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COMPETITOR SUITS AGAINST FALSE ADVERTISING: IS SECTION 43(a) OF THE LANHAM ACT A PRO- CONSUMER RULE OR AN ANTICOMPETITIVE TOOL?

Ross D. Petty†

I. INTRODUCTION

On November 16, 1988, the Trademark Law Revision Act of 1988¹ went into effect, making some significant changes to section 43(a) of the Lanham Act. The amendment of section 43(a) has led business commentators to suggest that the revised section 43(a) will make it easier for competitors to sue one another successfully for false comparative advertising.² The public policy issue implicitly raised by the revision is whether section 43(a) will be used anticompetitively

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1. Pub. L. No. 100-667, Title I, Sec. 132, 102 Stat. 3946 (1988) (codified as 15 U.S.C.A. § 1125(a) (West Supp. 1991)). Title 15, section 1125(a) of the United States Code, more commonly referred to as section 43(a) of the Lanham Act, now reads as follows:

(a) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Id.

2. See, e.g., Buchanan & Goldman, *Us vs. Them: The Minefield of Comparative Advertising*, 67 HARV. BUS. REV. 38 (1989); Trachtenberg, *New Law Adds Risk to Comparative Ads*, Wall St. J., June 1, 1989, at B6.

to quash advertising to the detriment of consumers.³ Commentators in the past concluded that, except in the cases of producer identity, the Lanham Act was rarely used, and where the statute was used it frequently led to abuse and consumer inefficiency.⁴

Other commentators have suggested that the Lanham Act may be efficient in that it allows competitors to act as avengers of consumer interest by suing one another for false advertising.⁵ While individual consumers suffer relatively small losses for purchases induced by false advertising, competing sellers may suffer large losses. Competitors, therefore, have a much stronger incentive to sue. In addition, competitors presumably have greater expertise than consumers concerning the quality of the goods in question and how consumers are likely to interpret advertising claims. Therefore, they can more readily identify and prove false advertising claims.⁶ In contrast to government regulation of advertising claims, where the taxpayers pay for the development of expertise, as well as the monitoring, investigation, prosecution, and adjudication of false advertising cases, competitors themselves are more efficient regulators because of their low incremental costs of product and advertising expertise as well as advertising monitoring.

3. This issue was raised several years ago by Ellen Jordan and Paul Rubin. See Jordan & Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527 (1979). They examined sixteen to eighteen false advertising cases brought by competitors under the Lanham Act and compared the remedies given by the courts to the remedies which would have been available under the common law. *Id.* See also P. RUBIN, *BUSINESS FIRMS AND THE COMMON LAW* 85-112 (1983).

4. See Jordan & Rubin, *supra* note 3, at 551-52. These authors concluded the following with regard to section 43(a):

Except in the case of producer identity, our analysis casts doubt upon a need for any legal action for competitors premised on false advertising. . . . If we did allow firms to sue easily for misrepresentation, then there might be substantial costs in terms of reduced competition in markets. . . . Although the Lanham Act now allows competitors to sue for false advertising which damages them, there have been a trivial number of such suits. Of those which have been brought, moreover, only an extremely small number have been economically efficient, even with a broad construction of such efficiency. Many have been aimed at new entrants. . . . [E]ven accurate advertising must run the risk of a charge of being "misleading." If such burdens exist, the law may hinder efficient consumer choice since more information for consumers is better than less.

Id. (emphasis in original).

5. See, e.g., Keller, *How Do You Spell Relief? Private Regulation of Advertising Under Section 43(a) of the Lanham Act*, 75 TRADEMARK REP. 227 (1985); Bauer, *A Federal Law of Unfair Competition: What Should be the Reach of Section 43(a) of the Lanham Act?*, 31 UCLA L. REV. 671 (1984).

6. See Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1, 58 (1985) [hereinafter *Comparative Study*].

Furthermore, smaller competitors, unable to match the advertising expenditures of larger firms, may find it less expensive to challenge the advertising content of the larger firm in court than to mount a counter-advertising campaign. Such a lawsuit also has the potential to generate some free favorable publicity for the smaller firm. The recent Lanham Act suit by MCI Communications, Inc. (MCI) against American Telephone & Telegraph, Inc. (AT&T) is a good example of this phenomenon. AT&T is estimated to have recently spent seven to eight times the amount spent by MCI in advertising costs annually, but MCI clearly benefitted from the publicity of the lawsuit.⁷

The debate concerning whether Lanham Act false advertising lawsuits encourage or discourage a competitive marketplace has given rise to an important question: Is the Lanham Act used to the detriment of consumers by quashing competition, or is it used to protect consumers who otherwise may be deceived by false advertising? Although a single, definitive answer to this question may not be possible, Part II of this Article presents evidence on both sides of this debate by analyzing the germane Lanham Act false advertising cases. Part III of the Article then defines the problem of determining whether the Lanham Act is used anticompetitively or for the benefit of consumers, and examines five types of evidence relevant to this question. Finally, the Article draws some conclusions and makes recommendations regarding this area of law.

II. LANHAM ACT FALSE ADVERTISING CASES

A. *Collection of Cases*

The easiest way to comprehend the selection of cases examined in this Article and enumerated in the Appendix is to examine the cases that were excluded. Cases involving only trademark or copyright infringement claims that included section 43(a) in their pleadings as another means of proving the infringement violation are not considered in this Article.⁸ The largest category of excluded cases were

7. See *MCI Sues AT&T, Seeks Damages Under Lanham Act for Deceptive Ads*, *Comm. Daily*, Oct. 11, 1989, at 1. The author wishes to thank Charles Allieri for his research assistance on this case.

8. See, e.g., *Hesmer Foods, Inc. v. Campbell Soup Co.*, 346 F.2d 356 (7th Cir.) (trademark), *cert. denied*, 382 U.S. 839 (1965); *Roquefort v. William Faehndrich, Inc.*, 303 F.2d 494 (2d Cir. 1962) (certification mark); *L & L White Metal Casting Corp. v. Joseph*, 387 F. Supp. 1349 (E.D.N.Y. 1975) (design copyright). Jordan and Rubin examined all cases that cited section 43(a) of the Lanham Act. They found the vast majority to be infringement actions and less than 10% to involve false advertising. *Jordan & Rubin, supra* note 3, at 544.

those alleging the related concept of "passing off." "Passing off" or "palming off" is the marketing of a product by one firm as though it were the product of another.⁹ While such marketing tactics constitute "false designation of origin" under section 43(a), these cases, like trademark infringement actions, typically involve questions of whether consumers are confused about the identity of the manufacturer of the products. In contrast, the advertising cases collected here typically concern claims about product attributes other than the manufacturer's identity.

Cases involving situations similar to "passing off" also were excluded.¹⁰ For example, some of the excluded Lanham Act cases contained allegations that the defendant copied the pictures of plaintiff's product or other aspects of plaintiff's advertising (sometimes referred to as "misappropriation").¹¹ Other excluded cases alleged

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9. See, e.g., *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001 (9th Cir. 1985) (defendants alleged to have "passed off" their valve body kits as plaintiff's "shift kits"), *cert. denied*, 474 U.S. 1059 (1986); *Rickard v. Auto Publisher, Inc.*, 735 F.2d 450 (11th Cir. 1984) (defendant magazine publisher alleged to have misappropriated plaintiff's unregistered trademark); *Vibrant Sales, Inc. v. New Body Boutique, Inc.*, 652 F.2d 299 (2d Cir. 1981) (defendant waist-reducing belt manufacturer alleged to have used photograph of plaintiff's product in its ads), *cert. denied*, 455 U.S. 909 (1982); *Alum-A-Fold Shutter Corp. v. Folding Shutter Corp.*, 441 F.2d 556 (5th Cir. 1971) (defendant aluminum shutter manufacturer alleged to have copied both shutters and advertising materials of plaintiff); *Durbin Brass Works, Inc. v. Schuler*, 532 F. Supp. 41 (E.D. Mo. 1982) (defendant lamp importer alleged to have caused confusion in market as to origin of plaintiff lamp manufacturer's product).
 10. See, e.g., *Lamothe v. Atlantic Recording Corp.*, 847 F.2d 1403 (9th Cir. 1988) (plaintiffs not given credit for co-authorship of musical compositions); *PPX Enters., Inc. v. Audiofidelity Enters., Inc.*, 818 F.2d 266 (2d Cir. 1987) (recordings promoted as being those of major recording artist, Jimi Hendrix, were those in which Hendrix only performed in a minor way); *Smith v. Montoro*, 648 F.2d 602 (9th Cir. 1981) (plaintiff's name removed from film credits and related advertising); *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365 (10th Cir. 1977) ("reverse passing off"—Goodyear preempted plaintiff's trade name), *cert. denied*, 434 U.S. 1052 (1978); *Roho, Inc. v. Marquis*, 717 F. Supp. 1172 (E.D. La. 1989) ("reverse passing off"—defendant assembled its product from plaintiff's product and sold it as its own); *R.H. Donnelly Corp. v. Illinois Bell Tel. Co.*, 595 F. Supp. 1202 (N.D. Ill. 1984) (plaintiff not given credit for co-publishing yellow pages with defendant); *Benson v. Paul Winley Record Sales Corp.*, 452 F. Supp. 516 (S.D.N.Y. 1978) (false sales promotion of George Benson albums which were actually recorded when he was unknown and only a member of a band); *Matsushita Elec. Corp. of Am. v. Solar Sound Sys., Inc.*, 381 F. Supp. 64 (S.D.N.Y. 1974) (defendant allegedly relabeled plaintiff's portable radio as its own, took it to a trade show and solicited orders for it).
 11. See, e.g., *Service Ideas, Inc. v. Traex Corp.*, 846 F.2d 1118 (7th Cir. 1988); *Metric & Multistandard Components Corp. v. Metric's Inc.*, 635 F.2d 710 (8th Cir. 1980); *Truck Equip. Serv. Co. v. Fruehauf Corp.*, 536 F.2d 1210 (8th Cir.), *cert. denied*, 429 U.S. 861 (1976); *Bangor Punta Operations, Inc. v. Universal Marine Co.*, 543 F.2d 1107 (5th Cir. 1976); *Ideal Toy Corp. v. Fab-*

that the defendant's advertising falsely represented that the plaintiff endorsed, approved, or sponsored defendant's product.¹² The last category of exclusions concerns situations where courts frequently dismiss the complaint. For example, the collection of cases in this Article does not include early cases decided under section 43(a) which held that only complaints alleging "passing off" were actionable.¹³ Similarly, cases holding that consumers have no standing to sue under the Act also are excluded.¹⁴ The one case in which a consumer was allowed standing is included.¹⁵

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- Lu, Ltd., 360 F.2d 1021 (2d Cir. 1966); L'Aiglon Apparel, Inc. v. Lana Lobell, Inc., 214 F.2d 649 (3d Cir. 1954); Clamp Mfg. Co. v. Enco Mfg. Co., 5 U.S.P.Q. 2d (BNA) 1643 (C.D. Cal. 1987), *aff'd*, 870 F.2d 512 (9th Cir.), *cert. denied*, 110 S. Ct. 202 (1989); Sublime Prods., Inc. v. Gerber Prods., Inc., 579 F. Supp. 248 (S.D.N.Y. 1984); Sensory Research Corp. v. Pasht Inc., 192 U.S.P.Q. (BNA) 168 (S.D.N.Y. 1976); American Optical Co. v. Rayex Corp., 266 F. Supp. 342 (S.D.N.Y. 1966), *aff'd*, 394 F.2d 155 (2d Cir.), *cert. denied*, 393 U.S. 835 (1968); General Pool Corp. v. Hallmark Pool Corp., 259 F. Supp. 383 (N.D. Ill. 1966).
12. *See, e.g.*, Consumers Union, Inc. v. General Signal Corp., 724 F.2d 1044 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984); Cher v. Forum Int'l, Ltd., 692 F.2d 634 (9th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983); Better Business Bureau, Inc. v. Medical Directors, Inc., 681 F.2d 397 (5th Cir. 1982); Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200 (2d Cir. 1979); Allen v. Men's World Outlet Inc., 679 F. Supp. 360 (S.D.N.Y. 1988); Allen v. National Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985); Schroeder v. Lotito, 577 F. Supp. 708 (D.R.I. 1983), *aff'd per curiam*, 747 F.2d 801 (1st Cir. 1984); Estate of Presley v. Russen, 513 F. Supp. 1339 (D.N.J. 1981); Amana Refrigeration, Inc. v. Consumers Union of United States, Inc., 431 F. Supp. 324 (N.D. Iowa 1977); Geisel v. Poynter Prods., Inc., 283 F. Supp. 261 (S.D.N.Y. 1968); Consumers Union of United States, Inc. v. Hobart Mfg. Co., 199 F. Supp. 860 (S.D.N.Y. 1961).
 13. *See, e.g.*, Federal-Mogul-Bower Bearings, Inc. v. Azoff, 313 F.2d 405 (6th Cir. 1963); Chamberlain v. Columbia Pictures Corp., 186 F.2d 923 (9th Cir. 1951); Samson Crane Co. v. Union Nat'l Sales, Inc., 87 F. Supp. 218 (D. Mass. 1949), *aff'd per curiam*, 180 F.2d 896 (1st Cir. 1950).
 14. The leading case denying consumer standing is Colligan v. Activities Club of New York, Ltd., 442 F.2d 686 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971). *See also* In re "Agent Orange" Prod. Liab. Litig., 475 F. Supp. 928 (E.D.N.Y. 1979); Torres v. Illinois Bell Tele. Co., No. 86 C 1718 (N.D. Ill. Aug. 3, 1987) (LEXIS, Genfed library, Dist file).
- The denial of consumer standing has been criticized by the Third and Ninth Circuits as well as by various other commentators. *See* Thorn v. Reliance Van Co., 736 F.2d 929, 931 (3d Cir. 1984); Smith v. Montoro, 648 F.2d 602, 607 (9th Cir. 1981); Morris, *Consumer Standing to Sue for False and Misleading Advertising Under Section 43(a) of the Lanham Trademark Act*, 17 MEM. ST. U.L. REV. 417 (1987); Thompson, *Consumer Standing Under Section 43(a): More Legislative History, More Confusion*, 79 TRADEMARK REP. 341 (1979).
15. Arnesen v. Raymond Lee Org., Inc., 333 F. Supp. 116 (C.D. Cal. 1971). Consumers also may be able to sue rivals under state statutes called "little FTC Acts" that have been enacted by all 50 states if they provide for private lawsuits. *See* Leaffer & Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurispru-*

All other cases decided under section 43(a) are included and analyzed under this Section. Many of the included cases involve claims of trademark or copyright infringement in addition to advertising claims. Several included cases differ from those excluded due to the involvement of a trade association, rather than a single firm, as plaintiff.¹⁶ These cases are not "passing off" cases since there is no confusion as to a single manufacturer's identity.

Although it is a close question, cases involving disparagement are included. As discussed below, some federal circuits have held that advertising that only disparages the plaintiff's product without making false claims about the defendant's products does not present a cause of action. However, not all circuits follow this "disparagement only" rule, and within those that do, there was no consistent determination of what constitutes "disparagement only." Because of these inconsistencies, "disparagement only" cases were included, contrary to the policy of excluding other summary dismissal cases, such as those involving consumer standing or requiring "passing off."

B. Parameters of Analysis of Lanham Act False Advertising Cases

One hundred and twenty-five cases are discussed in this Article.¹⁷ The chart contained in the Appendix shows these cases by year of

dence, 48 GEO. WASH. L. REV. 521 (1980). Arkansas, Iowa, Nevada, North Dakota, and Oklahoma do not permit private rights of action. K. PLEVAN & M. SIROKY, ADVERTISING COMPLIANCE HANDBOOK 344 (1988).

16. *See Camel Hair & Cashmere Inst., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6 (1st Cir. 1986); *Oil Heat Inst. v. Northwest Natural Gas*, 708 F. Supp. 1118 (D. Or. 1988); *Fur Information & Fashion Council, Inc. v. E.F. Timme & Sons, Inc.*, 364 F. Supp. 16 (S.D.N.Y. 1973), *aff'd*, 501 F.2d 1048 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974); *Potato Chip Inst. v. General Mills, Inc.*, 333 F. Supp. 173 (D. Neb. 1971), *aff'd*, 461 F.2d 1088 (8th Cir. 1972); *Mutation Mink Breeders Assoc. v. Lou Nierenberg Corp.*, 23 F.R.D. 155 (S.D.N.Y. 1959).

17. Cases are distinguished from decisions because many cases involve more than one decision. The year of the case is the year of the first published decision.

Only one situation contains ambiguity in this regard. In the long-running battle between American Home Products and McNeilab's subsidiary, Johnson & Johnson, within days of the district court decision, American Home Products changed their advertisements but these also were challenged before the same district court judge. The Second Circuit decision appears to treat these as two different cases (Advil I and II). *See McNeilab, Inc. v. American Home Prods. Corp.*, 848 F.2d 34, 36-37 (2d Cir. 1988). That is how they are treated here. Advil I as counted here also includes a separate opinion concerning one count of the original complaint that was separated from the others by the trial judge. *American Home Prods. Corp. v. Johnson & Johnson*, 672 F. Supp. 135 (S.D.N.Y. 1987).

the first opinion and outcome on the false advertising cause of action.¹⁸ While there are numerous nominally different outcomes in these cases, five categories reasonably describe all of the decisions.

In twenty-nine cases, the final outcome was either dismissal of the false advertising claims in the complaint or judgment for the defendant on those claims. Another fourteen cases denied the plaintiff injunctive (usually preliminary) relief. Since there are no later reported decisions in these fourteen cases, the defendant is considered to have prevailed in a total of forty-three defendant victories.

The plaintiff obtained at least injunctive relief for some claims in fifty-two cases. Eleven of those involved relief beyond just an injunction. In an additional twenty-six cases, the last reported decision denied the defendant's motion to dismiss the case. These cases were likely later settled by cessation of the challenged advertising. Therefore, these are included as plaintiff victories for a total of seventy-eight. The remaining four cases only contain reported decisions dealing with issues other than the advertising claims, such as motions to change venue. Thus, of the 121 cases with some reported outcome, the result was not in the defendant's favor approximately sixty-five percent of the time.

In 110 of the 126 included cases (88%), the plaintiffs were competitors of the defendants.¹⁹ Five cases involved distributors or former distributors as defendants. Four other cases were brought by plaintiffs who were one of the following: a non-competitor with a similar trade name, a consumer, an investor, and an inventor/potential competitor.

There are several other interesting aspects of the included cases. For example, fifty-seven (46%) include causes of action other than false advertising under section 43(a). Forty-one (32%) of the cases primarily involve other claims.²⁰ The most common other principal causes of action are trademark infringement (fourteen cases), patent infringement (twelve cases) and antitrust charges (nine cases).

Prior to 1969, when section 43(a) false advertising claims were still relatively new, more than half involved principal causes of action

18. Due to space limitations, the six decisions from 1955 through 1956 are condensed and represented at 1955 on the chart. As the Appendix clarifies, only one decision occurred in 1955 and one each in 1958, 1960, and 1961. In 1959, two decisions were rendered.

19. In 5 of these 110 cases, the plaintiffs were trade associations whose members were competitors of the defendants. In one included case, *Pignons S.A. de Mechanique de Precision v. Polaroid Corp.*, 657 F.2d 482 (1st Cir. 1981), the First Circuit upheld dismissal because the plaintiff failed to prove it competed with Polaroid in the quality of color reproduction. The court likened the situation to *Pinto suing Cadillac* for false luxury car claims.

20. For example, seven cases included counterclaims against the plaintiff for false advertising.

other than false advertising. By the 1980s, only twenty-three of the eighty-five cases (27%) primarily involved legal issues other than the section 43(a) claim.

The cross section of industries represented by the 125 included cases is also worth noting. Thirty cases (23%) involved advertising to businesses. Of the consumer advertising cases, nineteen (15%) involved household appliances such as cameras, air ionizers, and larger durables; fourteen (11%) involved personal grooming items; thirteen (10%) involved food or tobacco products; ten (8%) involved clothing, jewelry, or small household items (for example, cleaners and toys); and services were at issue in eight (6%) of the cases.

The most interesting category of products was over-the-counter (OTC) drugs which accounted for sixteen (13%) of the cases. Prior to 1980, this category accounted for five percent of the cases. After 1980, however, this drug category accounted for fifteen percent of the cases. This was the only category with a significant change in the proportion of section 43(a) cases. Commentators offer two explanations for this increase. One commentator argues that OTC drug companies are learning through experience.²¹ Other commentators argue that one percent in market share equals \$15 million in additional sales. Therefore, it is worthwhile for these firms to try questionable advertising strategies and to attempt to stop them promptly through litigation.²²

C. Case Law Synopsis

1. Proving a Violation

The plaintiff in a Lanham Act false advertising case bears the burden of proving that its rival's advertising actually is false—that is, that the advertising misleads or has the capacity to mislead consumers. The plaintiff cannot simply say that the advertising claims are unsubstantiated and win relief.²³ Of course, in cases where the

21. Best, *Comparative Study*, *supra* note 6, at 31.

22. Bixby & Lincoln, *Legal Issues Surrounding the Use of Comparative Advertising: What the Non-Prescriptive Drug Industry Has Taught Us*, 8 J. PUB. POL'Y & MARKETING 143, 158 (1989).

23. See, e.g., *Sandoz Pharm. Corp. v. Richardson-Vicks, Inc.* 920 F.2d 222, 227-29 (3d Cir. 1990); *Toro Co. v. Textron, Inc.*, 499 F. Supp. 241, 253 (D. Del. 1980). *But see* *Stiffel Co. v. Westwood Lighting Group*, 658 F. Supp. 1103 (D.N.J. 1987) (following *Johnson & Johnson*); *John O. Butler Co. v. Block Drug Co.*, 620 F. Supp. 771 (N.D. Ill. 1985) (case dismissed because claims had a "justifiable basis"); *Ciba-Geigy Corp. v. Thompson Medical Co.*, 672 F. Supp. 679 (S.D.N.Y. 1985) (packaging and advertising for defendant's 17-hour appetite suppressant and plaintiff's 15-hour product enjoined until clinical

advertising explicitly or implicitly promises that its claims are supported by proper evidence, the plaintiff may prove falsity by showing a lack of substantiation.²⁴

The plaintiff's burden of proving falsity is far from insurmountable. The plaintiff must prove that the false statements either have deceived or have the capacity to deceive a substantial segment of the audience, that the deception is material to the purchasing decision, and that the plaintiff is injured or likely to be injured by the statements.²⁵ This is often done through the use of extrinsic evidence—for example, studies of consumers' perceptions,²⁶ which itself is often an arduous task. When fifteen percent of the audience interprets the advertising in a deceptive way, courts become concerned.²⁷ Courts also have held that literally true claims may be "false" under the Lanham Act, if they are proven to be misleading.²⁸ Moreover, recently, the Second and Ninth Circuits have decided that

studies support duration claims); *Johnson & Johnson v. Quality Pure Mfg.*, 484 F. Supp. 975, 983 (D.N.J. 1979) (injunction of defendant's claim made "without a good faith basis, grounded on substantial pre-existing proof, to support it"). At least one commentator has argued there is a new trend toward allowing lack of substantiation to constitute a violation. See MORRISON, *The Emerging Burden of Proof Rule in Drug Advertising Cases*, 78 TRADEMARK REP. 551 (1988).

24. See, e.g., *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 747 F.2d 114, 119 (2d Cir. 1984); *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 277-78 (2d Cir. 1981); *Gillette Co. v. Wilkinson Sword, Inc.*, No. 89 Civ. 3586 (KMW) (S.D.N.Y. July 6, 1989) (LEXIS, Genfed library, Dist file); *American Home Prods. Corp. v. Johnson & Johnson*, 436 F. Supp. 785, 803 (S.D.N.Y. 1977), *aff'd*, 577 F.2d 160 (2d Cir. 1978).
25. See *Skil Corp. v. Rockwell Int'l Corp.*, 375 F. Supp. 777, 783 (N.D. Ill. 1974).
26. See Preston, *False or Deceptive Advertising Under the Lanham Act: An Analysis of Factual Findings and Types of Evidence*, 79 TRADEMARK REP. 508, 526-43 (1989).
27. See *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 317 (2d Cir. 1982), *rev'g*, 538 F. Supp. 1091, 1096 (S.D.N.Y. 1982); K. PLEVAN & M. SROKY, *supra* note 15, at 9. Before the adoption of the reasonable consumer test in its deception policy statement, the Federal Trade Commission also considered the number of consumers deceived by an advertisement. See generally KARNs, *The Federal Trade Commission's Evolving Deception Policy*, 22 U. RICH. L. REV. 399, 417-20 (1988); Bailey & Pertschuk, *The Law of Deception: The Past As Prologue*, 33 AM. U.L. REV. 849 (1984). For examples in early FTC cases, see *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 415, 461-62 (1972), *aff'd*, 481 F.2d 246, 249 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973); *Benrus Watch Co.*, 64 F.T.C. 1018, 1032 (1964); *Rhodes Pharmacal Co.*, 49 F.T.C. 263, 283 (1952).
28. See, e.g., *Avis Rent-A-Car Sys., Inc. v. Hertz Corp.*, 782 F.2d 381, 383-86 (2d Cir. 1986); *American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165-67 (2d Cir. 1978); *Gillette Co. v. Wilkinson Sword, Inc.*, No. 89 Civ. 3586 (KMW) (S.D.N.Y. July 6, 1989) (LEXIS, Genfed library, Dist file); *Fruit of the Loom, Inc. v. Sara Lee Corp.*, 674 F. Supp. 1020 (S.D.N.Y. 1986).

actual consumer deception may be presumed if the false advertising was willful.²⁹

Many judges ease the plaintiff's burden by interpreting the meaning of the express claims within the advertisement without requiring evidence of how consumers would interpret them.³⁰ Of course, other judges acknowledge their lack of expertise in this area, perceive the explicit claims as ambiguous, and require evidence of consumer interpretation.³¹ The "lack of expertise" argument is supported by occasional cases in which the higher courts interpret the express claims in advertising in a way diametrically opposed to the lower court's interpretation.³² The traditional rule for implied claims is to require evidence of consumer interpretation.³³

Not every false advertising claim is actionable. Closely related to the requirement that the claim be material to consumer purchasing decisions is the defense of "puffing."³⁴ In addition, the Lanham Act does not proscribe omissions of material facts.³⁵ Section 43(a) does,

29. See *PPX Enters., Inc. v. Audiofidelity Enters., Inc.*, 818 F.2d 266, 272 (2d Cir. 1987); *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986); *Harper House, Inc. v. Thomas Nelson, Inc.*, 4 U.S.P.Q. 2d (BNA) (C.D. Cal. 1987), *rev'd on other grounds*, 889 F.2d 197 (9th Cir. 1989). In a misappropriation of advertising case, the Sixth Circuit seems to approve this standard. See *Can-Am Eng'g Co. v. Henderson Glass, Inc.*, 814 F.2d 253, 257-58 (6th Cir. 1987).

30. See, e.g., *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 317 (2d Cir. 1982); *American Brands, Inc. v. R.J. Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1356 (S.D.N.Y. 1976).

31. See, e.g., *American Home Prods.*, 577 F.2d at 172 n.27; *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 588 F. Supp. 1082, 1094 (S.D.N.Y.), *aff'd*, 747 F.2d 114 (2d Cir. 1984); *American Brands*, 413 F. Supp. at 1357.

32. See, e.g., *Avis Rent-A-Car Sys., Inc. v. Hertz Corp.*, 782 F.2d 381, 384-86 (2d Cir. 1986); *Fur Information & Fashion Council v. E.F. Timme & Son, Inc.*, 501 F.2d 1048 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974).

33. See, e.g., *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 317 (2d Cir. 1982); *American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 165 (2d Cir. 1978); *K. PLEVAN & M. STROKY*, *supra* note 15, at 5, 415-16; *Preston*, *supra* note 26, at 513-28. *But see Tambrands, Inc. v. Warner-Lambert Co.*, 673 F. Supp. 1190 (S.D.N.Y. 1987); *Cuisinarts, Inc. v. Robot-Coupe Int'l Corp.*, 509 F. Supp. 1036 (S.D.N.Y. 1981).

34. See, e.g., *Koontz v. Jaffarian*, 617 F. Supp. 1108, 1115 (E.D. Va. 1985), *aff'd*, 787 F.2d 906 (4th Cir. 1986); *Marcyan v. Nissen Corp.*, 578 F. Supp. 485, 507 (N.D. Ind. 1982), *aff'd sub nom. Marcyan v. Marcy Gymnasium Equip. Co.*, 725 F.2d 687 (7th Cir. 1983); *Sheldon Friedlich Marketing Corp. v. Carol Wright Sales, Inc.*, 217 U.S.P.Q. (BNA) 896, 900 (S.D.N.Y. 1982).

The defense of "puffing" is likely to be strengthened under the Trademark Law Revision Act of 1988 which limits actionable representations to statements of fact.

35. See, e.g., *Alfred Dunhill Ltd. v. Interstate Cigar Co.*, 499 F.2d 232, 237 (2d Cir. 1974); *International Paint Co. v. Grow Group, Inc.*, 648 F. Supp. 729, 730 (S.D.N.Y. 1986); *McNeilab, Inc. v. American Home Prods. Corp.*, 501 F.

however, reach advertisements that contain statements deemed misleading without disclosure of additional, omitted information.³⁶

Two limitations on applying the Lanham Act to false advertising have been eliminated by the Trademark Law Revision Act of 1988. First, the prior revision of the statute had been interpreted by some courts as requiring that the false statement involve an inherent characteristic of the defendant's goods in order to be actionable. For example, defendant's claims that its offer was an "exclusive TV offer" and made "for the first time on TV" were not considered claims concerning an inherent characteristic of defendant's jewelry products.³⁷ The Trademark Law Revision Act of 1988 eliminates this requirement by explicitly covering misrepresentations about "commercial activities."³⁸

Second, a number of courts held under the previous version of section 43(a) that advertising which only disparaged a competitor, but did not falsely describe the defendant's product, was not actionable. These courts dissected comparative advertisements to determine whether what was said about the defendant's product was false.³⁹

Supp. 517, 532 (S.D.N.Y.), *modified*, 501 F. Supp. 540 (S.D.N.Y. 1980). *But see* Bohsei Enters. Co. v. Porteous Fastener Co., 441 F. Supp. 162 (C.D. Cal. 1977) (omission of designation of foreign origin on product is material); *In re* Certain Caulking Guns, 223 U.S.P.Q. (BNA) 388 (Int'l Trade Comm'n 1984) (omission of country of origin is a tacit misrepresentation that goods are of domestic origin, and therefore is actionable under section 43(a) of the Lanham Act).

The United States Trademark Association recommended that section 43(a) be amended to prohibit omissions of material information, but that language was deleted from the Trademark Law Revision Act of 1988. *See* C. MCKENNEY & G. LONG, FEDERAL UNFAIR COMPETITION: LANHAM ACT SECTION 43(A) B-7 (1989).

36. *See* Ragold, Inc. v. Ferrero U.S.A., Inc., 506 F. Supp. 117, 124 (N.D. Ill. 1980); Universal City Studios, Inc. v. Sony Corp. of Am., 429 F. Supp. 407 (C.D. Cal. 1977); Skil Corp. v. Rockwell Int'l Corp., 375 F. Supp. 777, 783 n.11 (N.D. Ill. 1974).
37. *See* Abernathy & Clothier, Ltd. v. E & M Advertising, Inc., 553 F. Supp. 834, 837 (E.D.N.Y. 1982). *See also* Coca-Cola Co. v. Tropicana Prods., Inc., 690 F.2d 312, 318 (2d Cir. 1982); Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272, 277 (2d Cir. 1981); Fur Information & Fashion Council, Inc. v. E.F. Timme & Son, Inc., 501 F.2d 1048, 1051-52 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974).
38. *See supra* note 1.
39. *See, e.g.*, Vibrant Sales, Inc. v. New Body Boutique, Inc., 652 F.2d 299, 303 n.3 (2d Cir. 1981), *cert. denied*, 455 U.S. 909 (1982); SSP Agricultural Equip., Inc. v. Orchard-Rite Ltd., 592 F.2d 1096, 1103 n.6 (9th Cir. 1979); Fur Information & Fashion Council, Inc. v. E.F. Timme & Sons, Inc., 501 F.2d 1048 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974); Bernard Food Indus., Inc. v. Dietene Co., 415 F.2d 1279 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970); Oil Heat Inst. of Or. v. Northwest Natural Gas, 708 F. Supp. 1118 (D. Or. 1988); Borden, Inc. v. Kraft, Inc., 224 U.S.P.Q. (BNA) 811, 818

Other courts viewed the claim as a whole and held that a false comparative claim was automatically a false claim about defendant's product or simply enjoined disparaging claims.⁴⁰ Fortunately, the Trademark Law Revision Act of 1988 resolved this inconsistency by making actionable any misrepresentations about the defendant's "or another person's goods, services, or commercial activities."⁴¹

2. *Proving Injury and Remedies*

The principal remedy in Lanham Act cases is an order enjoining the challenged advertising in the future. Frequently, cases are effectively resolved if a preliminary injunction is issued. In order to obtain a preliminary injunction, the plaintiff must prove: (1) that the plaintiff will likely win the lawsuit because the advertising is false; (2) that the defendant's advertising is likely to cause or has caused injury to the plaintiff; and (3) that the plaintiff's injury, without the injunction, is likely to be higher than the defendant's injury with the injunction (balancing of the hardships).⁴² Proving a likelihood of injury caused by the advertising in question can be relatively straightforward in injunction cases. It is presumed in cases involving explicit comparative advertisements.⁴³ Otherwise, injury can be proved by establishing direct competition between plaintiff's products and defendant's advertised product.⁴⁴

While an injunction of advertising may not seem like an effective remedy, it can often be disruptive to the defendant. Under the Lanham Act, a competitor's advertising may be enjoined within "months or even weeks" of the filing of the suit.⁴⁵ Of the eighty-one cases in the Appendix where timing could be ascertained from the opinion, 65% achieved an initial decision in less than one year, 25% in three months or less, and 10% in one month or less. This is obviously more expeditious than some Federal Trade Commission (FTC) advertising cases, which frequently take over a decade to be

(N.D. Ill. 1984); *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404 (E.D. Pa. 1983); *Ragold, Inc. v. Ferrero, USA, Inc.*, 506 F. Supp. 117, 124 (N.D. Ill. 1980).

40. *See, e.g., JS&A Group, Inc. v. Cambridge Int'l, Inc.*, 209 U.S.P.Q. (BNA) 112 (N.D. Ill. 1980).

41. *See supra* note 1.

42. K. PLEVAN & M. SIROKY, *supra* note 15, at 23-28. If the challenged conduct has ceased with no reasonable probability that it will be resumed, the court may refuse to issue an injunction. *Id.*

43. *See, e.g., McNeilab, Inc. v. American Home Prods. Corp.*, 848 F.2d 34, 38 (2d Cir. 1988).

44. *See, e.g., Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 189-91 (2d Cir. 1980).

45. Keller, *supra* note 5, at 243-44.

implemented.⁴⁶ Other injunction cases are disruptive because the court orders some sort of affirmative relief. Courts occasionally require the defendant to run corrective notices⁴⁷ or at least recall its previous advertising.⁴⁸ In extreme cases, the courts have banned or recalled the product itself.⁴⁹

Proving injury in cases where damages are being sought is more difficult. Most courts require proof of lost sales actually caused by defendant's advertising.⁵⁰ This requires establishing (1) that consumers were actually deceived by the advertising, and (2) then proving that the false advertising actually caused injury to the plaintiff. This is typically proved by showing a diminution in plaintiff's sales. The second element has been a virtual bar to damage recovery for lost sales.⁵¹ Such proof may expose the plaintiff to broad discovery of its sales figures and planning documents by the plaintiff's rivals.⁵²

The six false advertising cases to date awarding monetary compensation to the plaintiff have done so based on one of two theories.⁵³

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46. For example, complaints against three marketers of over-the-counter analgesics were issued in 1973, but appeals of the final FTC orders did not occur until 1982 for one and 1984 for the other two. *See Sterling Drug, Inc. v. FTC*, 741 F.2d 1146, 1148 n.1 (9th Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985). *See also Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 692 n.130 (1977) (average time for investigation and trial of an advertising case is "well over two years.").
 47. *See, e.g., Avis Rent-A-Car Sys., Inc. v. Hertz Corp.*, 223 U.S.P.Q. (BNA) 1255, 1256 (E.D.N.Y. 1984); *John Wright, Inc. v. Casper Corp.*, 419 F. Supp. 292, 333 (E.D. Pa. 1976), *aff'd in part, rev'd in part sub. nom. Donsco, Inc. v. Casper Corp.*, 587 F.2d 602 (3d Cir. 1978); *Ames Publishing Co. v. Walker-Davis Publications, Inc.*, 372 F. Supp. 1, 16 (E.D. Pa. 1974).
 48. *See, e.g., Toro Co. v. Textron, Inc.*, 499 F. Supp. 241 (D. Del. 1980); *American Brands, Inc. v. R. J. Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1358 (S.D.N.Y. 1976).
 49. *See, e.g., Playskool, Inc. v. Product Dev. Group, Inc.*, 699 F. Supp. 1056 (E.D.N.Y. 1988); *Haan Crafts Corp. v. Craft Masters, Inc.*, 683 F. Supp. 1234 (N.D. Ind. 1988); *American Home Prods. Corp. v. Johnson & Johnson*, 672 F. Supp. 135, 143-46 (S.D.N.Y. 1987); *Upjohn Co. v. Riahom Corp.*, 641 F. Supp. 1209 (D. Del. 1986); *Ciba-Geigy Corp. v. Thompson Medical Co.*, 672 F. Supp. 679 (S.D.N.Y. 1985).
 50. *See, e.g., Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 191 (2d Cir. 1980); *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 607-08 (3d Cir. 1978); *Coca-Cola Co. v. Tropicana Prods. Inc.*, 690 F.2d 312, 316 (2d Cir. 1982).
 51. *See, e.g., Can-Am Eng'g Co. v. Henderson Glass, Inc.*, 814 F.2d 253, 257-58 (6th Cir. 1987); *Burndy Corp. v. Teledyne Indus., Inc.*, 748 F.2d 767, 771 (2d Cir. 1984); *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 607 (3d Cir. 1978); *Tambrands, Inc. v. Warner-Lambert Co.*, 673 F. Supp. 1190, 1197-98 (S.D.N.Y. 1987); *American Home Prods. Corp. v. Johnson & Johnson Co.*, 654 F. Supp. 568, 592 (S.D.N.Y. 1987).
 52. *See Keller, supra* note 5, at 244.
 53. In two false advertising cases that primarily were trademark infringement actions, the court awarded the plaintiffs attorney's fees for willful misconduct

First, in two cases the court awarded damages for intellectual property infringement, but disallowed additional recovery for the false advertising for fear of double recovery. Thus, the infringement damages, in effect, included damages from false advertising.⁵⁴

Second, courts have occasionally awarded damages based on the amount of advertising expenditures. Two cases have ordered reimbursement for plaintiff's "curative" advertising campaign.⁵⁵ In a third case, *U-Haul International, Inc. v. Jartran, Inc.*,⁵⁶ the district court awarded damages for injury caused by defendant Jartran's false comparison of its trucks with U-Haul's trucks. The court based the damage award on U-Haul's curative advertising expenditures combined with Jartran's advertising expenditures. The court also justified its award on the ground that this amount was comparable to U-Haul's lost profits.⁵⁷ The Ninth Circuit affirmed the award based only on the district court's curative advertising theory, and affirmed the district court's decision to double the award because of Jartran's willful conduct.⁵⁸

In *Alpo Petfoods v. Ralston Purina Co.*,⁵⁹ the only false advertising case other than *U-Haul* in which the trial court awarded substantial damages, the victorious plaintiff had not conducted a curative advertising campaign. The district court awarded \$5.2 million as the amount of the defendant's false advertising, and then doubled it due to the defendant's willful conduct. The court rationalized the \$10.4 million award as being close to the plaintiff's share of the defendant's disgorged profits (actually \$11 million) from the sale of the products falsely advertised.⁶⁰ On appeal, the court of appeals disallowed the disgorgement award because the false advertising was not willful.⁶¹ The case was remanded for reconsideration of possible damage awards to both parties.

in addition to damages. See *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738 (7th Cir. 1985); *Clairol, Inc. v. Save-Way Indus.* 210 U.S.P.Q. (BNA) 459 (S.D. Fla. 1980).

54. See *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 744 (7th Cir. 1985); *Universal Athletic Sales Co. v. American Gym, Recreation & Athletic Equip. Corp.*, 397 F. Supp. 1063 (W.D. Pa. 1975), *aff'd without opinion*, 566 F.2d 1171 (3d Cir.), *cert. denied*, 430 U.S. 984 (1977).

55. See *Otis Clapp & Son, Inc. v. Filmore Vitamin Co.*, 754 F.2d 738, 745 (7th Cir. 1985); *Cuisinarts, Inc. v. Robot-Coupe Int'l Corp.*, 580 F. Supp. 634, 640 (S.D.N.Y. 1984).

56. 601 F. Supp. 1140 (D. Ariz. 1984), *aff'd in part, rev'd in part*, 793 F.2d 1034 (9th Cir. 1986).

57. *Id.* at 1146.

58. 793 F.2d 1034, 1041-42 (9th Cir. 1986). The award for costs of Jartran's advertising appears to be based on a "disgorgement of profits" theory. *Id.*

59. 720 F. Supp. 194 (D.D.C. 1989), *aff'd in part, vacated in part*, 913 F.2d 958 (D.C. Cir. 1990).

60. *Id.* at 194.

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

III. WELFARE EFFECTS FROM LANHAM ACT COMPETITOR LAWSUITS

A. Introduction

Before attempting to determine whether consumers or competitors benefit from Lanham Act false advertising litigation, a question should be asked: Who is supposed to benefit from the statute? Some courts have suggested that only competitors, not consumers, are supposed to benefit. In the principal case denying consumer standing, *Colligan v. Activities Club of New York, Ltd.*,⁶² the court stated, "Congress' purpose in enacting section 43(a) was to create a special and limited unfair competition remedy, virtually without regard for the interest of consumers generally."⁶³ The court in *Ragold, Inc. v. Ferrero, U.S.A., Inc.*⁶⁴ was equally blunt: "[P]rivate litigation under the Lanham Act seeks primarily to regulate business competition, with any benefit to the consuming public incidental."⁶⁵ This view has been strongly criticized as inconsistent with the plain meaning of the Lanham Act and its legislative history.⁶⁶ Most courts recognize that there is a "strong public interest" in using the Lanham Act to prevent misleading advertising and presume that consumers' as well as competitors' interests are to be protected under the Act.⁶⁷

The question then arises of how to resolve cases that present arguable conflicts between consumer interests and competitor interests. *U-Haul International, Inc. v. Jartran, Inc.*,⁶⁸ provides an example. In 1979, when Jartran entered the market, U-Haul supplied almost all the consumer trailer rentals and sixty percent of consumer truck rentals. Jartran gained nearly ten percent of the truck and trailer market in a few months, and U-Haul's anticipated revenues were approximately \$49 million lower over the three-year period following Jartran's entry.⁶⁹ Jartran's success was attributed in part

62. 442 F.2d 686 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

63. *Id.* at 692.

64. 506 F. Supp. 117 (N.D. Ill. 1980).

65. *Id.* at 125 n.9 (E.D. Ill. 1980). *See also* American Home Prods. Corp. v. Johnson & Johnson, 436 F. Supp. 785, 797 (S.D.N.Y. 1977) ("an action under the Lanham Act . . . is not the proper legal vehicle in which to vindicate the public's interest in health and safety"), *aff'd*, 577 F.2d 160 (2d Cir. 1978).

66. *See, e.g.*, Morris, *supra* note 14, at 430-32.

67. *See, e.g.*, American Home Prods. Corp. v. Johnson & Johnson, 654 F. Supp. 568, 590 (S.D.N.Y. 1987); Stiffel v. Westwood Lighting, Inc., 658 F. Supp. 1103, 1116 (D.N.J. 1987); Vidal Sassoon, Inc. v. Bristol-Meyers Co., 661 F.2d 272 (2d Cir. 1981).

68. 601 F. Supp. 1140 (D. Ariz. 1984), *aff'd in part, rev'd in part*, 793 F.2d 1034 (9th Cir. 1986).

69. 601 F. Supp. at 1145-48.

to advertising that showed its vehicles to be larger and more attractive and its prices to be lower than those of U-Haul.⁷⁰ As previously mentioned, U-Haul sued under the Lanham Act and was awarded \$40 million. Jartran subsequently entered bankruptcy. When U-Haul allegedly used the bankruptcy proceedings to prevent Jartran's reorganization, the FTC brought a suit which was subsequently settled.⁷¹ In *U-Haul*, consumers were protected from false advertising, but a market which lacked significant competition lost a new entrant. Thus, the case demonstrated that the vindication of a competitor's interest may be anticompetitive and indirectly hurt consumers.

Some of the Lanham Act cases have recognized this problem. For example, in *Mennen Co. v. Gillette Co.*,⁷² the district court dismissed a complaint that had alleged that Right Guard deodorant was packaged deceptively and infringed plaintiff's trademark. The court noted that the case was a "competitive ploy" and awarded attorney's fees and costs to the defendant.⁷³ Similarly, in *Johnson & Johnson v. Carter-Wallace, Inc.*,⁷⁴ the Second Circuit awarded injunctive relief, but denied a damage award, stating that the injunction "poses no likelihood of a windfall for the plaintiff. The complaining competitor gains no more than that to which it is already entitled—a market free of false advertising."⁷⁵

The primary goal of the Lanham Act is, or should be, the protection of consumers from false advertising. In a case like *U-Haul*, where a dominant firm can prove that a small or new rival's advertising is false, it should be awarded some relief, such as an injunction, regardless of the competitive consequences. This approach is comparable to the goal of the intellectual property law in general—that is, protecting a trademark or patent from duplication in order to promote innovation for the ultimate benefit of consumers, even though the short-term consequence may be increased market power for one firm.

70. *Id.*

71. *See Amerco, Inc.*, 109 F.T.C. 135 (1987).

72. 565 F. Supp. 648 (S.D.N.Y. 1983), *aff'd without opinion*, 742 F.2d 1437 (2d Cir. 1984).

73. *Id.* at 657.

74. 631 F.2d 186 (2d Cir. 1980).

75. *Id.* at 192. *See also* Gold Seal Co. v. Weeks, 129 F. Supp. 928, 940 (D.D.C. 1955), *aff'd per curiam sub. nom.* S.C. Johnson & Son, Inc. v. Gold Seal Co., 230 F.2d 832 (D.C. Cir.), *cert. denied*, 352 U.S. 829 (1956); A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 625 (1937) ("The interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer.").

B. Consumer Benefit

1. Comparison with the Federal Trade Commission

One method of analyzing the benefit consumers may receive from Lanham Act false advertising cases is to compare the Lanham Act cases with the efforts of the Federal Trade Commission's regulation of advertising. The FTC was established in 1914 as an independent regulatory agency empowered to create and enforce emerging antitrust policy. Its purpose was to condemn "unfair methods of competition."⁷⁶ From its inception, the FTC pursued false advertising cases.⁷⁷ However, after the Supreme Court held that the FTC had to prove injury to competition in advertising cases,⁷⁸ the FTC obtained authority also to pursue "unfair or deceptive acts and practices."⁷⁹ The FTC now uses that authority to condemn advertising which is likely to harm consumers, and it no longer expressly considers harm to competitors.⁸⁰

The FTC regulates virtually all types of advertising.⁸¹ Unlike most Lanham Act cases decided by the courts, the FTC is able to use its own expertise to determine both the express and implied claims made in the advertisement.⁸² The FTC acts in advertising cases

76. Act of Sept. 26, 1914, ch. 311, sec. 45(a)(1), 38 Stat. 717, 719 (1914).

77. *See, e.g.*, *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493 (1922); *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 311 (7th Cir. 1919); Clarence N. Yogle, 1 F.T.C. 13 (1916); and *A. Theo. Abbott and Co.*, 1 F.T.C. 16 (1916).

78. *See* *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931).

79. *See* 15 U.S.C. § 45(a)(1) (1992).

80. In fact, the FTC has the discretion to refuse to pursue cases that competitors may bring to its attention. *See, e.g.*, *Moog Indus., Inc. v. FTC*, 355 U.S. 411 (1958) (*per curiam*); *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 873-74 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962).

81. Other federal agencies may exercise jurisdiction over the advertising of certain products. For example, the U.S. Postal Service can pursue companies for mail and wire fraud. *See, e.g.*, *United States v. Alexander*, 743 F.2d 472 (7th Cir. 1984); *United States v. Andreadis*, 366 F.2d 423 (2d Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

States are also increasingly seeking to regulate advertising. All 50 states have acts similar to the FTC and several have other advertising statutes. *People v. Western Airlines*, 155 Cal. App. 3d 597, 202 Cal. Rptr. 237 (1984); K. PLEVAN & M. SIROKY, *supra* note 15, at 343, 351. *See also* Beales, *What State Regulators Can Learn from the Federal Experience in Regulating Advertising*, 10 J. PUB. POL'Y & MARKETING 101 (1991); Calvani, *Advertising Regulation: The States vs. The FTC*, 58 ANTITRUST L.J. 253, 259-65 (1989); *Beef Trade Forced to Alter Ads*, N.Y. Times, Mar. 2, 1985, at 48, col. 1.

82. *See, e.g.*, *J.B. Williams Co. v. FTC*, 381 F.2d 884 (6th Cir. 1967). *But see* Gelhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 U. KAN. L. REV. 559, 565 (1969) (criticizing the FTC's "intuitive" approach).

primarily by reviewing claims to determine if they are deceptive. It also requires advertisers to have substantiation for their claims which must have a "reasonable basis." To a lesser degree, the FTC also polices advertising that it deems to be unfair.⁸³

Under the FTC's Deception Policy Statement,⁸⁴ an advertisement would be considered deceptive if it contained a representation, practice, or omission likely to mislead consumers acting reasonably and the representation, practice, or omission was material to consumer choice. Thus, in contrast to the courts interpreting the Lanham Act, the FTC can pursue omissions of material information that must be disclosed to prevent the advertising from being misleading.⁸⁵ Moreover, in a clear break with the past, the Commission's Deception Policy Statement states that the FTC will only protect reasonable consumers, not the ignorant, the unthinking, or the credulous, as previous cases had done.⁸⁶

The FTC's deception policy has several similarities to principles embodied in Lanham Act case law. The FTC does not have to prove that the advertiser intended to deceive consumers or knew its advertisements were deceptive.⁸⁷ The FTC also does not need to prove actual falsity of a particular statement. Rather, it must prove merely that reasonable consumers are likely to be misled by particular representations—even those that might be literally true.⁸⁸ In addition, the FTC does not need to prove actual deception caused by the

83. For an explanation of the FTC's deception, unfairness, and advertising substantiation policy statements, see Crawford, *Unfairness and Deception Policy at the FTC: Clarifying The Commission's Roles and Rules*, 54 ANTITRUST L.J. 305 (1985). See also Averitt, *The Meaning of "Unfair Acts or Practices" in Section 5 of the Federal Trade Commission Act*, 70 GEO. L.J. 225 (1981).

The only examples of advertising the FTC has challenged solely on unfairness grounds involve depictions of unsafe behavior which children viewing the advertisements might emulate. See, e.g., *A.M.F., Inc.*, 95 F.T.C. 310 (1980); *Mego Int'l, Inc.*, 92 F.T.C. 186 (1978); *Uncle Ben's, Inc.*, 89 F.T.C. 131 (1977); *General Foods Corp.*, 86 F.T.C. 831 (1975); *Philip Morris, Inc.*, 82 F.T.C. 16 (1973).

84. The Commission's Unfairness Policy Statement is appended to its decision in *International Harvester Co.*, 104 F.T.C. 949, 1072 (1984).

85. The so-called "pure omission" can only be pursued if there is an element of unfairness. The FTC's deception analysis must be triggered by an affirmative misrepresentation. See *International Harvester Co.*, 104 F.T.C. 949 (1984); Crawford, *supra* note 83, at 310-11.

86. See, e.g., *Exposition Press, Inc. v. FTC*, 295 F.2d 869, 872 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942); *FTC v. Standard Educ. Soc'y*, 302 U.S. 112, 116 (1937).

87. See *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 n.5 (D.C. Cir. 1977); *Travel King, Inc.*, 86 F.T.C. 715, 773 (1975).

88. Some argue that the "likely to mislead" standard is a retreat from prior case language requiring only "the tendency or capacity to mislead." See *Bailey & Pertschuk, supra* note 27, at 856.

advertisements;⁸⁹ it only need show that the claims are material to consumer choice and consumers are likely to be misled.⁹⁰

The most significant difference between the Lanham Act and the FTC's policies is the latter's requirement that advertisers have a "reasonable basis" for their advertising claims prior to making them.⁹¹ In 1984, after a thorough review of the program, the FTC issued its Policy Statement Regarding the Advertising Substantiation Program.⁹² The substantiation requirement appears simple, but perhaps deceptively so. Advertisers must have a "reasonable basis" for their express and implied advertising claims. Like the "reasonable person" standard in tort law, this standard is objective, not subjective, and is judged on a case-by-case basis.⁹³ According to the Substantiation Policy Statement, claims that promise a certain level of substantiation must be supported by that level of substantiation. Claims that imply a high level of substantiation to reasonable consumers must have the promised level of substantiation.⁹⁴ For example, comparative claims, specific performance claims, and claims with a scientific aura all imply that tests were performed to substantiate them.

The Statement also lists six factors, commonly referred to as the *Pfizer* factors (although the *Pfizer*⁹⁵ decision only listed five), that the FTC considers when determining what a reasonable level of substantiation should be in a specific case: (1) type of claim, (2) type of product, (3) consequences of a false claim, (4) benefits of a truthful claim, (5) cost of developing substantiation, and (6) amount experts feel is reasonable.⁹⁶

The Commission also requires that substantiation be developed prior to the dissemination of the advertising claims. The FTC will, however, consider post-claim evidence of truthfulness in four circum-

89. See, e.g., *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979); *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir.), cert. denied, 423 U.S. 827 (1975).

90. See *Cliffdale Assoc., Inc.*, 103 F.T.C. 110, 175 (1984).

91. See *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972); Shafer, *Developing Rational Standards for an Advertising Substantiation Policy*, 55 U. CIN. L. REV. 1, 5-13 (1986).

92. The policy statement is appended to the Commission decision in *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), petition to review denied, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987).

93. See generally W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 173-92 (5th ed. 1984). But see Schwartz, *Objective and Subjective Standards of Negligence: Defining the Reasonable Person to Induce Optimal Care and Optimal Populations of Injurers and Victims*, 78 GEO. L.J. 241 (1989) (arguing the reasonable person standard has both objective and subjective elements).

94. *Thompson Medical*, 104 F.T.C. at 839.

95. See *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

96. See *Thompson Medical*, 104 F.T.C. at 821, 840.

stances: (1) when deciding whether it is in the public's interest to proceed against an advertiser, (2) when evaluating the truth of a claim, (3) when determining the reasonableness of proffered prior substantiation, or (4) when considering the appropriate scope of a remedial order.⁹⁷ All existing substantiation must be submitted to the Commission when it is requested under compulsory process. Otherwise, under section 3.40 of the Commission's *Rules of Practice and Procedure*, the administrative law judge shall exclude evidence that is offered later.⁹⁸

The standard FTC remedy in an advertising case, comparable to those under the Lanham Act, is a simple cease and desist order. Should the company later violate it, the company would be subject to civil penalties.⁹⁹ An FTC cease and desist order typically prohibits claims that are always false or misleading, and also prohibits other claims without a reasonable basis. Often the type of reasonable basis is specified—for example, drug efficacy claims must be substantiated by well controlled, double-blind clinical tests.¹⁰⁰

In addition to requiring a reasonable basis, FTC cease and desist orders differ from Lanham Act injunctions in other ways. In many cases, the FTC will also order affirmative disclosures of information necessary to prevent deception. Such disclosures may be ordered for all advertising, often for a limited period of time, or whenever a specified claim is made. In addition, FTC orders are noted for their "fencing-in" provisions.¹⁰¹ For example, in a recent case concerning Sears' false advertising for its Lady Kenmore dishwashers, the FTC order covered all major appliances.¹⁰²

Because FTC cases are notoriously slow, the FTC recently has obtained preliminary injunctions in advertising cases.¹⁰³ To obtain such relief, the FTC need only prove a likelihood of ultimate success in the underlying case on the merits.¹⁰⁴ Under the Lanham Act,

97. *Id.* at 840-41.

98. 16 C.F.R. § 3.40 (1990).

99. *See, e.g.,* United States v. J.B. Williams Co., 354 F. Supp. 521 (S.D.N.Y. 1973), *aff'd in part, rev'd in part*, 498 F.2d 414 (2d Cir. 1974).

100. *See* K. PLEVAN & M. SIROKY, *supra* note 15, at 200-21.

101. *See* American Home Prods. Corp. v. FTC, 695 F.2d 681, 706-08 (3d Cir. 1982); Litton Indus., Inc. v. FTC, 676 F.2d 364, 371-72 (9th Cir. 1982); Porter & Dietsch, Inc. v. FTC, 605 F.2d 294, 305 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); ITT Continental Baking Co. v. FTC, 532 F.2d 207, 222-23 (2d Cir. 1976); K. PLEVAN & M. SIROKY, *supra* note 15, at 121-30.

102. *See* Sears, Roebuck & Co. v. FTC, 676 F.2d 385, 392-94 (9th Cir. 1982).

103. *See, e.g.,* FTC v. Pharmtech Research, Inc., 576 F. Supp. 294 (D.D.C. 1983) (FTC had clearly demonstrated advertisements were misleading and deceptive). For a discussion of the slowness of FTC cases, see *supra* note 46 and accompanying text.

104. *Id.* at 299.

plaintiffs also must prove a likelihood of irreparable harm and often that a balancing of the hardships justify relief.¹⁰⁵

Due to the limited value of injunctive relief, the FTC has attempted to correct the effects of past practices by occasionally ordering corrective advertising.¹⁰⁶ In addition, under section 19 of the Federal Trade Commission Act,¹⁰⁷ the FTC is authorized to seek consumer redress for knowingly dishonest or fraudulent conduct, after the completion of an administrative proceeding. It has used this authority to negotiate refunds in settlements of advertising cases where feasible.¹⁰⁸ These two remedies enhance the deterrence value of FTC actions.

There is empirical evidence that FTC action offers some deterrence value. A recent study by economists at the FTC examined the stock market effects of advertising cases by the FTC, private litigation under the Lanham Act, and the National Advertising Division (NAD) of the Better Business Bureau. They found that only FTC actions had a significant effect on stock market value. Losers of FTC-litigated advertising cases suffered on average a five percent diminution of their stock value.¹⁰⁹ The study also found that neither NAD decisions nor Lanham Act filings or settlements had any real effect on stock market valuations.¹¹⁰

In sum, even though the Lanham Act is available to protect consumers when the FTC fails to act promptly or to act at all, in reality the FTC provides the most effective consumer protection. The FTC does not need to prove falsity, only lack of substantiation, and can pursue omissions more effectively. FTC orders better restrict a proven false advertiser, and therefore, provide greater deterrence. In the rare situation where monetary relief is obtained, the FTC orders refunds to consumers, not to competitors. Furthermore, the FTC can pursue cases that no competitor has a strong enough interest to pursue or any interest in challenging at all. For example, if one cigarette company claimed its cigarettes were relatively healthy, other companies would not rush in readily to attempt to prove that all cigarettes were equally unhealthy. In this same context, marketers of

105. See K. PLEVAN & M. SIROKY, *supra* note 15, at 23-28.

106. See, e.g., *Amrep Corp. v. FTC*, 768 F.2d 1171, 1180 (10th Cir. 1985), *cert. denied*, 475 U.S. 1034 (1986); *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 756 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

107. 15 U.S.C. § 57b(a)(2) (1992).

108. See, e.g., *Champion Home Builders Co.*, 101 F.T.C. 316 (1983); *Mid City Chevrolet, Inc.*, 95 F.T.C. 371 (1980).

109. See A. MATHIOS & M. PLUMMER, REGULATION OF ADVERTISING: CAPITAL MARKETING EFFECTS 31 (1988) (Bureau of Economics Staff Report to the Federal Trade Commission); Peltzman, *The Effects of FTC Advertising Regulation*, 24 J.L. & ECON. 403 (1981).

110. See A. MATHIOS AND M. PLUMMER, *supra* note 109, at 40.

air ionizers have challenged each other's claims, but only the FTC has questioned whether such products work at all.¹¹¹

On the other hand, the FTC process has its drawbacks. FTC cases are slower than Lanham Act cases; the FTC only protects what it considers to be reasonable consumers; and, the FTC must develop product expertise that rivals already possess. Moreover, as some commentators have noted, the FTC currently brings relatively few advertising cases.¹¹² For example, one commentator noted that the FTC's published decisions for 1982-83 contained only twenty-four advertising cases.¹¹³ Many of the cases the Commission does bring are against small, blatantly fraudulent businesses.¹¹⁴ The Kirkpatrick Report¹¹⁵ echoed these concerns, but noted that the FTC is currently pursuing some challenging cases against national advertisers. The Report's authors could not agree on whether the FTC was bringing a sufficient number of cases. Therefore, Lanham Act cases, while not providing complete protection, may provide consumer protection from false advertising in situations where the FTC fails to act promptly or at all.

2. *Advertised Product Attributes Subject to Scrutiny*

Some commentators have suggested that consumers benefit most from Lanham Act cases involving claims that they cannot easily verify and situations where individual consumer injury is too small to justify consumer lawsuits.¹¹⁶ Such cases are generally evaluated and grouped under one of three categories of product attributes: search, experience, or credence. Attributes of products that can be readily evaluated before purchase are called search attributes.¹¹⁷ There is little incentive to make false advertising claims about such products because consumers will discover the falsity before making the pur-

111. See Best, *Comparative Study*, *supra* note 6, at 70 n.227 (noting two FTC consent orders that highlight the likelihood that products of this type may be misrepresented).

112. See, e.g., McGrew, *Advertising Issues Avoided by the FTC in Past Year*, *Legal Times* 12 (Jan. 7, 1985); Cohen, *FTC Memo Hits Ad Self-Regulation*, *Advertising Age*, Feb. 7, 1983, at 39, 42. But see Foltz, *FTC Signals Its Concerns Over Deceptive Campaigns*, *N.Y. Times*, Feb. 14, 1991, at D-19; Lipman, *FTC is Cracking Down on Misleading Ads*, *Wall St. J.*, Feb. 4, 1991, at B-6.

113. See Best, *Comparative Study*, *supra* note 6, at 17.

114. See *id.* at 18 (deeming these businesses "outlaw" enterprises).

115. *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 *ANTITRUST L.J.* 43, 70-71 (1989).

116. See Jordan & Rubin, *supra* note 3, at 545; Reich, *Toward a New Consumer Protection*, 128 *U. PA. L. REV.* 1, 25-26 (1979).

117. See Nelson, *Informational and Consumer Behavior*, 78 *J. POL. ECON.* 311 (1970); Nelson, *Advertising or Information*, 82 *J. POL. ECON.* 729 (1974).

chase and presumably will not purchase the product. In contrast, attributes that can only be evaluated after purchase are called experience attributes. If goods with experience attributes are purchased frequently, consumers will discover the falsity of advertising claims after the initial purchase and not make any repurchases. Thus, a "fly-by-night" firm might make some quick, short-term profits in this manner, but firms concerned with long-term market survival would not make false claims and hope for repeat purchases by satisfied customers.

In other situations, businesses may have stronger incentives to make false advertising claims. Sellers of infrequently purchased experience goods, particularly when evaluation takes a long time, may profit—for a time—from making false claims. If, however, the price of such goods is sufficiently high and consumers can prove that the advertising claims became a part of the bargain, thereby constituting an express warranty, consumers may have the incentive to sue under breach of warranty.¹¹⁸ This is particularly true where attorneys can entice a large class of consumers to file as plaintiffs.

If consumers cannot, without expert assistance, evaluate the advertising claims, then such claims can involve credence characteristics.¹¹⁹ This attribute has a large potential for false advertising claims. In such cases, consumers may tend to rely on the seller's reputation through purchases of other goods from that same seller. Some commentators have argued that, pursuant to this concept, the common law efficiently allowed competitors to sue each other for passing off goods of one as being those of another.¹²⁰

This three-category scheme contains several assumptions. Proponents assume that most advertised product attributes can and will be evaluated by consumers. Such evaluation, however, is not without cost. Evaluation information from experts is costly, and to the extent that consumers do not perform their own evaluations, there is additional room for false advertising. Moreover, modern selling techniques, including mail-order marketing and telemarketing, may limit the consumer's ability to verify seller identity or inspect goods for search attributes before making a purchase. Comparative advertising claims also increase consumer evaluation costs. These expense factors may tend to increase the incentive for false advertising or reduce the incentive for a seller to develop a favorable reputation.

In analyzing the cases, it is useful to classify credence claims into two categories. The first, credence performance claims, are those

118. See Lewis, *Toward a Theory of Strict "Claim" Liability: Warranty Relief for Advertising Representations*, 47 OHIO ST. L.J. 671 (1986).

119. See Darby & Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68-69 (1973).

120. Jordan & Rubin, *supra* note 3, at 551-53.

claims that consumers cannot readily evaluate, but which are related to product performance. Therefore, consumers may get some sense of such claims' truthfulness over time even without being able to perform a precise evaluation. The second category of credence claims that consumers cannot evaluate includes faith attributes. These attributes are, at best, indirectly related to product performance and can only be verified by detailed investigation. Examples include manufacturer identity, geographic origin, certification as union-made, and exclusivity claims such as the claim that a product is patented.

The other determinant of consumer injury is the price and frequency of purchase of the advertised goods. In cases of frequently purchased, low-priced items that are close to the quality advertised, individual injuries may only be a few pennies. Even when aggregated, the total injury to the consumer may be less than the cost of a lawsuit. In such cases, it is inefficient for any competitor, consumer or the government to file suit.

Advertised goods from the 126 cases examined in this Article were placed in one of the three categories—disposable, durable, or occasional—depending on the price and frequency of purchase by consumers. Advertised goods placed in the disposable category are low-priced and frequently purchased. Durable goods are high-priced and infrequently purchased. Occasional goods are low-priced, but infrequently purchased. A simple cross analysis of the goods broken down by attribute characteristics captures all the potential for consumer injury:

Attribute:	<i>Credence</i>			
	<i>Search</i>	<i>Experience</i>	<i>Performance</i>	<i>Faith</i>
Good:				
Disposable	7	25	13	23
Durable	5	18	6	20
Occasional	1	0	0	6
	—	—	—	—
	13	43	19	49

One missing case involved credence claims for a high-priced frequently purchased good: a prescription hair-growth cream.¹²¹

121. *Upjohn Co. v. Riahom Corp.*, 641 F. Supp. 1209 (D. Del. 1986) (hair regrowth product campaign which sold a 60-day supply of solution and shampoo for \$150.00 was found by court to be actionable for unfair competition and false advertising).

If consumers were able to evaluate all search characteristics before purchase, there would be little need to file lawsuits challenging claims about such characteristics. Similarly, since disposable experience goods can readily be evaluated after purchase and cost little to try, consumers also would benefit very little from lawsuits involving this type of claim and good. The remaining 70% of the cases do appear to have potential for consumer benefit. The plaintiffs prevailed (obtained an injunction or survived a motion to dismiss), however, in only fifty-nine out of the eighty-seven pro-consumer cases. Therefore, consumers have the potential to benefit from less than half of the cases.¹²²

This figure may be an upper boundary of the actual consumer benefit. Since consumers can make judgments, although uncertain ones, about the performance of disposable credence products, those thirteen cases arguably should be excluded as well. Moreover, some of the faith claims that have survived dismissal or have been enjoined—for example, that a product is exclusive or original—are of questionable materiality and are more akin to puffing.¹²³ Consumers likely benefit little from lawsuits involving such claims.

In attempting to determine consumer benefit, a reasonable argument can be made that the exclusion of all cases concerning search goods or disposable experience goods may have been too sweeping. Plaintiffs prevailed in twenty-one of thirty-eight (71%) of these cases. While some of these cases have involved little consumer benefit, others have involved mail order products the characteristics of which the consumer could not evaluate before purchase.¹²⁴ Other cases of

122. Actually, consumers may benefit somewhat from a deterrence effect, since defeated defendants may wish to avoid the expense of future challenges.

123. See, e.g., *Coca-Cola Co. v. Procter & Gamble Co.*, 822 F.2d 28 (6th Cir. 1987) (reversing dismissal of case challenging claim that orange juice is made from the heart of the orange); *Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312 (2d Cir. 1982) (enjoined claim that orange juice is pure pasteurized as it comes from the orange); *Greeff Fabrics, Inc. v. Spectrum Fabrics Corp.*, 217 U.S.P.Q. (BNA) 498 (S.D.N.Y. 1981) (claims of exclusivity and originality of fabric design enjoined); *Chromium Indus., Inc. v. Mirror Polishing & Plating Co.*, 448 F. Supp. 544 (N.D. Ill. 1978) (claims of exclusivity not dismissed); *Channel Master Corp. v. JFD Elecs. Corp.*, 260 F. Supp. 568 (E.D.N.Y. 1966) (claims that antenna product was original and log-periodic not dismissed); *Norwich Pharmacal Co. v. Hoffman-La Roche, Inc.*, 180 F. Supp. 222 (D.N.J. 1960) (claim that product made in laboratory not dismissed).

124. See *Haan Crafts Corp. v. Craft Masters, Inc.*, 683 F. Supp. 1234 (N.D. Ind. 1988); *Harper House, Inc. v. Thomas Nelson, Inc.*, 4 U.S.P.Q. 2d (BNA) 1897 (C.D. Cal. 1987), *rev'd in part*, 889 F.2d 197 (9th Cir. 1989); *Clairol, Inc. v. Save-Way Indus., Inc.*, 210 U.S.P.Q. (BNA) 459 (S.D. Fla. 1980). See also *Seiko Time Corp. v. Alexander's, Inc.*, 218 U.S.P.Q. (BNA) 560 (S.D.N.Y. 1982) (store advertising gray market watches without giving notice that they were not covered by manufacturer's warranty).

this type may have benefited consumers by addressing safety issues.¹²⁵

Consumers also may benefit from suits involving comparative claims about search or experience attributes. The specificity of such claims may lead consumers to believe they are readily policed. Therefore, consumers may rely simply on information in comparative advertising rather than conducting their own search. Thus, while advertisers should not be able to deceive consumers by falsely advertising their own prices, they may deceive consumers by falsely advertising prices of competitors in comparison with their own. Consumers may believe that since prices are readily verifiable, they need not check. Therefore, they rely on the false advertisement.¹²⁶

The same reasoning might apply to disposable experience products. For example, in *Vidal Sassoon, Inc. v. Bristol-Myers Co.*,¹²⁷ the Second Circuit affirmed an injunction against advertising that implied 900 women had participated in a comparative shampoo test and preferred "Body on Tap" to Sassoon and other products. In fact, only 200 subjects had actually tried both shampoos.¹²⁸ Perhaps consumers still would have relied on this test rather than have bought several products to conduct their own comparison.

Comparative advertising is challenged under the Lanham Act more frequently than noncomparative advertising. Seventy of the 126 cases (56%) challenged comparative advertisements. This trend has increased in recent years: since 1980, forty-nine of the seventy-five cases (65%) involved comparative claims. Recent estimates suggest that comparative advertising accounts for between 25% and 50% of all advertising.¹²⁹ Perhaps consumers benefit from this greater scrutiny of comparative claims because their greater specificity may make them more believable and diminish consumer checks on verifiable claims.

In general, the Lanham Act does not protect consumers from false advertising as well as the FTC. Competitor suits may, however,

125. See *Playskool, Inc. v. Product Dev. Group, Inc.*, 699 F. Supp. 1056, 1059-60 (E.D.N.Y. 1988); *Littelfuse, Inc. v. Parker-Hannifin Corp.*, 230 U.S.P.Q. (BNA) 654, 660 (N.D. Ill. 1986).

126. See *Thorn v. Reliance Van Co.*, 736 F.2d 929, 931 (3d Cir. 1984); *U-Haul Int'l, Inc. v. Jartran, Inc.*, 681 F.2d 1159, 1160 (9th Cir. 1982). See also *Norton Tire Co. v. Tire Kingdom Co.*, 858 F.2d 1533 (11th Cir. 1988) ("bait and switch" price advertising not violative of Lanham Act). Cf. Scammon, *Comparative Advertising: A Reexamination of the Issues*, 12 J. CONSUMER AFFAIRS 381, 384-87 (1978).

127. 661 F.2d 272 (2d Cir. 1981).

128. *Id.* at 275.

129. See, e.g., Swayne & Stevenson, *Comparative Advertising in Horizontal Business Publications*, 16 INDUS. MARKETING & MGMT. 71, 73 (1989); Freeman, *Comparative Cautions*, 22 MARKETING & MEDIA DECISIONS 78 (1987); Levy, *Resurgence in Comparative Advertisements*, 129 DUNS BUS. MONTH 56, 57-58 (1987).

still fill an important gap in FTC enforcement. Competitor suits are resolved more quickly and are not dependent on policy or budget changes. Moreover, in about forty to fifty percent of the Lanham Act cases, some consumer benefit might be expected because of the difficulty for consumers to verify the truthfulness of the challenged claim and the significant cost to consumers of being deceived.

C. *Competitive Consequences*

1. *Introduction*

As the above analysis demonstrates, in over half of the Lanham Act cases, there is little reason to believe that consumers benefit significantly. The question remains whether consumers are harmed by rivals using Lanham Act false advertising cases for anticompetitive gain. When the challenged claims are likely to mislead consumers to their detriment, the lawsuit is pro-consumer and pro-competitive, and the advertising should be enjoined.

In contrast, when advertising is not significantly misleading, one rival may sue another, particularly a new entrant or small competitor, in the hopes of harassing the smaller firm. The smaller firm incurs the costs of defending the suit. If an injunction is issued, the smaller firm also would have to bear the costs of developing a new advertising campaign. Imposing such costs on one's rivals is currently receiving much antitrust commentary.¹³⁰ Such a suit would be anticompetitive and could be challenged under the antitrust laws as "sham" litigation if it truly lacked a legitimate basis.¹³¹

Fortunately, there is little reason to believe that the Lanham Act could be used to actually monopolize an industry. The typical injunction remedy only prohibits specific claims, leaving the advertiser free to make slightly modified claims.¹³² Unlike the antitrust laws, multiple damages that might bankrupt a rival are rarely awarded.¹³³ Moreover, unlike the import relief laws, a Lanham Act injunction

130. See, e.g., Salop & Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983); Brennan, *Understanding Raising Rivals' Costs*, 33 ANTITRUST BULL. 95 (1988).

131. See generally Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of "Noerr,"* 74 GEO. L.J. 601 (1985); see also *Wilkinson to Gillette: En Garde*, Boston Herald, June 21, 1989, at D1, col. 1 (Wilkinson filed a counterclaim against Gillette, alleging Gillette's advertising challenges to be monopolistic).

132. See, e.g., *McNeilab, Inc. v. American Home Prods. Corp.*, 848 F.2d 34, 36 (2d Cir. 1988) (within days after the first injunction, defendant launched a revised campaign).

133. See Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247, 252-54 (1985). But see *supra* notes 72-75 and accompanying text.

does not constitute a significant barrier to entry.¹³⁴ Of course, use of the Lanham Act to harass small rivals could be used to signal them to reduce their competitive efforts or face expensive consequences, even if the Lanham Act suits were not sufficiently expensive to drive them from the market.

2. *Comparison With The Common Law*

Jordan and Rubin believe the common law is economically efficient, i.e., that it is neither too restrictive, nor too permissive of advertising. If this is so, and the Lanham Act is more restrictive, then it would be hurting competition.¹³⁵ At common law, a business' legal recourse against a rival's advertising was extremely limited.¹³⁶ Courts have been reluctant to allow businesses to sue for redress against a rival's advertising misrepresentations, even when such misrepresentations took business away from the injured firm.¹³⁷ If the rival misrepresentations concerned the plaintiff's products (disparagement), or personality or character (defamation), common law permitted suit.¹³⁸ However, for disparagement the courts typically would not order an injunction, but would only award special damages, which had to be proved with considerable specificity. The plaintiff also had the burden of proving that the allegedly disparaging claims were false and made with malice.¹³⁹

Defamation was somewhat easier to prove than disparagement, since malice and proof of financial damage were not required. The defendant had the burden of proving the truth of its statements in either case, but injunctions typically were not permitted as a remedy for defamation cases.¹⁴⁰ Moreover, the plaintiff had to prove that

134. See, e.g., Calvani & Tritell, *Invocation of United States Import Relief Laws as an Antitrust Violation*, Remarks before the Fordham Corporate Law Institute (1985), reprinted in 16 J. REPRINTS ANTITRUST L. & ECON. 475 (1986); Waller, *Abusing The Trade Laws: An Antitrust Perspective*, 17 LAW & POL. IN INT'L BUS. 487 (1985).

135. Jordan & Rubin, *supra* note 3, at 535-40.

136. *Id.* Common law trademark protection did allow competitors to sue one another for misrepresentations concerning the origin, manufacturer, or name of the goods. Such trademark rules have largely been codified today. *Id.*

137. See, e.g., *Ely-Norris Safe Co. v. Mosler Safe Co.*, 7 F.2d 603, 604 (2d Cir. 1925), *rev'd on other grounds*, 273 U.S. 132 (1927); *American Washboard Co. v. Saginaw Mfg. Co.*, 103 F. 281, 285 (6th Cir. 1900); Schuman, *False Advertising: A Discussion of a Competitor's Rights and Remedies*, 15 LOY. U. CHI. L.J. 1, 4-8 (1983); Note, *Developments in the Law: Competitive Torts*, 77 HARV. L. REV. 888, 905-07 (1964).

138. See, e.g., Jordan & Rubin, *supra* note 3, at 536, 540; K. PLEVAN & M. SIROKY, *supra* note 15, at 363-92.

139. See Note, *Competitive Torts*, *supra* note 137, at 893.

140. See *id.*

the challenged statements impugned the integrity or character of the business.¹⁴¹

With regard to comparative advertising, the common law considered claims that one product was better than another to be non-actionable puffing, usually referred to as "unfavorable comparison." If the comparison went beyond statements of opinion to statements of fact, however, then it may have become actionable.¹⁴²

Thus, under the common law, unless a claim attacked the integrity of a business, the rival had to leap the barriers of proving falsity, malice, and special damages. In contrast, under the Lanham Act, the plaintiff need only establish falsity and a likelihood of consumer deception in order to obtain an injunction and perhaps reimbursement for counter-advertising. The easier standard of the Lanham Act makes it more likely that it will be used anticompetitively. It does not go as far as the FTC Act, however, which allows the FTC to challenge advertising and require the advertiser to substantiate its claims. The FTC standard would permit competitors to challenge advertising at a relatively low cost and force the defendant to incur relatively high costs in defending the suit.

3. *Competitive Aspects of Decided Cases*

Commentators have suggested that "claims of misrepresentation seem to be used as a method of harassing rivals rather than as a method of encouraging truthful statements."¹⁴³ Only thirty-two of the 126 cases examined (25%) cases indicated that a new entrant, low-price, or smaller rival was being sued. The success rate in these suits, however, was quite high. In twenty-four cases (75%), the plaintiff obtained an injunction, and in another four cases, the plaintiff survived dismissal. On one hand, this finding arguably indicates that these cases benefit consumers. Indeed, some suits clearly involved small, "outlaw" firms that are engaging in fraud or infringing patents or trademarks. The majority, however, appeared to have little potential for significant consumer injury. Therefore, most of these suits should be considered anticompetitive.

The number of suits against new entrants is only part of the story of the competitive effects of Lanham Act suits. Five of the 126 cases (4%) cases were brought by trade associations. The trade association allows firms to reduce "free riding" by non-participating firms. It also allows plaintiff firms to lower their individual costs, while imposing significant costs on a single competitor. Such collec-

141. *See id.* at 893-94.

142. *See id.*

143. *See* Jordan & Rubin, *supra* note 3, at 549.

tive action could arguably constitute conspiracy to monopolize under section 2 of the Sherman Act.¹⁴⁴

Fourteen of the 126 cases (11%) involved associative comparative claims. Associative claims may tend to identify situations in which a dominant firm is suing a small rival. Such claims do not assert superiority, only comparability. They are much more likely to be used in claims which involve new or relatively unknown products for which superiority claims would be less credible to consumers. One commentator has argued that associative claims "free ride" on the target firms' reputation investment,¹⁴⁵ but so do superiority claims. The important issue for either type of claim—associative or superiority—is whether the claim misleads consumers.

The anticompetitive uses of the Lanham Act are sometimes tempered by understanding judges and by countervailing pro-competitive uses. For example, in *Mennen Co. v. Gillette Co.*,¹⁴⁶ the district court found the suit to be a "competitive ploy" and awarded attorney's fees and costs to the defendant. While this is the only case to make such an award to the defendant, other cases have recognized the potential for abuse. In *Gold Seal Co. v. Weeks*,¹⁴⁷ the first Lanham Act false advertising case, the district court questioned why the advertising had gone unchallenged for seven years and, in denying an injunction and damages, stated that the Lanham Act should not be used to provide a "windfall to an overly eager competitor."¹⁴⁸ Similarly, in *Combe, Inc. v. Scholl, Inc.*,¹⁴⁹ the district court denied a preliminary injunction, finding the claims were not likely to be proven false, and that an injunction would severely injure defendant's business. Finally, in *Haagen-Dazs, Inc. v. Frusen Gladje, Ltd.*,¹⁵⁰ the court refused to enjoin the defendant's implicit false statement of its product's origin, because the plaintiff had "unclean hands"—the plaintiff had used the same marketing ploy.¹⁵¹

144. 15 U.S.C. § 2 (1982). See also Crew, *Continuing Viability of Pursuing "Traditional" Cases and New Litigation Theories*, 58 ANTITRUST L.J. 289, 295-96 (1989) (discussion of Section 2 of the Sherman Act conspiracy law as sham litigation).

145. See Scammon, *supra* note 126, at 388.

146. 565 F. Supp. 648 (S.D.N.Y. 1983), *aff'd without opinion*, 742 F.2d 1437 (2d Cir. 1984).

147. 129 F. Supp. 928 (D.D.C. 1955), *aff'd sub nom. S.C. Johnson & Son Inc. v. Gold Seal Co.*, 230 F.2d 832 (D.C. Cir.), *cert. denied*, 352 U.S. 829 (1956).

148. *Id.* at 940; See also *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 189-90 (2d Cir. 1980).

149. 453 F. Supp. 961 (S.D.N.Y. 1978).

150. 493 F. Supp. 73 (S.D.N.Y. 1980).

151. *Id.* at 75-76. *But see Gillette Co. v. Wilkinson Sword, Inc.*, No. 89 Civ. 3586 (KMW) (S.D.N.Y. July 6, 1989) (LEXIS, Genfed library, Dist file) (court enjoined implicit claim that a lubricated strip that was six times more slippery would give a better shave, without recognizing plaintiff's implicit claim that its lubricating strip improved shaving).

Other cases have used the Lanham Act in a pro-competitive manner, as an ancillary argument to an antitrust claim in order to attack the advertising of a firm with market power. Eleven of the 126 cases considered (9%) were such cases. Seven of these occurred before 1979, and the remaining four were decided after 1986. These most recent four cases may mark a resurgence in advertising/antitrust cases.¹⁵² In at least nine other cases, small firms challenged the advertising of large firms without alleging antitrust violations.¹⁵³ Thus, while there likely have been some anticompetitive uses of the Lanham Act, other cases have encouraged competition.

IV. CONCLUSIONS AND RECOMMENDATIONS

In comic books, when superheros are given their superpowers, they are admonished to use their powers for good and never for evil. Of course, inevitably some choose to use their powers for personal gain; they become supervillains. In the real world, the Lanham Act, like comic book superpowers, appears to have been used for both good and evil. This examination reveals that while less than half of the cases appear to have potential for significant consumer benefit, there are fewer cases that appear blatantly anticompetitive. Moreover, a few of the cases examined here appear to be actually pro-competitive.

The Lanham Act does make it easier than does the common law for rivals to sue one another for false advertising. The burden of proof in such cases is, however, significantly higher than that imposed by the Federal Trade Commission. Furthermore, the potential for monopolizing through the Lanham Act appears to be limited. If, as is contended herein, most Lanham Act false advertising cases neither significantly benefit consumers nor are particularly anticompetitive, the question must then be asked: Why waste judicial resources with such litigation? As one court has noted: "One of the phenomena of the last half of the Twentieth Century has been the extent to which economic battles have been waged in the courthouse rather than in the marketplace."¹⁵⁴

152. See Petty, *Predatory Promotion: A Theory of Antitrust Liability Whose Time Has Come?*, 27 AM. BUS. L.J. 215, 217 (1989).

153. See, e.g., *American Rockwool, Inc. v. Owens-Corning Fiberglas Corp.*, 640 F. Supp. 1411 (E.D.N.C. 1986) (also alleging violation of state tort of willful destruction of competitor); *Borden, Inc. v. Kraft, Inc.*, 224 U.S.P.Q. (BNA) 811 (N.D. Ill. 1984) (action under Lanham Act); *Marshall v. Procter & Gamble Mfg. Co.*, 170 F. Supp. 828 (D. Md. 1959) (suit for profit infringement, breach of confidential relationship, and false marking and misrepresentation).

154. *H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 672 F. Supp. 724, 727 (S.D.N.Y. 1987), *aff'd*, 879 F.2d 1005 (2d Cir. 1989). Similarly, another court

The waste of judicial resources becomes even more obvious when one considers the advertising industry's ability to regulate itself. Many industry trade associations have advertising codes, as do most media associations.¹⁵⁵ The National Advertising Division of the Council of Better Business Bureaus (NAD) has actively investigated advertising complaints since 1971. It is funded by dues paid to the Council of Better Business Bureaus by advertisers and advertising agencies. Between 1983 and 1985, 43% of these complaints were from competitors.¹⁵⁶ If the NAD cannot resolve the complaint to its own satisfaction, the case can be appealed to the National Advertising Review Board. The Board has decided only forty-one cases of the more than 2,000 investigated by NAD since 1971. In 66% of those cases, the Board upheld the NAD decision. In 20% it reversed or modified the NAD decision, and in 15% the case was dismissed or withdrawn.¹⁵⁷ If the advertiser does not comply with the Board decision, procedures call for referring the complaint to the FTC.¹⁵⁸

NAD standards for reviewing advertising appear comparable to the FTC's standards. For example in 1984, the NAD took formal action on 105 complaints. Eighty percent of these complaints questioned the adequacy of substantiation and 83% challenged misleading statements or depictions.¹⁵⁹ In 1984, fifteen cases involved explicit comparisons with rival offerings and nearly forty involved implicit comparisons—for example, "the only lawn fertilizer there is."¹⁶⁰ In addition, from 1973 to mid-1982, 30% of NAD cases dealt with

has pointed out the following: "The ongoing competition between . . . rival pain reliever manufacturers has brought anything but relief to the federal courts. Instead, repeated and protracted litigation has created a substantial headache. The competitive battlefield has shifted from the shelves of supermarkets and drugstores to the courtroom." *McNeilab, Inc. v. American Home Prods. Corp.*, 848 F.2d 34, 35 (2d Cir. 1988). In a case involving conflicting superiority claims by hand lotions, a district court judge noted in denying relief to either side: "The parties are sparring to obtain commercial advantage over what is at most a cosmetological distinction." *Procter & Gamble, Co. v. Chesebrough-Pond's, Inc.*, 588 F. Supp. 1082, 1094 (S.D.N.Y.), *aff'd*, 747 F.2d 114 (2d Cir. 1984).

155. See G. MIRACLE & T. NEVETT, *VOLUNTARY REGULATION OF ADVERTISING* 29-33 (1987).

156. See *id.* at 209.

157. See *id.* at 218.

158. See Best, *Monetary Damages for False Advertising*, 49 U. PITT. L. REV. 1, 37-38 (1987) [hereinafter *Monetary Damages*].

159. G. MIRACLE & T. NEVETT, *supra* note 155, at 226. The NAD also addressed children's advertising issues in 9% of its cases. *Id.* It may be the best forum to resolve disputes over children's advertising.

160. See Best, *Monetary Damages*, *supra* note 158, at 22-23. But see G. MIRACLE & T. NEVETT, *supra* note 155, at 226 (estimating that only 9% of the 1984 cases involved comparative advertising).

companies in *Advertising Age's* 100 Leading National Advertisers.¹⁶¹ Thus, this data suggested that the NAD is more willing than the FTC to deal with national advertisers and comparative advertising.¹⁶²

The cost of complaining to the NAD is likely comparable to complaining to the FTC, and lower than that of bringing a Lanham Act case. Like the Lanham Act courts, the NAD acts quickly. It resolves complaints frequently within six months of receipt.¹⁶³ It examines about one hundred complaints annually. Despite its lack of authority to issue binding orders, it obtains discontinuance or modification in about 75% of its cases with the remainder vindicating the challenged advertisement.¹⁶⁴ As a result, it would seem appropriate to eliminate the cause of action for false advertising under the Lanham Act. The federal government can continue to police advertising in the public interest,¹⁶⁵ and competitors can resolve their differences through industry self-regulation. It appears that little would be lost by eliminating Lanham Act suits.¹⁶⁶

In any event, courts should continue to be wary of cases that seem to have little potential for substantial consumer benefit. Perhaps the requirement that the plaintiff prove the materiality of the challenged claim should be more strongly emphasized. In addition, the substantiality of potential injury to consumers should be examined in determining the merits of appropriate relief. Alternatively, the Lanham Act could be amended to cover only misrepresentations that consumers cannot readily check for themselves.

Finally, the potential for competitor abuse of the statute, while not substantial, does appear significant. Courts should be reluctant

161. See Armstrong & Ozanne, *An Evaluation of NAD/NARB Purpose and Performance*, 12 J. ADVERTISING 15, 17 (1983).

162. Until 1972 two major television networks and a number of national print publications banned comparative advertising. The FTC endorsed comparative advertising in a 1971 policy statement and persuaded the television networks to change their policies. See Note, *To Tell the Truth: Comparative Advertising and Lanham Act Section 43(a)*, 36 CATH. U. L. REV. 565, 565-66 (1987).

163. Sixty-four percent of all complaints in 1982 were resolved within six months. See G. MIRACLE & T. NEVETT, *supra* note 155, at 203.

164. NAD examined 107 complaints in 1986 and obtained discontinuance or modification in 75% of them. Best, *Monetary Damages*, *supra* note 158, at 38. For figures from 1980-84, see G. MIRACLE & T. NEVETT, *supra* note 155, at 216.

165. The government, not just private lawsuits, may also unduly restrict competition in its regulation of advertising. See Schechter, *Letting the Right Hand Know What the Left Hand's Doing: The Clash of the FTC's False Advertising and Antitrust Policies*, 64 B.U. L. REV. 265, 307-13 (1984).

166. One possible loss would be the reduction of international uniformity of laws. The Lanham Act and its predecessor statutes were passed as part of United States international treaty obligations. See G. ROSDEN & P. ROSDEN, *THE LAW OF ADVERTISING* § 11.02[3] (1988).

to restrain the advertising of a new entrant. Perhaps the Lanham Act could be modified to disallow suits by industry-dominating firms.¹⁶⁷ Such modification would have the drawback of requiring litigation over the definition of the market and the size of the plaintiff therein. These are issues that antitrust cases spend enormous resources disputing. For this reason, relying on industry self-regulation, rather than the courts, is preferred.

167. For example, the Lanham Act could adopt the Department of Justice Merger Guidelines disallowing horizontal mergers by any firm with 35% or more market share. See *Justice Department Merger Guidelines* § 3.12, reprinted in *Antitrust & Trade Reg. Rep. (BNA) No. 1169* (Special Supp. June 14, 1984).

APPENDIX - Lanham Act Cases

Due to the space limitations, some abbreviations have been used in the case names.

Other abbreviations are explained below:

Outcome:

D = dismissal/judgment for the defendant
 I = injunction
 ID = injunction denied
 ND = no dismissal
 d = damages awarded
 c = corrective advertising awarded
 ar = advertising recall
 af = attorneys fees awarded
 pr = product recall
 s = substantiation required
 O = procedural outcome, not on merits

Parties:

C = competitor
 D = distributor
 NE = defendant is a new entrant
 lp = defendant is a low price seller
 P>D = plaintiff is larger seller
 of the advertised product
 P<D = plaintiff is smaller seller
 of the advertised product
 As = plaintiff is a trade association
 I = plaintiff is investor
 Con = plaintiff is consumer
 PC = plaintiff is potential competitor
 TN = plaintiff has similar trade name

Other issues:

(italics designates principal issue of case)
 TM = trademark infringement
 M = antitrust; monopolization
 P = patent infringement
 D = disparagement
 PO = passing off
 cc = counterclaim of false advertising
 C = copyright infringement
 RICO = racketeering

Industry:

F = food or tobacco
 G = personal grooming; cosmetics
 D = drugs
 A = household appliances
 H = household disposable products; toys
 B = business products or services
 C = clothing; jewelry or watches
 S = services
 M = miscellaneous

Comparative claims:

N = no comparison
 Dis = disparagement
 D = differentiation claims
 A = associative claims
 E = express; rival named
 I = implied;
 e.g., "best or better than others"
 V = vague;
 e.g., "original or exclusive"

Product attributes:

S = search
 E = experience
 C = credence
 F = faith
 N = non-durable;
 low price, frequent purchase
 D = durable;
 high price, infrequent purchase
 O = occasional;
 low price, infrequent purchase
 M = miscellaneous;
 high price, frequent purchase

Name	Outcome	Parties	Time	Other Issues	Industry	Comp.	Attrib.
1. Gold Seal Co. v. Weeks, 129 F. Supp. 928 (D.D.C. 1955), <i>aff'd sub nom.</i> , S.C. Johnson & Son, Inc. v. Gold Seal Co., 230 F.2d 832 (D.C. Cir.), <i>cert. denied</i> , 352 U.S. 829 (1956).	D	C	6 yrs	TM	H	N	C; N
2. Gerber Prods. Co. v. Beechnut, 160 F. Supp. 916 (S.D.N.Y. 1958).	ID	C; P<D		M	F	D; I	C; N
3. Mutation Mink v. Lou Nierenberg Corp., 23 F.R.D. 155 (2d Cir. 1959).	ND	As			C	A; E	E; D
4. Marshall v. Proctor & Gamble, 170 F. Supp. 828 (D. Md. 1959).	D	PC	6 yrs	P	G	N	C; N
5. Norwich Pharmecal Co. v. Hoffman-LaRoche, Inc., 180 F. Supp. 222 (D.N.J. 1960).	ND	C	4 yrs	TM	D	N	F; O
6. Societe Comptoir v. Alexander's, 190 F. Supp. 594 (S.D.N.Y. 1961), <i>aff'd</i> , 299 F.2d 33 (2d Cir. 1962).	ND	C; P>D	3 mos	TM	C	A; E	S; N
7. Smith-Victor Corp. v. Sylvania Elec., 242 F. Supp. 302 (E.D. Ill. 1965).	ND	C; P<D	1 yr	M; D	A	D; I	E; D
8. Chanel, Inc. v. Smith, Inc., 151 U.S.P.Q. (BNA) 685 (N.D. Cal.), <i>rev'd</i> , 402 F.2d 562 (9th Cir. 1966).	I	C; lp	2 mos	TM	G	A; E	S; N
9. Glenn v. Advertising Pub., Inc., 251 F. Supp. 889 (S.D.N.Y. 1966).	D	C; P<D	7 yrs		B	D; I	C; N
10. Channel Master Corp. v. JFD Elec., 260 F. Supp. 568 (E.D.N.Y. 1966), <i>reh. denied</i> , 262 F. Supp. 292 (E.D.N.Y. 1967).	ND	C; lp		P	A	N	F; O

11. H.A. Friend & Co. v. Friend & Co., 276 F. Supp. 707 (C.D. Cal. 1967) <i>aff'd sub. nom</i> Friend v. H.A. Friend & Co., 416 F.2d 526 (9th Cir. 1969), <i>cert. denied</i> , 397 U.S. 914 (1970).	I	C; P>D	17 yrs	TM	B	N	C; N
12. Cutler-Hammer, Inc. v. Universal Relay Corp., 285 F. Supp. 636 (S.D.N.Y. 1968).	I	C		TM	B	N	F; N
13. Elec. Corp v. Honeywell, Inc., 303 F. Supp. 1220 (D. Mass. 1969), <i>rev'd</i> , 428 F.2d 191 (1st Cir. 1970), <i>remanded</i> , 358 F. Supp. 1230 (D. Mass. 1973), <i>aff'd</i> , 487 F.2d 513 (1st Cir. 1973), <i>cert. denied</i> , 415 U.S. 960 (1974).	I	C; NE	4 mos		B	A; E	E; D
14. Bernard Food Indus. v. Dietene Co., 415 F.2d 1279 (7th Cir. 1969), <i>cert.</i> <i>denied</i> , 397 U.S. 912 (1970).	D	C			F	D; E; Dis	E; N
15. Arnesen v. Raymond Lee Org., Inc., 333 F. Supp. 116 (C.D. Cal. 1971).	ND	Con			S	N	E; D
16. Potato Chip Inst. v. General Mills, Inc., 333 F. Supp. 173 (D. Neb. 1971), <i>aff'd</i> , 461 F.2d 1088 (8th Cir. 1972).	I	As; NE	2 yrs		F	N	E; N
17. Bose Corp. v. Linear Design Labs, Inc., 340 F. Supp. 513 (S.D.N.Y. 1971), <i>aff'd</i> , 467 F.2d 304 (2d Cir. 1972).	ID	C; NE	4 mos	P	A	N	C; D
18. Saxony Prod., Inc. V. Guerlain, Inc. 176 U.S.P.Q. (BNA) 97 (C.D. Cal. 1972).	D	C; lp	1 yr		G	A; C	S; N
19. Natcontainer v. Continental Can Co., 362 F. Supp. 1094 (S.D.N.Y. 1972).	ND	C; P<D		M	B	N	F; N
20. Alfred Dunhill, Ltd. v. Interstate Cigar, 364 F. Supp. 366 (S.D.N.Y. 1973), <i>rev'd</i> , 499 F.2d 232 (2d Cir. 1974).	I	C	3 mos		F	N	C; N

Name	Outcome	Parties	Time	Other Issues	Industry	Comp.	Attrib.
21. Fur Info. v. E.F. Timme & Son, Inc., 364 F. Supp. 16 (S.D.N.Y. 1973), <i>aff'd</i> , 501 F.2d 1048 (2d Cir.), <i>cert. denied</i> , 419 U.S. 1022 (1974).	D	As	6 mos		C	Dis	F; D
22. Ames Pub. v. Walker-Davis, 372 F. Supp. 1 (E.D. Pa. 1974).	I; c	C; NE	8 mos	cc	B	N	C; N
23. Skil Corp. v. Rockwell, 375 F. Supp. 777 (N.D. Ill. 1974).	ND	C	8 mos		A	D; E	E; D
24. Universal Athletic Sales v. American Gym, 397 F. Supp. 1063 (W.D. Pa. 1975), <i>vacated</i> , 546 F.2d 530 (3d Cir. 1976), <i>cert. denied</i> , 430 U.S. 984 (1977).	I; d	C; NE		P	A	D; E	S; D
25. Noma Lites v. Westinghouse, 399 F. Supp. 243 (D.D.C. 1975).	ID	C		P	B	N	E; N
26. Alberto-Culver v. Gillette, 408 F. Supp. 1160 (N.D. Ill. 1976).	O	C	22 mos	M	G	D; E	E; N
27. American Brands v. R.J. Reynolds, 413 F. Supp. 1352 (S.D.N.Y. 1976).	I; ar	C	5 mos	cc	F	D; I	F; N
28. John Wright, Inc. v. Casper Corp., 419 F. Supp. 292 (E.D. Pa. 1976), <i>aff'd in part</i> , <i>rev'd in part</i> , 587 F.2d 602 (3d Cir. 1978).	I; c	C; lp		PO	O	N	F; D
29. American Home Products v. Johnson & Johnson, 436 F. Supp. 785 (S.D.N.Y. 1977), <i>aff'd</i> , 577 F.2d 160 (2d Cir. 1978).	I	C	10 mos		D	D; E	E; N
30. Bohsei Ent. v. Porteous Fastener Co., 441 F. Supp. 162 (C.D. Cal. 1977).	ND	C			B	N	F; N
31. Humid-Aire v. J. Levitt, 1978-1 Trade Cas. (CCH) 61,846 (N.D. Ill. 1977).	O	D	11 mos	D	A	N	F; D

32. Wolf v. Louis Marx & Co., 203 U.S.P.Q. (BNA) 856 (S.D.N.Y. 1978).	D	C		P	A	N	F; D
33. Fox Chem. v. Amsoil, Inc., 445 F. Supp. 1355 (D. Minn. 1978).	ND	C; P<D	4 yrs	M	H	N	C; N
34. Chromium Ind. v. Mirror Polishing & Plating, 448 F. Supp. 544 (N.D. Ill. 1978).	ND	C; P<D	6 yrs	M	B	D; V	F; D
35. Combe, Inc. v. Scholl, Inc., 453 F. Supp. 961 (S.D.N.Y. 1978).	ID	C	1 yr	PO	G	N	E; N
36. In re Uranium Antitrust Litigation, 473 F. Supp. 393 (N.D. Ill. 1979).	ND	C		M	B	N	F; D
37. Johnson & Johnson v. Quality Pure Mfg., 484 F. Supp. 975 (D.N.J. 1979).	I	C; NE	1 day	PO	G	A; E	E; N
38. Johnson & Johnson v. Carter-Wallace, 487 F. Supp. 740 (S.D.N.Y. 1979), <i>rev'd</i> , 631 F.2d 186 (2d Cir. 1980).	ID	C	2 yrs		G	N	C; N
39. SSP Ag. Equip. v. Orchard-Rite, Ltd., 592 F.2d 1096 (9th Cir. 1979).	D	C	15 mos	P	B	D; E; Dis	E; D
40. JS&A Group, Inc. v. Cambridge Int'l, Inc., 209 U.S.P.Q. (BNA) 112 (N.D. Ill. 1980).	I	C			A	D; E	C; D
41. Clairol, Inc. v. Save-Way, 210 U.S.P.Q. (BNA) 459 (S.D. Fla. 1980).	I; af	C; P>D	2 yrs	TM; P	A	N	S; D
42. Sherrell Perfumers, Inc. v. Revlon, Inc., 483 F. Supp. 188 (S.D.N.Y. 1980).	I	C; P>D	4 yrs		G	A; E	S; N
43. Salomon/ North Am., Inc. v. AMF, Inc., 484 F. Supp. 846 (D. Mass. 1980).	ID	C	3 mos		O	N	F; D
44. Black Hills Jewellery v. Gold Rush, 489 F. Supp. 754 (D.S.D.), <i>aff'd</i> , 633 F.2d 746 (8th Cir. 1980).	I	C	2 yrs		C	N	F; D

Name	Outcome	Parties	Time	Other Issues	Industry	Comp.	Attrib.
45. Haagen-Dazs v. Frusen Gladje, 493 F. Supp. 73 (S.D.N.Y. 1980).	ID	C	1 mo		F	N	F; N
46. Pignons S.A. v. Polaroid Corp., 498 F. Supp. 805 (D. Mass.), <i>aff'd</i> , 657 F.2d 482 (1st Cir. 1980).	D	C	2 mos	TM	A	N	E; D
47. Toro v. Textron, 499 F. Supp. 241 (D. Del. 1980).	I; ar	C	2 yrs		A	D; E	E; D
48. McNeilab v. American Home Prod., 501 F. Supp. 517 (S.D.N.Y. 1980).	I	C	1 yr		D	D; E	F; N
49. Quaker State Oil v. Burham-Castrol, Inc., 504 F. Supp. 178 (S.D.N.Y. 1980).	I	C; P>D	3 wks		H	D; E	C; N
50. Ragold, Inc. v. Ferrero U.S.A., Inc., 506 F. Supp. 117 (N.D. Ill. 1980).	ID	C	1 wk		F	D; E	F; N
51. Philip Morris, Inc. v. Loews Theatres, Inc., 511 F. Supp. 855 (S.D.N.Y. 1980).	I	C	1 mo		F	D; E	E; N
52. R.J. Reynolds Co. v. Loews Theatres, Inc., 511 F. Supp. 867 (S.D.N.Y. 1980).	I	C			F	D; E	E; N
53. Greef Fabrics, Inc. v. Spectrum Fabrics Corp., 217 U.S.P.Q. (BNA) 498 (S.D.N.Y. 1981).	I	C; P>D		C	B	D; V	F; N
54. Walker-Davis Pub. v. Penton/IPC, Inc., 509 F. Supp. 430 (E.D. Pa. 1981).	ID	C			B	N	F; N
55. Cuisinarts, Inc. v. Robot-Coupe Corp., 509 F. Supp. 1036 (S.D.N.Y. 1981).	I; C	D		PO	A	A; E	F; D
56. Pennwalt Corp. v. Plough, Inc., 516 F. Supp. 751 (D. Del. 1981), <i>rev'd</i> , 676 F.2d 77 (3d Cir. 1982).	ND	C			D	D; E	F; N

57. American Home Prod. v. Abbott Labs., 522 F. Supp. 1035 (S.D.N.Y. 1981).	I	C; NE	1 mo		D	D; E	E; N
58. U-Haul Int'l, Inc. v. Jartran, Inc., 522 F. Supp. 1238 (D. Ariz. 1981), <i>aff'd</i> , 681 F.2d 1159 (9th Cir. 1982).	I	C; NE	8 mos		S	D; E	E; D
59. Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272 (2d Cir. 1981).	I	C	1 yr		G	D; E	E; N
60. Sheldon Friedlich Corp. v. Carol Wright, Inc., 219 U.S.P.Q. (BNA) 883 (S.D.N.Y. 1983).	ID	C	2 days		A	D; V	F; D
61. Seiko Time Corp. v. Alexander's, Inc., 742 F.2d 1440 (2d Cir. 1983).	I	D; P > D	7 mos		C	D; E	S; D
62. Plough, Inc. v. Johnson & Johnson, 532 F. Supp. 714 (D. Del. 1982).	ID	C			B	D; I	F; N
63. Coca-Cola v. Tropicana Prod., Inc., 538 F. Supp. 1091 (S.D.N.Y.), <i>rev'd</i> , 690 F.2d 312 (2d Cir. 1982).	I	C	3 mos		F	N	F; N
64. CES Publ. Corp. v. Dealerscope, Inc., 544 F. Supp. 656 (E.D. Pa. 1982).	O	C	2 mos		B	D; E	S; N
65. Max Daetwyler Corp. v. Input Graphics, 545 F. Supp. 165 (E.D. Pa. 1982).	D	C	1 yr	<i>P</i>	B	D; I	E; N
66. Abernathy & Clostner v. E&M Advertising, Inc., 553 F. Supp. 834 (E.D.N.Y. 1982).	ID	C	4 mos		C	N	S; N
67. Marcyan v. Nissen Corp., 578 F. Supp. 485 (N.D. Ind. 1982), <i>aff'd</i> , 725 F.2d 687 (7th Cir. 1983).	D	C	3 yrs	<i>P</i>	A	D; I	F; D
68. Spring Mills, Inc. v. Ultracashmere House, Ltd., 532 F. Supp. 1203 (S.D.N.Y. 1982), <i>rev'd</i> , 689 F.2d 1127 (2d Cir. 1982).	ND	C	4 mos	<i>TM</i>	C	N	F; D

Name	Outcome	Parties	Time	Other Issues	Industry	Comp.	Attrib.
69. Marilyn M. M. M., Inc. v. Jovan, Inc., 223 U.S.P.Q. (BNA) 634 (N.D. Ill. 1983).	D	C; P<D		TM	G	N	F; N
70. Eastern Airlines v. N.Y. Airlines, 559 F. Supp. 1270 (S.D.N.Y. 1983).	I	C; NE	5 mos	TM	S	D; E	E; N
71. Zerpol v. DMP Corp., 561 F. Supp. 404 (E.D. Pa. 1983).	D	C		D	B	Dis	E; D
72. Mennen Co. v. Gillette Co., 565 F. Supp. 648 (S.D.N.Y. 1983), <i>aff'd</i> , 742 F.2d 1437 (2d Cir. 1984).	D; af	C		TM	G	N	S; N
73. Williams Elec. v. Bally Mfg., 568 F. Supp. 1274 (N.D. Ill. 1983).	ND	C	1 yr	C	B	D; E	E; D
74. Gimi v. JS&A Group, Inc., 699 F.2d 901 (7th Cir. 1983).	D	TN	5 mos	TM	B	N	E; D
75. Data Cash v. JS&A Group, Inc., 223 U.S.P.Q. (BNA) 865 (N.D. Ill. 1984).	D	C	5 yrs		A	N	F; D
76. Avis, Inc. v. Hertz Corp., 223 U.S.P.Q. (BNA) 1255 (E.D.N.Y. 1984).	D	C; P<D	5 mos		S	D; E	F; D
77. Borden, Inc. v. Kraft, Inc., 224 U.S.P.Q. (BNA) 811 (N.D. Ill. 1984).	ID	C; P<D	9 mos		F	D; I	F; N
78. Warren Corp. v. Goldwert Textile Sales, 581 F. Supp. 897 (S.D.N.Y. 1984).	ID	C; NE	1 yr		C	N	F; D
79. Burndy Corp. v. Teledyne Indus., 584 F. Supp. 656 (D. Conn.), <i>aff'd</i> , 784 F.2d 767 (2d Cir. 1984).	ND	C; lp	2 yrs		B	N	F; D
80. Procter & Gamble v. Cheseborough-Ponds, 588 F. Supp. 1082 (S.D.N.Y.), <i>aff'd</i> , 747 F.2d 114 (2d Cir. 1984).	D	C	1 yr		G	D; I	E; N

81. UpJohn Co. v. American Home Prod., 598 F. Supp. 550 (S.D.N.Y. 1984).	I	C; NE	4 mos		D	A; I	F; N
82. Thorn v. Reliance Van Co., 736 F.2d 929 (3d Cir. 1984).	ND	I		RICO	S	N	S; D
83. Southern Shows, Inc. v. Exposition Ent., 226 U.S.P.Q. (BNA) 351 (W.D.N.Y. 1985).	I	C; NE	3 mos		S	D; V	F; O
84. Olsonite Corp. v. Bemis Mfg., 610 F. Supp. 1011 (E.D. Wis. 1985).	D	C		P	B	D; V	F; N
85. Koontz v. Jaffarian, 617 F. Supp. 1108 (E.D. Va. 1985), <i>aff'd</i> , 787 F.2d 906 (4th Cir. 1986).	D	C; NE		C	B	N	F; D
86. John O. Butter Co. v. Block Drug Co., 620 F. Supp. 771 (N.D. Ill. 1985).	D	C		P	H	N	F; N
87. AMF, Inc. v. Brunswick Corp., 621 F. Supp. 456 (E.D.N.Y. 1985).	I; s	C	6 mos		B	D; I	F; D
88. Mercury Foam Corp. v. L&N Sales, 625 F. Supp. 87 (E.D. Pa. 1985).	I	C		TM	H	N	F; O
89. Ciba-Geigy v. Thompson Medical, 672 F. Supp. 679 (S.D.N.Y. 1985).	I; s; pr	C	3 mos	cc	D	N	E; N
90. Otis Clapp & Son v. Filmore Vitamin Co., 754 F.2d 738 (7th Cir. 1985).	I; d; c; af	C; NE	4 yrs	TM	D	Dis	F; N
91. Vlick v. PC World, 1986 WL 84368 (N.D. Ill. 1986).	I	C			B	Dis	F; N
92. Littelfuse v. Parker, 1986 WL 13640 (N.D. Ill. 1986).	I	C; NE	3 yrs	TM	B	A; E	E; N
93. American Rockwool v. Owens-Corning Fiberglas, 640 F. Supp. 1411 (D.N.C. 1986).	ND	C		D; cc	B	D; I; Dis	F; D

Name	Outcome	Parties	Time	Other Issues	Industry	Comp.	Attrib.
94. Coca-Cola v. Procter & Gamble, 642 F. Supp. 936 (S.D. Oh. 1986), <i>rev'd</i> , 822 F.2d 28 (6th Cir. 1987).	ND	C	6 wks		F	N	F; N
95. UpJohn Co. v. Riahoim Corp., 641 F. Supp. 1209 (D. Del. 1986).	I; pr; ar	C; P>D	4 mos	P	D	A; E	C; M
96. Maybelline Co. v. Noxell Corp., 643 F. Supp. 294 (E.D. Ark. 1986), <i>rev'd</i> , 813 F.2d 901 (8th Cir. 1987).	O	C	5 days		G	N	E; N
97. Metro Mobile v. New Vector, 643 F. Supp. 1289 (D. Ariz.), <i>rev'd</i> , 803 F.2d 724 (9th Cir. 1986).	ID	C; NE			B	D; I	E; D
98. Grant Airmass Corp. v. Gaymar Indus., 645 F. Supp. 1507 (S.D.N.Y. 1986).	ND	C; lp	18 mos		B	D; E	C; D
99. International Paint v. Grow Group, 648 F. Supp. 729 (S.D.N.Y. 1986).	D	C		RICO	H	N	F; N
100. McNeilab v. Bristol Myer, 656 F. Supp. 88 (E.D. Pa. 1986).	D	C			D	D; E	C; N
101. Frito-Lay, Inc. v. Bachman Co., 659 F. Supp. 1129 (S.D.N.Y. 1986).	D	C			M	N	E; N
102. Camel Hair, Inc. v. Associated Dry Goods, 799 F.2d 6 (1st Cir. 1986).	I	As	13 mos		C	N	F; D
103. Chicagoland v. White, 714 F. Supp. 383 (N.D. Ill. 1989)	ID	C	7 mos		M	N	F; O
104. Harper House v. Thomas Nelson, Inc., 889 F.2d 197 (9th Cir. 1989).	I	C; P>D		C	A	N	S; O
105. Tyco Indus. v. Lego Systems, Inc., 5 U.S.P.Q. 2d (BNA) 1023 (D.N.J. 1987).	I	C; NE	3.5 yrs		H	A; E	E; N

106. National Assoc. Pharm. v. Ayerst, 850 F.2d 904 (2d Cir. 1988).	ND	As; NE	1 yr	M	D	D; I	F; D
107. Norton Tire Co. v. Tire Kingdom Co., 116 F.R.D. 236 (S.D. Fla. 1987), <i>aff'd</i> , 853 F.2d 1533 (11th Cir. 1988).	D	C		M	M	N	S; D
108. American Home Prod. v. Johnson & Johnson, 654 F. Supp. 568 (S.D.N.Y. 1987).	I	C; P>D	3 yrs	cc	D	D; E	C; N
109. Stiffel Co. v. Westwood Lighting Group, 658 F. Supp. 1103 (D.N.J. 1987).	I	C; P>D	2.5 mos		A	D; E	C; D
110. Turbosound, Inc. v. Eastern Acoustic Works, 672 F. Supp. 575 (D. Mass. 1987).	ND	C			B	D; E	E; D
111. H. L. Hayden Co. v. Siemens Med. Sys., 672 F. Supp. 724 (S.D.N.Y. 1987), <i>aff'd</i> , 879 F.2d 1005 (2d Cir. 1989).	ND	D		M	B	N	E; D
112. Tambrands, Inc. v. Warner-Lambert Co., 673 F. Supp. 1190 (S.D.N.Y. 1987).	I	C; P<D	1.5 yrs	cc	D	D; I	E; N
113. Fruit of the Loom, Inc. v. Sara Lee Corp., 674 F. Supp. 1020 (S.D.N.Y. 1987).	D	C; P>D	1 yr		C	D; E	E; N
114. McNeilab, Inc. v. American Home Prod., 675 F. Supp. 819 (S.D.N.Y. 1987), <i>aff'd</i> , 848 F.2d 34 (2d Cir. 1988).	I	C	7 mos		D	A; E	E; N
115. H.B. Halicki v. United Art. Comm., 812 F.2d 1213 (9th Cir. 1987).	D	D			M	N	E; N
116. Bloch v. Smithkline Beckman Corp., 1988 D. Lexis 12397 (E.D. Pa. 1988).	ND	C; P<D	7 mos	M; P	D	N	F; D
117. U.S. Healthcare, Inc. v. Blue Cross, 1988 U.S. Dist. LEXIS 1832 (E.D. Pa. 1988).	D	C; P<D	5 mos	D; cc	S	D; E	E; D
118. Haan's Craft v. Craft Master, Inc., 683 F. Supp. 1234 (N.D. Ind. 1988).	I; pr	C; NE		C	H	N	E; N

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119. Playskool, Inc. v. Product Dev. Group, Inc., 699 F. Supp. 1056 (E.D.N.Y. 1988).	I; pr	C; lp	9 mos		H	A; E	E; N
120. Oil Heat Inst.v. Northwest Natural Gas, 708 F. Supp. 1118 (D. Or. 1988).	ND	As	14 mos	D	S	D; E	C; D
121. Johnson & Johnson v. GAC Int'l, Inc., 862 F.2d 975 (2d Cir. 1988).	I	C	3 mos		B	N	F; D
122. Gillette Co. v. Wilkinson Sword, Inc., 1989 U.S. Dist. Lexis 8776 (S.D.N.Y. 1989).	I	C; P>D		M	G	D; E	E; N
123. Hobart Corp. v. Weibilt, No. 1:89CV1726, slip op. (N.D. Ohio Oct. 4, 1989).	I	C; P>D			B	D; E	E; D
124. Alpo Petfoods, Inc. v. Ralston Purina Co., 12 U.S.P.Q. 2d (BNA) 1178 (D.D.C. 1989).	I; c; d	C; P<D			F	N	C; N
125. Construction Technol., Inc. v. Lockformer Co., 704 F. Supp. 1212 (S.D.N.Y. 1989).	ND	C	10 mos	P	B	D; E	E; D
126. Barr Labs v. Abbott Labs, 867 F.2d 743 (2d Cir. 1989).	D	C; P<D	23 mos	M	D	D; E	C; D

DECISIONS BY YEAR AND OUTCOME



