90. *Id.* at 559.

personal interest in the issue.[91] In response, the plaintiffs alleged that they intended to travel to foreign locations in the future to observe endangered species.[92] Thus, the plaintiffs' alleged injury was that the new regulation would enable the endangerment or extinction of more foreign species, therefore infringing upon their ability to observe these species in the future.[93] The plaintiffs did not, however, specify dates or actual travel plans.[94] The Court explained that "'some day' intentions" do not meet the standard of an "actual or imminent" future injury.[95]

Another Supreme Court case, *City of Los Angeles v. Lyons*, also interpreted the future injury requirement and held that past exposure to injury is not sufficient to meet this standard.[96] Lyons filed a complaint for an injunction[97] due to an episode where he was stopped for a traffic violation and the responding officers applied a chokehold to subdue him.[98] Lyons sought to enjoin the police department from using the chokehold because he suffered bodily injury, other citizens incurred similar injuries, and some even died from police use of chokeholds.[99]

The Court held that Lyons's past experience of being choked by the police did not "establish a real and immediate threat" that he would suffer the same injury again.[100] The Court reasoned that the "odds" that Lyons would again be unreasonably subdued via chokehold were insufficient to support Article III standing for injunctive relief.[101] To show a threat of future injury, the Court asserted that Lyons would have needed to allege a future interaction with the Los Angeles police.[102] Even if he had done so, Lyons would also need to allege that all police officers always apply a

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91. *Id.* at 563.

92. *Id.* at 563–64.

93. *Id.* at 562–63.

94. *Id.* at 563–64 ("When Ms. Skilbred was asked at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that 'I intend to go back to Sri Lanka,' but confessed that she had no current plans: 'I don't know [when]. . . . Not next year, I will say. In the future.'").

95. *Id.* at 564.

96. City of L.A. v. Lyons, 461 U.S. 95, 111–12 (1983). The Court relied, in part, on a prior decision, *O'Shea v. Littleton*, 414 U.S. 488 (1974). In *Littleton*, the district court dismissed a punitive civil rights class action, holding that the court had no jurisdiction to hear the case for injunctive relief, but the Seventh Circuit reversed. *Id.* at 492. The Supreme Court held that the plaintiffs did not meet the injury requirement of Article III standing because "[p]ast exposure to illegal conduct" does not establish a current injury. *Id.* at 495. Rather, there must be "continuing, present adverse effects," or at least a threat thereof. *Id.* at 496. The Court explained that plaintiffs must allege a threatened or actual injury in which they have a "personal stake in the outcome." *Id.* at 493–94.

97. *Lyons*, 461 U.S. at 97.

98. *Id.*

99. *Id.* at 98.

100. *Id.* at 105. The Court did note, however, that past wrongs can be used as evidence to show a threat of future injury. *Id.* at 102.

101. *Id.* at 108. Further, the Court held that the "capable of repetition, yet evading review" exception did not apply here because Lyons was still able to sue for damages. *Id.* at 109; *see infra* notes 134–35 and accompanying text.

102. *Lyons*, 461 U.S. at 105–06. Thus, Lyons would need to allege that he would break the law in the future. *Id.*

chokehold to those with whom they interact or that the City instructed police officers to do so.[103] The Court believed this occurrence was too unlikely to be recognized as a risk of future injury sufficient to confer standing.[104] Additionally, the Court viewed Lyons's request for an injunction as a generalized grievance,[105] which, due to prudential considerations,[106] was inappropriate for the federal court system.

The Court articulated an example of the type of future injury that would satisfy the standing requirement in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc*.[107] The Court explained that a threat of future injury that changes a plaintiff's recreational activities may suffice for standing purposes if the plaintiff can show "reasonable concern" of the risk.[108] The plaintiffs asserted that they avoided swimming and fishing in a river because they feared that the defendant's practice of discharging mercury in the river would cause environmental damage.[109] They were unable to prove that the mercury would actually cause environmental damage, but the Court still granted standing.[110]

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103. *Id.* at 106.

104. *Id.* (noting this would be an "incredible assertion").

105. *Id.* at 111; *see also* Leonard & Brant, *supra* note 73, at 22.

106. Besides Article III standing, a court must also consider statutory standing requirements and prudential standing considerations. There are three main prudential considerations: these are against (1) "generalized grievances," (2) "assertion of third parties' rights," and (3) "maintaining an action when the plaintiff lies outside of the 'zone of interests' created by the relevant statute or constitutional guarantee." Leonard & Brant, *supra* note 73, at 3.

107. 528 U.S. 167 (2000); *see* Brian Calabrese, Note, *Fear-Based Standing: Cognizing an Injury-in-Fact*, 68 WASH. & LEE L. REV. 1445, 1449 (2011) ("*Laidlaw* is the only case in which the Supreme Court has dealt with fear-based standing directly since the 1980s."). The Court has addressed threatened future injury very recently, in *Clapper v. Amnesty International*. 133 S. Ct. 1138 (2013). The Court recognized that the plaintiffs were incurring present expenditures due to a perceived future harm, but found standing could not be "manufacture[d] . . . by choosing to make expenditures." *Id.* at 2. It is important to note that the Court explicitly distinguished this case from *Laidlaw*, in which the discharge of pollutants was "concededly ongoing," thus justifying the plaintiffs' fears. *Id.* at 20. Conversely, in *Clapper*, it was disputed whether the plaintiffs would be subject to continuing harm, but regardless, the plaintiffs' cited a chain of possibilities that would need to occur to cause this harm that was simply too speculative for the Court to accept. *Id.* at 15, 20. The Court also held that the "objectively reasonable likelihood" test adopted by the Second Circuit "improperly waters down" the Court's threatened injury requirement. *Id.* at 17.

108. *Laidlaw*, 528 U.S. at 183–85. The "reasonable concern" language has, for the most part, been limited to the environmental law context. *See, e.g.*, Me. People's Alliance v. Mallinckrodt, Inc., 471 F.3d 277 (1st Cir. 2006) (the plaintiffs filed suit under the citizen suit provision of the Resource Conservation and Recovery Act); Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149 (4th Cir. 2000) (en banc) (the plaintiffs filed suit under the citizen suit provision of the Clean Water Act); Ecological Rights Found. v. Pacific Lumber Co., 230 F.3d 1141 (9th Cir. 2000) (same). This is further evidenced by the Court's refusal to accept a similar argument in *Lyons*. *See supra* notes 100–03 and accompanying text.

109. *Laidlaw*, 528 U.S. at 181–83. For a discussion of fear-based anticipatory harm, see Calabrese, *supra* note 107, at 1465.

110. *Laidlaw*, 528 U.S. at 184–85. It is possible that the Court may have granted standing because the justices could sympathize with the plaintiffs' fear. *See infra* note 117 and accompanying text.

4. Parsing the Probability of Future Harm for Consumer Plaintiffs

A major problem regarding standing for consumer plaintiffs is that, if they are aware of the deceptive business practices at issue, their threat of future injury is extremely low. This is because the individual will rationally avoid purchasing a product if she feels that she has been deceived and has not received what she had bargained for. The requirement that a threat of future injury must be "real and immediate" has the effect of creating a minimum threshold for the probability of a future risk.

Since the "real and immediate" requirement is judicially created, courts have had trouble uniformly applying this standard to cases with facts dissimilar to those addressed by the Supreme Court. Professor F. Andrew Hessick explains that, because judges do not have sufficient information to determine the probability of a particular injury, they must often guess, which may introduce personal biases and values.[111] Some argue that any amount of harm is a legally cognizable interest.[112] Hessick argues that the interest of "[a] plaintiff who faces a small threat of injury . . . . is no less real than the interest held by an individual in avoiding a threatened injury that is extremely likely to occur" except "that the [first] plaintiff's stake is smaller."[113] Nevertheless, courts continue to establish a threshold level that must be met to achieve standing.[114]

Lyons is an example of the Court's refusal to grant standing when the plaintiff suffers from a very small threat of future injury.[115] The Court defined the potential threat of injury as Lyons again being stopped by a

111. Hessick, *supra* note 68, at 58; *see also* Bandes, *supra* note 72, at 229; Farber, *supra* note 86, at 1507 ("The difficulties of standing law are belied by apparently simple and well-settled doctrinal formulations. . . . Each of the [elements of standing] seems clear enough on the surface, yet . . . has proved remarkably tricky in practice."); Fletcher, *supra* note 74, at 223 (lamenting the courts' practice of failing to include situation-specific reasons for why standing is granted or denied).

112. Hessick, *supra* note 68, at 67 (noting that the Supreme Court "has explained that any 'identifiable trifle' relating to a cognizable interest will support standing" (citing United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n.14 (1973) (citation omitted)); *cf.* Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L.J. 391, 392 (2009) (criticizing the D.C. Circuit's "math-laden opinion" in *Natural Resources Defense Council v. Environmental Protection Agency*, which denied standing because of the length of time for a future injury to come to fruition).

113. Hessick, *supra* note 68, at 58, 67–68 ("Thus, standing treats identically a plaintiff who alleges only 1¢ in harm and a plaintiff who alleges a $100,000 injury; both have a personal stake warranting invocation of the courts. A plaintiff's interest in a case depends on both the size and likelihood of suffering an injury. Therefore, because standing does not impose a minimum requirement for the size of the injury, it also should not impose a threshold for the likelihood of injury." (citations omitted)).

114. For example, Bradford Mank discusses how the Supreme Court applied a probabilistic standing test in *Laidlaw*. Bradford Mank, Summers v. Earth Island Institute *Rejects Probabilistic Standing, but a "Realistic Threat" of Harm Is a Better Standing Test*, 40 ENVTL. L. 89, 102 (2010) (explaining that the "reasonableness" test introduced in *Laidlaw* turns on the probability of the threatened event's occurrence).

115. *See supra* notes 96–105 and accompanying text.

police officer for some violation and then being improperly choked.[116] Since the Court defined the potential future transaction so narrowly, it was easy to dismiss that possibility as a hypothetical one.[117] Courts continue to discount future injuries that appear too attenuated from the past injury.[118]

Since the current standing doctrine is so convoluted,[119] plaintiffs do not adequately provide information concerning the probabilities of a particular harm to a court, and thus courts make inconsistent decisions as to whether a future risk is a likely one.[120]

This risk-based analysis creates difficulties for plaintiffs who have suffered "small" injuries yet rely upon the protection afforded to them by a statute. Legislatures enact statutes with the purpose of protecting a large group of individuals (e.g., consumers) and generally do not include threshold requirements for an endowment of rights.[121] Therefore, the minimum-risk requirement imposed by federal courts has the effect of excluding a class of people that a legislature intended to protect.[122] The individuals who try to assert claims pursuant to state consumer protection laws are even worse off because, while Congress has the option (or perhaps possibility) to enact a statute conferring standing, a state legislature cannot do so.[123]

C. An Overview of the Mootness Doctrine

Mootness arises when a case no longer presents a live controversy or when the parties no longer have a legally cognizable interest in the outcome of the litigation.[124] Thus, if a court considers a mootness issue, that means

116. City of L.A. v. Lyons, 461 U.S. 95, 105 (1983).

117. *See* Hessick, *supra* note 68, at 75 (discussing the personal biases that may affect a judge's probability determination, such as "the availability heuristic, which leads people to have a heightened fear of a risk of harm if an example of that harm occurring readily comes to mind"). Hessick suggests this is why the Court was willing to recognize standing in *Laidlaw* (where the injury was Laidlaw's excessive pumping of mercury into river) but not in *Lyons* (where the injury was suffering a chokehold during an arrest). *Id.* at 75–76; *see also* Mank, *supra* note 114, at 101–02 (discussing how the Court distinguished *Laidlaw* from *Lyons*).

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

119. *See* Bandes, *supra* note 72, at 264 (noting that there is no simple "checklist" for determining standing, although courts often act as if there is one and only offer conclusory statements for their grant or denial of standing); Bradford Mank, *Standing and Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665, 684 (2009) (explaining that the Supreme Court has yet to "provide[] a clear test for future or probabilistic injuries").

120. *See infra* Part II; *see also* Farber, *supra* note 86, at 1540.

121. Hessick, *supra* note 68, at 71.

122. *Id.* Hessick speculates that "in some cases no individual may face the risk necessary to support standing, and consequently Congress's policies could go unenforced. In short, under the minimum-risk requirement, Congress and the courts talk past each other." *Id.*

123. *See supra* note 84 and accompanying text.

124. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980).

the parties had standing at the commencement of the litigation.[125] The Court has frequently defined mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."[126] If a case becomes moot, the federal court must dismiss for lack of subject matter jurisdiction.[127]

Though the "cases" or "controversies" language of Article III provides the basis for mootness,[128] the doctrine is grounded in prudential concerns as well.[129] The prudential nature of the mootness doctrine is evidenced by the Court's decision to carve out a number of exceptions to the doctrine.[130]

One of these exceptions is the "capable of repetition, yet evading review" doctrine.[131] A case falls into this category if (1) the disputed act will cease before the case is fully litigated, and (2) it is reasonable to believe that the same party will become subject to this injurious act again in the future.[132] This exception was famously applied in the Supreme Court's landmark abortion case, *Roe v. Wade*.[133] The *Lyons* Court, however, rejected this

125. *Cf.* Renne v. Geary, 501 U.S. 312, 320–21 (1991) (holding that the "capable of repetition, yet evading review" exception cannot remedy a standing problem (citing O'Shea v. Littleton, 414 U.S. 488, 495–96 (1974))).

126. Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.22 (1997) (quoting *Geraghty*, 445 U.S. at 397). The Court later retracted this definition in *Laidlaw*, stating that the "plain lesson" of cases where a plaintiff seeks injunctive relief for an unlikely injury (such as *Lyons*) "is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000).

127. 15 MOORE ET AL., *supra* note 81, § 101.90.

128. Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964).

129. *See* 15 MOORE ET AL., *supra* note 81, § 101.91 (discussing constitutional versus prudential mootness); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605, 610–11 (1992) (noting that mootness contains "both constitutional and prudential components"). *See generally* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562 (2009).

130. This Note will discuss the "capable of repetition, yet evading review" exception and the "relation back" doctrine. There are a number of other methods for resolving mootness, but they are inapplicable to this Note. *See generally* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (noting a logically antecedent exception); 15 MOORE ET AL., *supra* note 81, § 101.99 (discussing the voluntary cessation of the challenged activity by the defendant to avoid judicial resolution).

131. *See* 15 MOORE ET AL., *supra* note 81, § 101.99 ("By 'evading review,' the Supreme Court means evading Supreme Court review. In other words, for an action to be fully litigable, there must be time for it to be decided by the Supreme Court before it ceases or expires." (citation omitted)).

132. Turner v. Rogers, 131 S. Ct. 2507, 2514–15 (2011) (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam)) (accepting the "capable of repetition, yet evading review" argument).

133. 410 U.S. 113 (1973). The plaintiff seeking an abortion had already given birth by the time the Court heard the case. Traditionally, this would moot her case. The Court made an exception to the rule and noted that the duration of pregnancy "is so short that the pregnancy will come to term before the usual appellate process is complete." *Id.* at 125. If the Court had accepted a rigid mootness doctrine, pregnancy litigation would probably never receive appellate review. *Id.* The Court clearly found that outcome unacceptable. *Id.*

exception.[134] The Court held that this doctrine may apply only in exceptional situations, and only if the plaintiff is likely to be subject to this harm again.[135] Courts that refuse to recognize standing in consumer protection cases often follow *Lyons*'s reasoning if a plaintiff seeks to invoke this doctrine.[136]

D. The Relationship Between Standing and Class Actions

Article III standing becomes even more complex in the class action context because the named plaintiff seeks not only to litigate her claims but also the claims of an absent class.[137] While plaintiffs have suggested using different standing requirements for a class representative (versus an individual plaintiff), bringing a class action does not enable the named plaintiff to invoke a different burden to establish Article III standing.[138] The Supreme Court has, however, recognized exceptions to the mootness doctrine when addressing class action cases.

1. Standing Requirements for a Named Plaintiff

In individual lawsuits, the plaintiff must have a personal stake in the litigation,[139] and if she loses this interest, a federal court no longer has the power to hear her claims.[140] The named plaintiff in a class action is subject to the same objections regarding standing that a defendant could raise against an individual plaintiff.[141] While class actions may appear unique,[142] the Supreme Court has not allowed this fact to justify a relaxation of standing requirements for named plaintiffs.[143] The Court has,

134. City of L.A. v. Lyons, 461 U.S. 95, 109 (1983).

135. *Id.* (citing DeFunis v. Odegaard, 416 U.S. 312, 319 (1974)). Further, the Court noted that Lyons' claim does not "evade" review because he could still seek monetary damages for the chokehold from which he already suffered. *Id.*

136. *See infra* notes 200–02 and accompanying text.

137. 1 RUBENSTEIN, *supra* note 70, § 2:6.

138. *Id.* § 2.7 ("When a named plaintiff in a class suit attempts to obtain an injunction due to the likelihood of future injury, that injury must be suffered personally by the named plaintiff—potential future injuries to class members do not provide standing for the named plaintiff to seek injunctive relief."); *see* 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 4:28 (9th ed. 2012); *see also* Friends of the Earth Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 185 (2000).

139. *See supra* note 77 and accompanying text.

140. *See supra* note 127 and accompanying text.

141. 5 MOORE ET AL., *supra* note 81, § 23.63.

142. Plaintiffs often try to assert that a class action is distinctive because the named plaintiff seeks to represent both herself and "all [those] similarly situated." Roe v. Wade, 410 U.S. 113, 121 (1973).

143. *See* 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.9.6 (3d ed. 2012). Wright notes that generally, courts assume that "[s]o long as there is a class of injured persons who would satisfy standing requirements, an able representative could easily be found to satisfy all the needs of Article III." *Id.*; *cf.* Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1048 (9th Cir. 1999) (Reinhardt, J., concurring) (noting the availability of more appropriate named plaintiffs).

however, carved out a number of exceptions for the class action plaintiff in a related doctrine—mootness.

2. Mootness in the Class Action Context

While courts do not distinguish between individual lawsuits and class actions when considering standing requirements, courts do recognize the special status of a class action in the mootness context.[144] Class actions are unique because, after class certification, there are two distinct legal interests that must be protected: that of the named plaintiff and that of the absent class members.[145] Mootness may become an issue in class actions because there are no standard timing rules for class certification.[146] Often, the status of the parties can change during the time that passes between the filing of a lawsuit and the court's ruling on a motion for class certification.

Since the Supreme Court has identified the "social policies facilitated by the class action device,"[147] the Court has applied a number of exceptions to the mootness doctrine to class action suits.[148] Although the Court rarely applies these exceptions—and when it does, applies them in very narrow holdings—it is clear that the Court sees the importance of protecting the interests of the absent class.[149]

One such rule is the "relation back" doctrine. If the named plaintiff's claim becomes moot prior to class certification, the court may permit the date of certification to relate back to the date of the filing of the complaint if the suit focuses on a claim of a "transitory nature."[150] The Supreme Court has only addressed this doctrine in narrow contexts. For instance, the Court has recognized a named plaintiff's right to appeal a denial of class certification, although his claim had become moot during the course of the

144. *See* Sosna v. Iowa, 419 U.S. 393, 399 (1975) (noting a certified class "acquire[s] a legal status separate from the interest asserted by [the named plaintiff]").

145. *See* Daniel A. Zariski et al., *Mootness in the Class Action Context: Court-Created Exceptions to the "Case or Controversy" Requirement of Article III*, 26 REV. LITIG. 77, 79–80 (2007) (citing Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 51–52 (1991)).

146. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1280 (2002) (noting that Rule 23(c)(1) only instructs that a judge make a "certification decision '[a]s soon as practicable after the commencement of [the] action'"); David Hill Koysza, Note, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 785–86 (2003); *cf.* FED. R. CIV. P. 23(c)(1).

147. Koysza, *supra* note 146, at 783; *see also* Ryan Patrick Phair, Comment, *Resolving the "Choice-of-Law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. CHI. L. REV. 835, 837 (2000) (noting the benefits of judicial efficiency, cost-spreading across plaintiffs, and avoiding inconsistent obligations).

148. *See supra* note 130 and accompanying text; *see also* Koysza, *supra* note 146, at 787–89 (noting the Court's willingness to hear arguments advocating mootness exceptions in class action lawsuits).

149. Aside from the exceptions previously discussed, courts currently apply slightly different mootness rules in the class action context. Lusardi v. Xerox Corp., 975 F.2d 964, 974 (3d Cir. 1992).

150. 15 MOORE ET AL., *supra* note 81, § 101.94 (citing Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 50–52 (1991)).

appeal.[151] The Court has construed the "personal stake" requirement as met because the question of whether class certification was appropriate remained a "concrete, sharply presented issue" between the parties.[152] The Court has also noted that there is a class of claims that are so "inherently transitory" that the named plaintiff's interest will be extinguished before the trial court has an opportunity to rule on a class certification motion.[153] It is important to note that this holding was limited to situations in which a named plaintiff appeals the denial of a motion for class certification—a named plaintiff with a moot claim cannot appeal the merits of a case until certification.[154] Thus far, however, the Court has specifically avoided addressing how it would rule if this issue arose prior to a court's ruling on class certification.[155] Therefore, lower courts are currently split concerning whether to preserve class allegations prior to class certification.[156]

II. BALANCING THE IMPORTANCE OF FEDERAL STANDING PRECEDENT WITH THE RELIEF PROMISED BY STATE CONSUMER PROTECTION STATUTES

This part discusses the problems that arise when a court hears a claim predicated on a state consumer protection statute, but the plaintiff has not shown a threat of future injury previously recognized by federal courts. When a consumer believes a company has engaged in a deceptive business practice, she often stops buying the product or using the service. She may then bring a lawsuit to enjoin the defendant company from continuing to use the deceptive practice.[157] Yet federal district courts often dismiss the case, explaining that because the plaintiff stopped buying the product, she

151. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 402 (1980) (recognizing the "procedural . . . right to represent a class" although the named plaintiff had been released from prison, thus causing the claim to become moot, while the appeal was pending).

152. *Id.* at 403–04.

153. *Id.* at 399 (citing Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975)) (holding that no plaintiff "would be in pretrial custody long enough for a district judge to certify the class" (citation omitted) (internal quotation marks omitted)).

154. *Id.* at 404.

155. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 340 n.12 (1980) (decided the same day as *Geraghty*).

156. *Compare* Carroll v. United Compucred Collections, Inc., 399 F.3d 620 (6th Cir. 2005), *with* Brunet v. City of Columbus, 1 F.3d 390, 399 (6th Cir. 1993), Reed v. Heckler, 756 F.2d 779, 786 (10th Cir. 1985), *and* Zeidman v. McDermott & Co., 651 F.2d 1030, 1051 (5th Cir. Unit A July 1981); *see also* Zariski et al., *supra* note 145, at 104–06 (discussing the circuit split).

157. It is often more effective for a consumer to bring a class action lawsuit than an individual suit. This is because the amount an individual seeks is often small, such as a few dollars that she overpaid for a product or service. Thus, consumer cases are often negative-value suits. *See* Andrew D. Thibedeau, Note, *Vindicating the Public Interest?: The Public Law Implications of Attorneys' Fee Restrictions in Class Actions*, 13 SUFFOLK J. TRIAL & APP. ADVOC. 231, 233–34 (2008); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 529 (1997) (defining "negative expected value suits" as "suits in which the expected trial award is too small to cover plaintiff's litigation costs"). Although some consumer protection statutes contain fee-shifting provisions, class actions are generally more effective in terms of equalizing the bargaining power between the parties as well.

does not suffer from a threat of future injury.[158] Therefore, the plaintiff will not have Article III standing to obtain an injunction.[159] Very few plaintiffs are successful in avoiding this problem.[160]

Most courts remain strictly committed to the precedent set by the Supreme Court and do not differentiate between consumer protection claims and instances previously addressed by the Court.[161] Some courts, however, have distinguished consumer protection cases and hold that the named plaintiffs do have Article III standing.[162] These courts instead focus on the intent of the state legislatures. Further, these courts stress that if the court does not make an exception for these cases, classes advancing consumer protection claims may be unable to find an appropriate class representative. Although all these district courts apply the same standing elements, they interpret these requirements quite differently.

A. Lower Courts Construe Precedent Narrowly and Do Not Grant Plaintiff Standing To Seek an Injunction

Generally, district courts read standing requirements narrowly in consumer protection cases and hold that a plaintiff who is aware of a deceptive business practice is safe from future injury. The Northern District of California used this reasoning in *Deitz v. Comcast Corp.*[163] Deitz filed suit under California's three consumer protection statutes,[164] seeking to enjoin Comcast's practice of requiring customers to rent a cable converter box and remote control.[165] Deitz alleged these products were unnecessary for particular cable services.[166]

Deitz previously had subscribed to Comcast's cable, telephone, and internet services, but he cancelled his cable service prior to filing suit.[167] Deitz asserted that an injunction barring this practice would benefit him because he could consider using Comcast for his future cable needs.[168] The

158. One may wonder why these cases claiming state-created rights are even heard in federal court. Plaintiffs may choose to file in federal court because they do not meet the requirements for a class action in state court or because state courts do not provide adequate recovery. *See, e.g.*, Sweeney & Englund, *supra* note 26, at 234 (discussing the 2005 ILR/Harris Poll State Liability Systems Ranking Study, which listed California as one of the five lowest-ranked states for class action suits and most unsatisfactory punitive damages treatment, and listed local New York metropolitan area jurisdictions as among those with the worst reputation in the state court liability system).

159. *See infra* Part II.A.

160. This part presents a sampling of cases from each side of the debate, but it is far from inclusive of all the cases involved in this conflict.

161. *See infra* Part II.A.

162. *See infra* Part II.B.

163. No. C06-06352 WHA, 2006 WL 3782902 (N.D. Cal. Dec. 21, 2006).

164. *See supra* notes 32–48 and accompanying text.

165. *Deitz*, 2006 WL 3782902, at *1. The complaint was originally filed in state court, but Comcast removed the suit because Deitz also asserted claims under the Cable Communications Act (a federal statute). *Id.* at *2.

166. *Id.* at *1.

167. *Id.*

168. *Id.* at *3.

court did not accept this argument, however, because Deitz was no longer a Comcast cable subscriber.[169] Further, Deitz could not show "a definitive likelihood" that he would resubscribe if this concern was remedied.[170] Therefore, the court held that Deitz's risk of injury was "too speculative and attenuated" to establish standing.[171]

Deitz asserted that the class nature of his suit resolved his standing problem since some class members suffered the same injury but remained Comcast cable subscribers.[172] The court noted, however, that alleged injuries of unnamed class members cannot confer—or remedy a lack of—standing on a named plaintiff.[173]

In 2012, the Third Circuit similarly held in *McNair v. Synapse Group*[174] that consumers who ceased using a service prior to filing suit did not have Article III standing to pursue injunctive relief. The defendant, Synapse Group, was a magazine marketer that offered a service plan in which a customer had to actively cancel a subscription rather than renewing it at the end of a set term.[175] The plaintiffs filed suit under the New Jersey,[176] New York,[177] and District of Columbia[178] consumer protection statutes, claiming that the automatic renewal notice was deceptive,[179] and sought injunctive relief and monetary damages.[180]

Though the plaintiffs were no longer Synapse customers, they alleged a threat of future harm premised on the possibility that they might choose to accept a Synapse offer again in the future.[181] The court rejected this argument, holding that "generally, the law accords people the dignity of assuming that they act rationally, in light of the information they possess."[182] Whether or not the plaintiffs choose to accept a Synapse offer in the future would be "pure speculation."[183]

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169. *Id.*
170. *Id.*
171. *Id.* (citations omitted).
172. *Id.* at *4.
173. *Id.* ("[S]ystem-wide injunctive relief is not available based solely on alleged injuries to unnamed members of a proposed class.").
174. 672 F.3d 213 (3d Cir. 2012).
175. *Id.* at 216. In other words, the subscription continued to renew, term after term, until the customer took affirmative steps to cancel the subscription.
176. N.J. STAT. ANN. §§ 56:8-1 to -20 (West 2012); *see supra* notes 60–66 and accompanying text.
177. N.Y. GEN. BUS. LAW § 349 (McKinney 2012); *see supra* notes 49–59 and accompanying text.
178. D.C. CODE §§ 28-3901 to -3913 (LexisNexis 2010).
179. *McNair*, 672 F.3d at 217.
180. *Id.* at 219.
181. *Id.* at 224–25.
182. *Id.* at 225. *But see* Fortyune v. Am. Multi-Cinema, Inc., No. CV-01-05551 NM (JWJx), 2002 U.S. Dist. LEXIS 27960 (C.D. Cal. Oct. 22, 2002). In a suit brought under the Americans with Disabilities Act, the defendant movie theater asserted that the plaintiff had no threat of future injury because it would be very unlikely that the theater would not have a companion seat available next to plaintiff's wheelchair space again. *Id.* at 18. The Court found this argument "disingenuous" because the theater had not changed its companion seat policies, so the incident may occur again (even though the plaintiff frequented the theater

The court also rejected the plaintiffs' "capable of repetition, yet evading review" argument on the same basis.[184] The plaintiffs alleged that they should not be subjected to billing throughout the course of litigation to obtain and retain standing, especially because a subscription term is shorter than the time it would take to litigate the action.[185] The court noted, yet again, that the plaintiffs had not made a reasonable showing that they will be subjected to the allegedly deceptive practices in the future.[186] The court explained that, if the plaintiffs had retained their subscriptions until after moving for class certification, they would have had standing to represent a class seeking injunctive relief.[187]

Likewise, in *Robinson v. Hornell Brewing Co.*,[188] the District Court of New Jersey denied a plaintiff's motion for class certification, citing the *McNair* holding.[189] The plaintiff, Robinson, claimed that products labeled as all natural were misleading to him because the products actually contained high-fructose corn syrup (HFCS), an unnatural product.[190] Robinson filed suit under the CFA[191] and sought to enjoin the defendant from continuing to claim that products containing HFCS are all natural.[192]

In an interrogatory, Robinson asserted that when he learned Arizona products contained HFCS, he became "disillusioned" and stated that he would no longer purchase these beverages even if all natural was removed from the label.[193] Relying on *McNair*, the court held that because Robinson stated that he would probably never purchase the product again, he did not have Article III standing to seek an injunction.[194]

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and it had not yet happened again). *Id.* at 18–19. The court held that the past instance of illegal conduct established the plaintiff's standing because it was "accompanied by 'continuing, present adverse effects'"—such as arriving to the theater forty-five minutes early to ensure the availability of a companion seat. *Id.* at 19. Generally, California district courts are more lenient with standing requirements. *See infra* Part II.B.

183. *McNair*, 672 F.3d at 225.

184. *Id.* at 226.

185. *Id.*

186. *Id.*

187. *Id.*

188. No. 11-2183 (JBS-JS), 2012 WL 1232188 (D.N.J. Apr. 11, 2012).

189. *Id.* at *3–4.

190. *Id.* at *1.

191. N.J. STAT. ANN. §§ 56:8-1 to -20 (West 2012); *see supra* notes 60–66 and accompanying text.

192. *Robinson*, 2012 WL 1232188, at *4. Robinson sought monetary damages as well. *Id.* at *2.

193. *Id.* at *3 ("Plaintiff states that due to his current lack of trust regarding Defendants and their products, there are no changes [to Arizona product labeling] that would be sufficient for Plaintiff to purchase Arizona Products in the future." (quoting Plaintiff's Response to Interrogatory No. 36) (internal quotation marks omitted)).

194. *Id.* at *1–2. On December 12, 2012, the District Court of New Jersey granted Robinson's motion to dismiss, concluding that the court no longer had subject matter jurisdiction after denying class certification for lack of Article III standing. Robinson v. Hornell Brewing Co., No. 11-2183 (JBS-JS), 2012 WL 6213777, at *11 (D.N.J. Dec. 13, 2012).

Robinson advanced a unique argument, claiming he was at risk of injury each time he saw the all-natural label, "which happens every time he steps into a convenience store."[195] Further, Robinson analogized himself to the "hypothetical dog bite victim."[196] The "victim" had been bitten by a dog, yet the dog still wanders around the neighborhood. The victim is at risk of a future injury any time he steps outside, although the dog does not bite him each time he goes outdoors. In this scenario, the victim would have standing to seek an injunction to tie up the dog.[197] Robinson argued that he faced a similar threat of injury any time he enters a store selling Arizona beverages, although he may not purchase their products.[198] The court, however, found this alternative argument unpersuasive because Robinson had the ability to control the risk of injury by choosing to not purchase the product.[199]

Robinson also argued that he suffered an injury "capable of repetition, yet evading review."[200] He claimed that other consumers will suffer the same injury but the issue will evade review because a consumer will lose standing upon becoming aware of the allegedly deceptive labeling.[201] The court agreed with the precedent set forth in *McNair*, noting that this exception can only apply if the same person was likely to suffer from the alleged injury.[202] Besides, the deceived consumers could still seek money damages, so the issue did not evade review.[203] As previously explained, the court felt Robinson could not show that he is likely to suffer this injury again,[204] and thus it could not invoke the "capable of repetition, yet evading review" exception.

The *Robinson* court did express concern, however, that *McNair* precludes consumer classes from seeking injunctive relief in a federal court.[205] Specifically, the court explained that "[b]y necessity, such cases can involve only identified plaintiffs who have become aware of the misleading nature of the label."[206] Yet *McNair* held that these plaintiffs could not show a sufficient threat of future injury to meet Article III standing requirements.[207] Thus, although the *Robinson* court followed this holding,

195. *Robinson*, 2012 WL 1232188, at *4.
196. *Id.* at *6.
197. *Id.*
198. *Id.*
199. *Id.* The court noted that in contrast, the dog-bite victim would not be able to control the risk of injury (whether the dog will attack him). *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *See supra* note 135 and accompanying text (discussing how the Supreme Court used this reasoning in *Lyons*).
204. *See supra* note 194 and accompanying text.
205. *Robinson*, 2012 WL 1232188, at *7.
206. *Id.*
207. *Id.*

the court did express some doubts as to whether the *McNair* court actually intended this result.[208]

In *Rikos v. Proctor & Gamble*,[209] the Southern District Court of Ohio recognized the tension between Article III standing and California's consumer protection statutes but still did not grant the plaintiff standing to seek injunctive relief.[210] The plaintiff asserted claims under the CLRA and UCL,[211] alleging that the defendant's assertion that the digestive benefits provided by Align[212] were "clinically and scientifically proven," was false.[213]

The plaintiff stressed that an injunction is the "primary form of relief provided by California's consumer protection statutes."[214] The court struggled with the plain language of the California statutes, but it concluded that this language could not overcome the federal standing requirements.[215] Since the plaintiff could not assert that he was at risk of future injury, he did not have standing to seek injunctive relief.[216]

B. Other Lower Courts Focus on the Purpose of Consumer Protection Statutes and Grant Plaintiff Standing To Seek an Injunction

In contrast, some California district courts have been more willing to grant plaintiffs Article III standing, asserting that the purpose of the California consumer protection statutes dictates this holding. For example, the Central District Court of California addressed a case similar to the ones discussed above in *Henderson v. Gruma Corp*.[217] The plaintiffs purchased Mission Guacamole and Spicy Bean Dip products, then filed suit under California's three consumer protection statutes,[218] claiming they were misled by the deceptive product labels.[219] Specifically, the plaintiffs asserted that the labels advertising the products as "guacamole" and "all

208. *Id.* Judge Wolfson, also in the District of New Jersey, agreed with this concern. She was unable to reconcile the *McNair* court's statement that "the law affords people the dignity of assuming that they act rationally" (arguing that the plaintiffs will not purchase a Synapse offer in the future) with the court's assertion that, if the plaintiffs continued their subscriptions until moving for class certification, they would have standing to represent an injunctive relief class. Dicuio v. Brother Int'l Corp., No. 11-1447 (FLW), 2012 U.S. Dist. LEXIS 112047, at *52 n.17 (D.N.J. Aug. 9, 2012); *see supra* notes 182, 184 and accompanying text.

209. 782 F. Supp. 2d 522 (S.D. Ohio 2011).

210. *Id.* at 532. The court recently granted Proctor & Gamble's motion to dismiss similar claims asserted in an amended complaint for lack of Article III standing. Rikos v. Proctor & Gamble, Co., No. 1:11-cv-226, 2013 U.S. Dist. LEXIS 12405 (S.D. Ohio Jan. 30, 2013).

211. *See supra* notes 32, 34–41, 44–48 and accompanying text.

212. Align is a dietary supplement that was produced by the defendants.

213. *Rikos*, 782 F. Supp. 2d at 526.

214. *Id.* at 531 (citations omitted); *see also supra* notes 37, 43, 48 and accompanying text.

215. *Id.* at 532.

216. *Id.*

217. Henderson v. Gruma Corp., No. CV-10-04173 AHM(AJWx), 2011 WL 1362188 (C.D. Cal. Apr. 11, 2011).

218. *See supra* notes 32–48 and accompanying text.

219. *Henderson*, 2011 WL 1362188, at *1.

natural" were misleading.[220] The plaintiffs sought to enjoin the Gruma Corporation from continuing to engage in misleading advertising, along with money damages for past harm.[221] Gruma then filed to dismiss the suit.[222]

The court first noted that the plaintiffs met the injury-in-fact and causation requirements for Article III standing, then moved to the redressability component.[223] Gruma claimed that since the plaintiffs were now aware of the deceptive advertising, they would not continue to purchase the products in the future, so they did not suffer from a threat of future injury.[224] The court found this argument unpersuasive, however, because this logic would preclude federal courts from applying California consumer protection statues to enjoin false advertising, "because a plaintiff who had been injured would always be deemed to avoid the cause of the injury thereafter . . . and would never have Article III standing."[225] The court delved into the purpose of California's consumer protection statutes and concluded that preventing the plaintiffs from representing a class in federal court "would surely thwart the objective" of these statutes.[226] Thus, the court found that the plaintiffs had standing.[227]

A subsequent case in the same district court, *Larsen v. Trader Joe's Co.*,[228] agreed with this reasoning and denied Trader Joe's motion to dismiss a class action requesting injunctive relief. The injunctive claim—predicated on California's consumer protection statutes[229]—related to the all-natural labels on numerous Trader Joe's products that allegedly contained synthetic or unnatural ingredients.[230] Although the plaintiff

220. *Id.* The plaintiffs also filed claims regarding the labeling of "0 g transfat," "0 g cholesterol," "The Authentic Tradition," and "With Garden Vegetables," but these claims were dismissed. *Id.* at *14.

221. *Id.* at *1.

222. *Id.* at *11–12. The court granted the motion to strike some claims, but denied the motion for the phrases "all natural" and "guacamole." *Id.*

223. *Id.* at *7. As evidenced by this case, sometimes the threat-of-future-injury determination is discussed as part of the redressability element of Article III standing. This is because the court focuses on whether judicial action would actually diminish the threat.

224. *Id.*

225. *Id.*

226. *Id.* at *8; *see also* Astiana v. Ben & Jerry's Homemade, Inc., Nos. C10-4387 PJH, C10-4937 PJH, 2011 WL 2111796 (N.D. Cal. May 26, 2011) (holding that the plaintiff had standing to seek injunctive relief, yet failing to discuss the unique standing requirements when alleging a future threat of injury).

227. *Henderson*, 2011 WL 1362188, at *8.

228. No. C11-05188 SI, 2012 WL 5458396 (N.D. Cal. June 14, 2012). *Cabral v. Supple, LLC*, a case in the Central District of California, also relied on *Henderson* in denying Supple's motion to dismiss. Cabral v. Supple, LLC, No. EDCV12-00085-MWF(OPx), 2012 WL 4343867, at *1 (C.D. Cal. Sept. 19, 2012). Cabral sued under California's UCL, FAL, and CLRA because she allegedly relied on claims in an infomercial prior to purchasing the product. *Id.* The court refused to dismiss for lack of standing and quoted the portion of *Henderson* discussed above. *Id.* at *2.

229. *See supra* notes 32–48 and accompanying text.

230. *Larsen*, 2012 WL 5458396, at *1.

ceased purchasing the disputed products,[231] the court agreed with the reasoning in *Henderson*. The court explained that holding that the plaintiff did not have standing would "eviscerate" the purpose of the state's consumer protection statute, because that holding would "bar any consumer who avoids the offending product from seeking injunctive relief."[232]

In *Ries v. Arizona Beverages U.S.*,[233] the Northern District Court of California granted standing in a case very similar to *Robinson*.[234] In *Ries*, the plaintiffs had filed a putative class action under the California consumer protection statutes[235] that encompassed all people in California who purchased an Arizona beverage that was labeled as all natural but contained HFCS.[236] Ries had asserted that after realizing that her Arizona beverage contained HFCS, she threw it in the trash because she felt deceived by the label.[237] The defendants moved for summary judgment, and the plaintiffs moved for class certification.[238]

The defendants made similar arguments to those in *Robinson*[239] and asserted that the named plaintiffs did not have standing for injunctive relief. The plaintiffs, however, responded that their testimony did not mean they had foresworn purchasing Arizona products in the future.[240] The court agreed with the plaintiffs and thus found the plaintiffs had standing to seek injunctive relief.[241] Further, the court held that the plaintiffs' wish to be safe from future false advertising was a sufficient harm to be redressed by a court, because the plaintiffs were aware of the deceptive advertising and would thus be unable to rely on Arizona's other labels that market their products as all natural.[242] The court focused on the plaintiffs' (potential) inability to confidently rely on future Arizona advertisements or labels that market the product as all natural. In the court's view, this is the type of harm the statute intended to protect against and correct.[243] The court also quoted the central holding from *Henderson*.[244] Although the *Ries* court

231. *Id.* at *3 ("[P]laintiffs affirm they would not have bought the Trader Joe's products if they had known about the synthetic ingredients, and have not purchased any of these products since.").

232. *Id.* at *4.

233. 287 F.R.D. 523 (N.D. Cal. 2012); *see also* Miller v. Ghirardelli Chocolate Co., No. C12-04936 LB, 2012 WL 6096593 (N.D. Cal. Dec. 7, 2012). In *Miller*, the plaintiff sued because the "Ghirardelli Chocolate Premium Baking Chips Class White" did not contain any white chocolate. *Id.* at *1. The court held that Miller had standing to seek injunctive relief (but only for the product that he actually purchased). *Id.* at *4.

234. *See supra* notes 190–93 and accompanying text.

235. *See supra* notes 32–48 and accompanying text.

236. *Ries*, 287 F.R.D. at 527.

237. *Id.*

238. *Id.*

239. *See supra* notes 193–94 and accompanying text.

240. *Ries*, 287 F.R.D. at 533 (noting that one plaintiff "testified she has not purchased defendants' products since 2009. . . . Ries merely agreed that her claims were predicated on one purchase that occurred in 2006.").

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 533–34.

decided that the plaintiffs had standing, many consumer plaintiffs file their cases in districts that are not so amenable to their claims.

III. CONSUMER PLAINTIFFS NEED TO MAKE A CHANGE

Currently, lower federal courts are confused as to how to treat these consumer cases. The Supreme Court has clearly stated that there must be an actual threat of future injury for a plaintiff to have standing to seek injunctive relief.[245] The Court has not, however, clearly explained how to determine if a threat of future injury is likely or imminent.[246] Therefore, the district courts that have denied standing to plaintiffs who have foresworn particular products have acted appropriately—albeit conservatively—in light of binding precedent. By contrast, the courts that have granted standing have instead loosely construed the standing requirement that the plaintiff suffer from a threat of future injury.

This legal conflict is problematic because it has created difficulties for consumer classes to find an appropriate named plaintiff. The type of consumers that are currently arising as named plaintiffs are often denied standing.[247] Yet this group consists of those who have perhaps the strongest interest in pursuing litigation, because they wish to enjoin deceptive business practices. Thus, consumer classes must either be represented by a new type of plaintiff, replead the type of future injury they fear, or seek a complete overhaul of Article III standing doctrine.

A. Why the Lack of Standing Is Problematic

Generally, it is assumed that an injured class consisting of those who can meet Article III standing requirements will also have (or be able to find) a representative who can satisfy these requirements as well.[248] Yet there are potential problems with any type of consumer that attempts to become a named plaintiff.

1. Consumers Can Be Split into Three Categories for Purposes of Standing

The consumers who have used a disputed product or service can be separated into three groups. The first group consists of the consumers that use the product and do not know that the product is defective or that the defendant company's marketing scheme is deceptive. This group is probably the largest of the three. These individuals satisfy the elusive requirement that they be at risk of a future injury because they may very well continue to purchase and use the disputed product.[249] By definition,

245. *See supra* notes 88, 95 and accompanying text.
246. *See supra* note 119 and accompanying text.
247. *See supra* Part II.A.
248. *See supra* note 143 and accompanying text.
249. It is undisputable that some members of this group will be injured in the future. It is unavoidable that someone will purchase a product that advertises itself to be "all natural" because of that claim and would not have done so otherwise. That person will probably also

however, members of this group will never be a class representative, simply because one cannot bring a lawsuit if they do not recognize that a problem (may) exist.[250] This group is the epitome of a "catch-22." If an individual does not know that she is being injured, she will remain in this group. Once she realizes (or believes) that she is being injured, she will become a member of one of the other two groups.[251] Therefore, consumers in this group will generally make up the absent class.

Second, there are consumers who have become aware of the deceptive marketing—or believe there is a problem—and have ceased using the product. Members of this group are the individuals that traditionally bring a lawsuit, as evidenced by the cases discussed in Part II. As shown by this Note, however, members of this second group frequently cannot meet standing requirements.[252] Since this group cannot display a threat of future injury,[253] they do not have standing to seek an injunction in federal court.

Third, there are consumers who have become aware of the deceptive advertising but continue to use the product regardless of this knowledge. One could imagine a number of reasons why a consumer may continue to use a product. She may feel that the defect in the product—that it is not all natural or does not provide whatever benefits it promises—is not significant enough to give up using a product she enjoys. Maybe the consumer is upset about the deception, but she does not believe there is an alternative, comparable product available.[254] This group can clearly show they are likely to purchase the product again and again, and therefore pay a price premium or otherwise suffer from their use of the product.

It is possible that we have already seen these plaintiffs, but the complaints and opinions have not explicitly differentiated these plaintiffs and made this clear. For instance, in *Ries*, the named plaintiffs asserted that they did not disavow purchasing the products in the future. The court accepted this argument and granted standing.[255]

2. The Alternative Plaintiff

Since the "group two" plaintiffs are denied standing by a number of federal courts, a "group three" plaintiff can instead try to represent a

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pay an extra few dollars for that product because of that claim. Therefore, the threat of future injury for this group is very real and very imminent.

250. Although the *Robinson* court denied standing, the court did recognize this concern. *See supra* note 206 and accompanying text.

251. Both of these other groups, however, have Article III standing concerns.

252. *See supra* Part II.A.

253. Of course, a few district courts in California have held otherwise. *See supra* Part II.B.

254. Or even, perhaps, she is continuing to purchase the product because she knows it will be needed to assert standing in federal court! If this was the case, however, a court may find that she does not meet the causation element of Article III standing to seek an injunction.

255. *See supra* notes 240–41 and accompanying text.

consumer class. There are two issues that must then be considered if a group three plaintiff chooses to bring a suit.

First, a court may simply find a consumer's decision to continue to purchase the product irrational, like the Third Circuit did in *McNair*. The *McNair* court suggested that once an individual decides he is unhappy with a service, it would be irrational to begin using the service again.[256] If a consumer continues to use a product, yet files a lawsuit and asks a court to enjoin the defendant from engaging in an allegedly improper act, a court is likely to hesitate. The named plaintiff has not shown that there is a problem with this practice. If a class representative understands that a product is, for example, not all natural, yet continues to buy a product that advertises itself as such, a court is unlikely to find that this act must be remedied.[257]

Strangely enough, the *McNair* court suggested that using this group three plaintiff may actually be the solution.[258] Specifically, the court explained that if the plaintiffs waited until after moving for class certification to cancel their Synapse subscriptions, they would have had standing to seek injunctive relief.[259] This assertion seems contradictory, however, to the courts' espousal that it affords a plaintiff the "dignity of assuming that [he] act rationally"[260] once he learns that an advertisement is deceptive. These two assertions are clearly in conflict with one another.[261] It is unclear how the Third Circuit (or another court) will address this tension in the future. If the plaintiffs who continue to purchase a product are not granted standing, however, then consumer classes will be precluded from bringing claims in federal court.[262]

Second, even if a court holds that this consumer has met Article III standing requirements, whether the consumer will retain standing for damages or an injunction under the relevant consumer protection statute may vary from state to state.[263] It is likely, however, that this group of consumers will meet the statutory standing requirements for the statutes highlighted in this Note.[264]

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256. *See supra* notes 181–82 and accompanying text.

257. It is challenging to imagine that after learning that a product is not all natural, a plaintiff's continued purchase of a product would be due to that advertisement. Therefore, it is doubtful that this plaintiff would be able to meet the causation requirement of Article III standing. *See supra* note 88 and accompanying text.

258. *See supra* note 187 and accompanying text.

259. *See supra* note 187 and accompanying text.

260. McNair v. Synapse Grp., 672 F.3d 213, 225 (3d Cir. 2012).

261. Two judges in the District Court of New Jersey noted this tension, although they followed the holding in *McNair*. *See supra* notes 205–08 and accompanying text.

262. *See supra* note 205 and accompanying text. Plaintiffs could avoid this problem, however, by redefining the scope of their future injury. *See infra* Part III.B.1.

263. Although state consumer protection statutes have a number of common features, it would still be necessary to undergo an individualized interpretation of the standing elements for each state statute to come to an answer. There are often minute differences between the reliance and causation requirements of these statutes, the types of injuries needed, and of course, how courts have interpreted the requirements of these statutes.

264. Of course, this issue is speculative because whether a plaintiff can actually obtain an injunction turns on the merits of her claim and on whether the court will certify the class

California courts do not ask whether a particular plaintiff will continue to be injured by the defendant's acts. Rather, California's consumer protection statutes require that the courts focus on whether the defendant will continue to violate the statute when deciding whether an injunction is appropriate.[265] Similarly, a plaintiff suing under the New Jersey's CFA can seek an injunction provided that she has shown an ascertainable loss.[266] In New York, the purpose of an injunction is to protect the public at large, so an injunction should be permissible as well.[267]

Further, the fact that the suit is in a federal forum would not preclude a court from providing the injunctive relief afforded by the state statute. To obtain an injunction in federal court, a plaintiff generally must show a risk of harm if a defendant is permitted to continue acting in a particular manner.[268] The injunctive remedy provided by state consumer protection statutes, however, is an integral provision of the statutes.[269] Since these consumer cases are presented to federal courts as diversity actions, choice-of-law rules dictate that a district court use state law when deciding when to issue an injunction.[270] Therefore, if a consumer plaintiff would be able to recover under the relevant state statute, a federal court will be able to issue the appropriate remedy.

3. Current Law Does Not Provide Another Solution

If a court holds that this third group still cannot meet standing requirements, consumer classes will once again find themselves in a bind. Although *McNair* may appear unfair to some,[271] the Third Circuit decided that case properly in light of the clearly established principles of *Lujan* and *Lyons*.[272] Except for the narrow holding provided in *Laidlaw*,[273] the Court has not explained what types of threats are sufficient to establish a threat of future injury. The courts that decided *Henderson*, *Larsen*, and *Ries* may have acted to keep the intent of the California legislature alive,[274] but a state statute cannot usurp Article III requirements and confer standing in federal courts.[275]

Further, exceptions such as "capable of repetition, yet evading review" and the relation-back doctrine do not save consumer protection cases

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under Rule 23. Additionally, a court may not be amenable to these claims because a plaintiff who continues to purchase the product clearly did not attempt to mitigate her damages (although this defense has not yet been raised in consumer protection cases). These issues, however, are distinct from standing issues and are not discussed in this Note.

265. *See supra* note 37 and accompanying text.
266. *See supra* note 66 and accompanying text.
267. *See supra* notes 51, 54 and accompanying text.
268. *See supra* notes 80–82 and accompanying text.
269. *See supra* note 83 and accompanying text.
270. *See supra* note 83 and accompanying text.
271. *See, e.g.*, *supra* notes 205–08 and accompanying text.
272. *See supra* notes 88, 105 and accompanying text.
273. *See supra* note 108 and accompanying text.
274. *See supra* note 122 and accompanying text.
275. *See supra* note 123 and accompanying text.

because standing is distinct from mootness. Each of the plaintiffs in *McNair*, *Robinson*, and *Deitz* ceased purchasing the products prior to filing suit, so they did not even have a live interest at the time of filing. These plaintiffs cannot seek refuge in mootness exceptions because they did not even have Article III standing at the time of filing their complaint.[276]

B. How Do We Address This Problem?

There are two ways to address this issue.[277] One option is to define the plaintiffs' alleged injury in a broad manner and recognize fear as a future injury, such as the Supreme Court did in *Laidlaw*.[278] The second option is to make an exception to Article III standing for the group two plaintiffs. This second choice is much more extreme and would require a major deviation from Article III standing doctrine. Therefore, this Note supports the first option.

1. The Alternative Future Injury

It is necessary for a court to first define the scope of the threat of future injury that a named plaintiff suffers from before ruling on whether they have standing.[279] This is because a plaintiff may only seek relief to remedy the specific injuries from which she suffers (or is at risk of suffering).[280] Currently, courts describe the threat of future injury in consumer cases as a named plaintiff's risk of being deceived by the same misleading label on the same product.[281] This description is problematic because no one is likely to sympathize with such a plaintiff. Consider the dog-bite analogy advanced in *Robinson*.[282] The court rejected this analogy because it found that, unlike the dog-bite victim, a consumer can avoid the injury by choosing to not purchase the product.[283]

Alternatively, one can define the threat of future injury as a named plaintiff being unable to rely on the defendant's future advertisements (or perhaps advertisements generally).[284] For instance, in *Ries*, the plaintiffs asserted that their injury was their inability to rely on future advertisements made by that defendant due to the past deception.[285] More people—and perhaps judges[286]—can relate to a risk of injury like this.

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276. *Cf. supra* note 125 and accompanying text.

277. This Note only addresses a judicial solution to this standing problem. Other solutions, such as proposing new state or federal legislation, are beyond its scope.

278. *See supra* notes 107–10 and accompanying text.

279. *Cf. supra* note 104 and accompanying text.

280. 1 RUBENSTEIN, *supra* note 70, § 2.6.

281. *See supra* notes 171, 183, 194, 215–16 and accompanying text.

282. *See supra* note 196 and accompanying text.

283. *See supra* note 199 and accompanying text.

284. This solution is more appropriate for group two plaintiffs because their decision to refrain from purchasing the product can only strengthen the argument.

285. *See supra* note 242 and accompanying text.

286. Clearly, this argument proved convincing to the *Ries* court. *See supra* note 242 and accompanying text.

This injury is comparable to the injury that the Supreme Court recognized in *Laidlaw*. In *Laidlaw*, the plaintiffs sought to enjoin the defendant from dumping mercury in a river, although they could not show that this caused any environmental damage.[287] Regardless, the Court held that the plaintiffs suffered an injury because their decision to cease using the river for recreational activities was based upon a "reasonable concern" of the possible future environmental damage.[288]

Similarly, consumer plaintiffs who cease using a product cannot conclusively prove that they will be injured in the future. Yet a court can certainly recognize that they have a "reasonable concern" about future reliance on similar advertisements.[289] Courts should recognize this injury because it can be remedied by enjoining a defendant from engaging in deceptive advertising. By enjoining this conduct, a consumer can have renewed faith in future advertisements made by the defendant.

2. The Last Alternative: An Exception to Standing Requirements

If courts do not recognize this fear as a basis for standing, consumer plaintiffs must instead seek an exception to Article III standing. This option is extreme and very unlikely to succeed. It is worth mentioning because consumer plaintiffs have started moving toward this idea, as evidenced by the number of plaintiffs who raise a "capable of repetition, yet evading review" argument.[290] Although courts have rejected this argument, some exception similar to the relation-back doctrine may be appropriate for these plaintiffs.

The idea that consumer protection claims are inherently transitory is a compelling one. While these claims are not on the same plane as the pretrial detainment challenge asserted in *Gerstein v. Pugh*,[291] they are comparable. As soon as a consumer learns of a product defect, it is rational for her to cease using the product.[292] It is extremely unlikely that a consumer plaintiff will be able to file suit while she is still suffering from an injury caused by deceptive advertising. As soon as a plaintiff decides to cease purchasing a product, any injuries she has suffered are past injuries.[293]

The problem with this argument is that in the *Gerstein* line of cases, the plaintiffs had standing at the start of litigation and merely suffered from a potential mootness issue,[294] while consumer plaintiffs do not have standing

287. *See supra* notes 108–10 and accompanying text.
288. *See supra* note 108 and accompanying text.
289. *See supra* note 242 and accompanying text.
290. *See supra* notes 184, 200–02 and accompanying text.
291. 420 U.S. 103 (1975). In *Gerstein*, the Supreme Court noted that those claims were "inherently transitory" because a prisoner who was subject to temporary detainment would not remain there long enough for a district court to determine a motion to certify a class. *See supra* note 153 and accompanying text.
292. *See supra* notes 181–82 and accompanying text.
293. At least, any of the injuries recognized by present law are past injuries.
294. *See supra* Part I.D.2.

at all. This solution may have more force with the group three plaintiffs who continue to purchase a product, because lower courts are already relaxing the relation-back exception.[295] This option is unlikely to succeed, however, because district court judges are unlikely to rule in favor of an entirely new mootness exception, especially because consumers have other options available to try before advocating for such a radical solution.

CONCLUSION

Consumers are presently at a severe disadvantage because current law does not provide a federal forum for their claims for injunctive relief through state consumer protection statutes. Individuals who are interested enough to engage in a lawsuit consistently fail to meet Article III standing requirements, because they cannot display a recognized threat of future injury. Although a few courts have distinguished consumer protection cases, these decisions have not carried much force outside of their districts, and have not proved persuasive when courts consider other consumer protection statutes.

Consumers should attempt to resolve this issue by continuing to purchase or use a product throughout the early phases of litigation. In the alternative, consumer plaintiffs should seek to broaden the scope of their alleged future injury to satisfy Article III standing requirements. Although plaintiffs could also seek an exception to standing requirements akin to a mootness exception, that solution is not advised because it is unlikely to succeed.

295. *See supra* note 156 and accompanying text.