Western New England Law Review

Volume 32 *32 (2010)*
Issue 3 *SYMPOSIUM: WOMEN, ETHNICITY, AND ENTREPRENEURSHIP*
Article 6

1-1-2010

TRADEMARK LAW AND CONSUMER PROTECTION LAW—DECEPTION IS A CRUEL ACT: "UNIFORM" STATE DECEPTIVE TRADE PRACTICES ACTS AND THEIR DECEPTIVE EFFECTS ON THE TRADEMARK CLAIMS OF CORPORATE COMPETITORS

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TRADEMARK LAW AND CONSUMER PROTECTION LAW—DECEPTION IS A CRUEL ACT[1]: "UNIFORM" STATE DECEPTIVE TRADE PRACTICES ACTS AND THEIR DECEPTIVE EFFECTS ON THE TRADEMARK CLAIMS OF CORPORATE COMPETITORS

INTRODUCTION

The Lanham Trademark Act,[2] enacted in 1946, was created to protect and regulate commerce through the registration of trademarks for goods and services.[3] Codified at 15 U.S.C. § 1125(a), section 43(a) of the Lanham Act addresses the deceptive use of protected trademarks via means of false advertising and other unfair trade practices.[4] Courts have generally held that in order to have standing to bring suit under section 43(a), plaintiffs must be competitors in the marketplace.[5] Since the stated purpose of the Lanham Act is the protection of commercial interests, common consumers are not typically afforded standing to bring claims under section 43(a), because they have none.[6]

Complaints of false advertising and unfair trade practices made under the Lanham Act often give rise to state-law claims of deceptive trade practices born of the same infringement.[7] Modeled after both the Federal Trade Commission Act[8] ("FTCA") and the Uni-

1. "Deception is a cruel act. . . . It often has many players on different stages that corrode the soul." Donna A. Favors, Member of the Bd. of Directors of the Montgomery Institute (1955), *available at* http://thinkexist.com/quotation/deception_is_a_cruel_act-it_often_has_many/250933.html.

2. 15 U.S.C. § 1051-1141n (2006).

3. Travis Ketterman, *Lanham Act Does Not Cover Consumer Claims*, 7 LOY. CONSUMER L. REP. 31, 38 (1994).

4. James S. Wrona, *False Advertising and Consumer Standing Under Section 43(a) of the Lanham Act: Broad Consumer Protection Legislation or a Narrow Pro-Competitive Measure?*, 47 RUTGERS L. REV. 1085, 1091-92 (1995).

5. Brian 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, 418 (1987).

6. *See, e.g.*, Serbin v. Ziebart Int'l Corp., 11 F.3d 1163, 1175 (3d Cir. 1993); Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686 (2d Cir. 1971).

7. *See* Marcia B. Paul, *Basic Principles of Section 43(a) and Unfair Competition*, *in* PRACTISING LAW INSTITUTE: PATENTS, COPYRIGHTS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 81, 98 (1995), *available at* 419 PLI/PAT 81 (Westlaw).

8. 15 U.S.C. § 41-58 (2006).

form Deceptive Trade Practices Act[9] ("UDTPA"), deceptive trade practices acts ("DTPA") seek to prevent consumer fraud and deception. These statutes make actionable the "pass[ing] off [of] goods or services as those of another or caus[ing] confusion regarding the source of sponsorship, approval, or certification of goods or services"[10] and are often replete with desirable promises of enhanced attorneys' fees and treble damages awards. When the DTPAs were first adopted by the states, many of these statutes dictated that only the State Attorney General could bring suit on behalf of private individuals.[11] But with the passing of time, private rights of action were recognized under the DTPAs.[12] This recognition, however, gave rise to a new debate among the states—should the private right of action be extended to corporate competitors or restricted solely to individual consumers?

While some states have afforded standing to corporate competitors under the DTPAs, albeit with restrictions,[13] other states have precluded corporate competitors from making claims under the DTPAs.[14] Further still, some states have limited the private right of

9. UNIF. DECEPTIVE TRADE PRACTICES ACT (amended 1966, withdrawn 2000), 7A U.L.A. 265 (1985), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf.

10. John L. Reed, *Lanham Act and Deceptive Trade Practice Claims Arising Under State Professional Licensure Laws*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 223, 259 (1997).

11. *See* Richard F. Dole, Jr., *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485, 486 (1967).

12. *Id.*

13. *See, e.g.*, Conn. Gen. Stat. Ann. § 42-110b (West 2007) (requiring proof of ascertainable loss); MASS. GEN. LAWS ch. 93A, §§ 2, 11 (2008); N.H. REV. STAT. ANN. § 358-A:2 (2009) (requiring analysis of nature of transaction); N.J. STAT. ANN. § 56:8-19 (West 2001) (requiring proof of ascertainable loss); N.Y. GEN. BUS. LAW § 349 (McKinney 2004) (requiring actual harm to the public); Trent Partners & Assocs., Inc. v. Digital Equip. Corp., 120 F. Supp. 2d 84, 106 (D. Mass. 1999) (requiring proof of "rascality"); *see also* ABA COMM. ON BUS. & CORPORATE LITIG., ANNUAL REVIEW OF DEVELOPMENTS IN BUSINESS AND CORPORATE LITIGATION § 6.3, at 204 (2005).

14. *See, e.g.*, Me. Rev. Stat. Ann. tit. 10, § 1212 (2009); 73 PA. CONS. STAT. ANN. §§ 201-3, -9.2 (West 2008); R.I. GEN. LAWS §§ 6-13.1-2, -5, -5.2 (2001); VT. STAT. ANN. tit. 9, §§ 2453, 2461(b) (2006); Scully Signal Co. v. Joyal, 881 F. Supp. 727, 741 (D.R.I. 1995) ("The Rhode Island Act only provides private rights of action to the Attorney General and to 'person[s] who purchase or lease goods or services primarily for personal, family, or household purposes. . . .' " (citation omitted)); Permagrain Prods., Inc. v. U.S. Mat & Rubber Co., 489 F. Supp. 108, 111 (E.D. Pa. 1980) ("[The Pennsylvania] act limits private suits to goods purchased by consumers for their personal use"); *see also* ABA COMM. ON BUS. & CORPORATE LITIG., *supra* note 13, § 6.3, at 204. R

action under the DTPAs solely to corporate competitors.[15] The discrepancy present in the interpretation of the DTPAs has left many corporate plaintiffs, who often do business in more than one state, without any legal remedy for trademark infringement under these state DTPAs. Not only are corporate competitors unable to fully litigate their claims in a court of law, but they are also denied the possibility of receiving the treble damages and attorneys' fees, which the vast majority of the DTPAs offer as relief.[16]

This discrepancy in the law is particularly problematic when corporate plaintiffs attach deceptive-trade-practices allegations to section 43(a) Lanham Act claims, primarily because, under the Lanham Act, only corporate competitors have standing to bring suit.[17] Corporate competitors' rights are especially frustrated in the northeastern United States due to the geographic proximity of its small, clustered states. Because these states are so close together, corporate competitors are wont to engage in business in many of them. This is problematic because a trademark-related claim arising out of a defendant's deceptive trade practice that is actionable in one state is not similarly actionable in another.

This Note will explore the legal history and ramifications of the DTPAs of representative states of the First, Second, and Third Circuits upon section 43(a) Lanham Act claims between corporate competitors. This analysis suggests that the states of the First, Second, and Third Circuits must reform their DTPAs through the adoption of a uniform act to allow for cohesion in the Northeast of available remedies to corporate competitors.

Part I of this Note will detail the history and purpose of the Lanham Act (the "Act"), including the scope of the Act itself and how it applies to and affects corporations. Part II will examine the evolution of the state DTPAs from the early days of the FTCA, to

15. *See, e.g.*, DEL. CODE ANN. tit. 6, § 2532 (2005); Wald v. Wilmington Trust Co., 552 A.2d 853, 855 (Del. Super. Ct. 1988) ("The statute is meant to provide a remedy for injuries to business interests, rather than for harm to individual consumers.").

16. Dole, *supra* note 11, at 495. Although injunctive relief is the primary function of the UDTPA, reasonable attorneys' fees and treble damages are awarded at the discretion of the court. *Id.* The states' failure to correct the discrepancy between the existing DTPAs serves as a deterrent to corporate competitors seeking to fully recover upon their claims. Under the section 43(a) of the Lanham Act, attorneys' fees are awarded only in "exceptional cases." Reed, *supra* note 10, at 258. **R**

17. *See* Morris, *supra* note 5, at 417. **R**

the development of the UDTPA,[18] and finally to the formation of the "Little FTC Acts."[19] Part III will then discuss the DTPAs and their application to corporate competitors.

Part IV of this Note will provide the recommendation that, to redress the discrepancies present in the DTPAs, it is necessary to devise new requirements for corporate competitors to be afforded standing under these acts. In contrast to Rhode Island[20] and Pennsylvania's[21] strict rule of law prohibiting corporate competitor claims and Delaware's act[22] allowing only corporate competitors to bring claims, the states of the Northeast ought to blend the treatments of the law by states within the First, Second, and Third Circuits to adopt a *true* uniform law. To achieve this goal, clear guidelines as to standing requirements for corporate competitors under the DTPAs must be formed.[23] Further, the states must establish revised terms for what a competitor-plaintiff must prove in order to succeed on his claim.[24] Lastly, the states must craft a final, concise definition of what constitutes a "deceptive trade practice."[25] If such a uniform system were implemented, corporations in the Northeast would be able to operate with greater efficiency and without fear of being unable to litigate their valid claims in a court of law.

I. The Lanham Trademark Act

The evolution of the Lanham Trademark Act has shaped the protection of trademarks in our country. To a large extent, judicially rendered standing requirements have determined who can,

18. Unif. Deceptive Trade Practices Act (amended 1966, withdrawn 2000), 7A U.L.A. 265 (1985), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf.

19. Each of the fifty states has crafted its own version of the Federal Trade Commission Act in the form of statutes dubbed "Little FTC Acts," which are used as mechanisms to deter deceptive trade practices. Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 Dick. L. Rev. 373, 375-76 (1990).

20. R.I. Gen. Laws, §§ 6-13.1-2, -5 (2001); Scully Signal Co. v. Joyal, 881 F. Supp. 727, 741 (D.R.I. 1995).

21. Pa. Cons. Stat. Ann. § 201-3 (West 2008); Permagrain Prods., Inc. v. U.S. Mat & Rubber Co., 489 F. Supp. 108, 111 (E.D. Pa. 1980).

22. Del. Code Ann. tit. 6, § 2532 (2005); Wald v. Wilmington Trust Co., 552 A.2d 853, 855 (Del. Super. Ct. 1988).

23. *See infra* notes 220-231 and accompanying text. R

24. *See infra* notes 232-275 and accompanying text. R

25. *See infra* notes 276-288 and accompanying text. R

and who cannot, bring suit under the Lanham Act.[26] Importantly, the courts have decided that only corporate competitors may be afforded this right.[27] Ordinarily this is not a problem. However, these standing requirements may become hazardous to a competitor-plaintiff's suit if a DTPA claim arises, despite the fact that these claims are born of the same infringement that sparked Lanham intervention in the first place.

A. *Lanham's Purpose: Trademark Infringement, Trademark Dilution, and False Advertising Claims*

In lay terms, a trademark is a sign or logo that is affixed to a product or service to signal ownership of the goods as well as a legal right to exclusive use by the owner of the mark.[28] *Black's Law Dictionary* defines a trademark as a "commercial substitute for one's signature."[29] The essential commercial purpose of a trademark is to guarantee, sell, and advertise the product or service to which it is attached.[30] The critical element of every trademark is that it must "identify and distinguish" one company's products from another's.[31] In order to receive federal protection, trademarks must have the following five attributes: (1) affixation;[32] (2) use;[33] (3) dis-

26. *See* Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: The Quest for Optimal Levels of Accurate Information in the Marketplace*, 29 U. ARK. LITTLE ROCK L. REV. 283, 296 (2007) ("[P]rudential standing requirements remain[ ] constant in that a competitive injury and some degree of competition [is] required to have standing for a section 43(a) false advertising claim."); *see also infra* note 50 and accompanying text. R

27. *See infra* notes 48-64 and accompanying text. R

28. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1325 (11th ed. 2005).

29. BLACK'S LAW DICTIONARY 1630 (9th ed. 2009).

30. 3 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 17:1, at 17-9 (4th ed. 2009).

31. SIEGRUN D. KANE, TRADEMARK LAW: A PRACTITIONER'S GUIDE § 1:1:1, at 1-2 (4th ed. 2006).

32. Trademarks must be "affixed" to a product such that the product or service is immediately recognizable by the consumer in the marketplace. INTELLECTUAL PROPERTY FOR THE INTERNET § 1.12, at 1-12 (Lewis C. Lee & J. Scott Davidson eds., 1997).

33. Companies must use or have an intent to use the trademark within interstate commerce in order for federal protection to be granted. *Id.*

tinctiveness;[34] (4) lack of similarity to other marks;[35] and (5) nonfunctionality.[36]

The Lanham Act, created in 1946 to replace the Trade-Mark Act of 1920,[37] was passed specifically to address infringement,[38] dilution,[39] and false advertising claims.[40] The Lanham Act's purpose is clear, providing, in relevant part, that "[t]he intent of this [Act] is

34. "A distinctive mark is one that is unique or nonordinary." *Id.* There are five categories of distinctiveness in the trademark arena—those that are fanciful, arbitrary, suggestive, descriptive, and generic. *Id.* § 1.12, at 13. While some trademarks are inherently distinctive (fanciful, arbitrary, and suggestive) and may be registered immediately, others are not (descriptive and generic) and must acquire secondary meaning in the marketplace before becoming registrable. *Id.*

35. Federal "[t]rademark protection will not be given to a mark that is likely to cause confusion with another registered mark." *Id.* In examining this standard, trademark examiners will consider the similarity of the marks with respect to

> appearance, sound, connotation, . . . impression[,] . . . [the] nature of the products or services[,] . . . [the] established trade channels for the products or services[,] . . . [the] conditions of the sale (impulse purchase versus sophisticated purchase)[,] . . . [the] fame of the prior mark[,] . . . [the] number and nature of similar marks in use on similar products or services[,] . . . [the] nature and extent of any actual confusion[,] . . . [and the] variety of products and services with which the mark is used.

Id. § 1.12, at 13-14.

36. The nonfunctionality requirement states that trademark protection is not usually available for functional or utilitarian purposes or features of a product. *Id.* § 1.12, at 14.

37. 15 U.S.C. § 1051-1141n (2006); *see* Theresa E. McEvilly, *Virtual Advertising in Sports Venues and the Federal Lanham Act § 43(a): Revolutionary Technology Creates Controversial Advertising Medium*, 8 SETON HALL J. SPORT L. 603, 616-17 (1998).

38. Trademark infringement is "[t]he unauthorized use of a trademark—or of a confusingly similar name, word, symbol, or any combination of these—in connection with the same or related goods or services and in a manner that is likely to cause confusion, deception, or mistake about the source of the goods or services." BLACK'S LAW DICTIONARY 852 (9th ed. 2009).

39. As defined in *Black's Law Dictionary*, trademark dilution is "[t]he impairment of a famous trademark's strength, effectiveness, or distinctiveness through the use of the mark on an unrelated product, usu[ally] blurring the trademark's distinctive character or tarnishing it with an unsavory association." *Id.* at 524. To recover for trademark dilution, a plaintiff must prove ownership of a famous mark and actual dilution of that mark. Moseley v. V Secret Catalogue, Inc., 537 U.S. 418, 432-33 (2003).

40. A statement of advertisement "that tends to [deceive or] mislead consumers about the characteristics, quality, or geographic origin of . . . goods, services, or commercial activity" is considered false advertising under the Lanham Act. BLACK'S LAW DICTIONARY 677 (9th ed. 2009). False advertising need not be false but only misleading in a material way. 15 U.S.C. § 55(a). To succeed in a false advertising case, a plaintiff must prove generally the following elements:

> 1. . . . [A] false or misleading description or representation of fact in commercial advertising or promotion [has been made]; 2. That description or representation actually deceived or has the tendency to deceive a substantial segment of the intended audience; 3. Such deception is material to consumers in that it is likely to influence the purchasing decision; 4. The false advertiser caused its

to . . . mak[e] actionable the deceptive and misleading use of marks . . . ; to protect persons engaged in . . . commerce against unfair competition; [and] to prevent fraud and deception . . . by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks."[41] In order to effectuate this broad purpose, Congress included a section in the Act that focused upon consumer protection from misuses of trademarks.

B. *Section 43(a) and Its Effect on Consumers and Corporations*

Section 43(a) of the Lanham Act, in effect, created a federal remedial statute dealing with consumer protection issues, while at the same time encompassing unfair competition claims.[42] As originally enacted, section 43(a) of the 1946 Lanham Act dealt solely with claims relating to false designation of origin.[43] This narrow language created confusion within the court system as to the Lanham Act's stance on false advertising, primarily because the Act's legislative history was unclear as to whether section 43(a) ought to carry a broader arsenal "against general misrepresentations in advertising."[44]

Congress resolved these issues in 1988 with the passing of the Trademark Law Revision Act.[45] The Trademark Law Revision Act expanded the scope of section 43(a) to include both infringement and false advertising claims.[46] To be successful in a section 43(a) claim, a plaintiff must prove that a business entity's commercial advertising venture utilizes materially false statements that deceive, or

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falsely advertised goods or services to enter into interstate commerce; and 5. The plaintiff has been or is likely to be injured as a result of such falsities.

Michael F. Clayton, *Handling Unfair Competition and False Advertising Cases*, *in* PRACTISING LAW INSTITUTE: PATENTS, COPYRIGHTS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES 261, 269 (2001), *available at* 677 PLI/PAT 261 (Westlaw); *see* Lemley, *supra* note 26, at 285. Because of its focus on deceptive trade practices between corporate competitors, this Note will deal primarily with the false advertising and infringement aspects of section 43(a) the Lanham Act, codified at 15 U.S.C. § 1125(a). R

41. Lanham Act of 1946 § 45, 15 U.S.C. § 1127.

42. *See* Paul, *supra* note 7, at 86. R

43. The 1946 version of the Lanham Act adopted much of its language from the federal statute it replaced—the 1920 Trade-Mark Act. The 1920 Trade-Mark Act was designed such that standing to bring suit was limited to "any person, firm, or corporation doing business in the locality falsely indicated as that of origin, or in the region in which said locality is situated." Trade-Mark Act of Mar. 19, 1920, ch. 104, § 2, 41 Stat. 533, 533-34 (repealed 1946); *see also* McEvilly, *supra* note 37, at 616-17. R

44. McEvilly, *supra* note 37, at 616-17. R

45. Trademark Law Revision Act of 1988, Pub. L. 100-667, 102 Stat. 3935; *see* McEvilly, *supra* note 37, at 616-18. R

46. *See* McEvilly, *supra* note 37, at 616-18. R

have the capacity to deceive, a substantial portion of a populace through interstate commerce due to the statements' injurious nature.[47] Despite the clarification of the Lanham Act's reach, the question of whether the Act extended its remedies to consumers still remained unanswered.[48]

On its face, the language of the Lanham Act appears to grant consumers the right to bring suit. In relevant part, section 43(a) states that

> [a]ny 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 original, false or misleading description of fact, or false or misleading representation of fact, which—
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval or his or her goods, services, or commercial activities by another person or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

47. Bruce P. Keller, *"It Keeps Going and Going and Going": The Expansion of False Advertising Litigation Under the Lanham Act*, *in* PRACTISING LAW INSTITUTE: COMMERCIAL LAW AND PRACTICE COURSE HANDBOOK SERIES 135, 148-49 (1997), *available at* 775 PLI/COMM 135 (Westlaw); *see, e.g.*, Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 31 (2003) (concluding that the "false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion . . . as to the origin . . . of [one's] goods" is actionable under the Lanham Act (omissions in original) (quoting section 43(a) of the Lanham Act) (internal quotation marks omitted)); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 919 F. Supp. 756, 764-65 (D.N.J. 1996) (asserting that misrepresentations made about a plaintiff's goods are actionable under the Lanham Act if four-pronged test is satisfied); Nat'l Artists Mgmt. Co. v. Weaving, 769 F. Supp. 1224, 1230 (S.D.N.Y. 1991) (stating that a plaintiff must establish that the requirements of the four-pronged test have been met in order to bring suit).

48. *See* Richard A. De Sevo, *Consumer Standing Under Section 43(a)—An Issue Whose Time Has Passed*, 88 TRADEMARK REP. 1, 8 (1998). Confusion in the courts over consumers' ability to bring suit under the Lanham Act has ensued since the Act's inception in 1946. Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. REV. 807, 836 (1999). The "vast majority" of courts choose to deny consumer standing, concluding that the purpose of the Act is "to protect primarily competitors rather than consumers." *Id.* These questions of ability to bring suit boil down to the federal courts' adherence to prudential standing limitations, "which are 'judicially self-imposed limits on the exercise of federal jurisdiction.'" Gregory Apgar, *Prudential Standing Limitations on Lanham Act False Advertising Claims*, 76 FORDHAM L. REV. 2389, 2394 (2008) (quoting Bennett v. Spear, 520 U.S. 154, 162 (1997)).

> 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 an act.[49]

Because section 43(a) uses such broad language—allowing "any person who believes that he or she is likely to be damaged" to bring suit—one might conclude that it was Congress's intent to abrogate prudential standing requirements.[50] In terms of the Lanham Act, prudential (or, rather, judicially imposed) standing serves to limit the class of plaintiffs to those whom the Act was meant to protect.[51] Some commentators have asserted that the Lanham Act was designed with the "dual goals" of protection for both consumers and competitors.[52] Section 45 of the Lanham Act, however, states that the Lanham Act's purpose "is exclusively to protect the interests of a purely commercial class against unscrupulous commercial conduct."[53] Thus, Lanham Act standing requires that a plaintiff be a corporate competitor.

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49. 15 U.S.C. § 1125(a)(1) (2006) (emphasis added).

50. *See* Apgar, *supra* note 48, at 2400. Standing, a right which arises from the Constitution, refers to one's ability to bring a matter before a court of law. Peter S. Massaro, III, *Filtering Through a Mess: A Proposal to Reduce the Confusion Surrounding the Requirements for Standing in False Advertising Claims Brought Under Section 43(a) of the Lanham Act*, 65 WASH. & LEE L. REV. 1673, 1677 (2008). Prudential standing is said to be a "creature[ ] of prudence." Craig A. Stern, *Another Sign from* Hein*: Does the Generalized Grievance Fail a Constitutional or a Prudential Test of Federal Standing to Sue?*, 12 LEWIS & CLARK L. REV. 1169, 1198 (2008). Prudential standing requirements are not derived from the Constitution but, rather, are congressionally or judicially imposed. *Id.* Unless a statute states otherwise, prudential standing requirements are automatically assumed by the courts presiding over federal litigation. Diane Taing, Comment, *Competition for Standing: Defining the Commercial Plaintiff Under Section 43(a) of the Lanham Act*, 16 GEO. MASON L. REV. 493, 497 (2009). Theories of prudential standing typically refer to three distinct categories: R

> the rule against allowing a party to assert a generalized grievance; the rule against ordinarily allowing a party to assert the rights of others; and the rule that a party be arguably within the zone of interest of the statutory or constitutional provision the party raises in support of its position.

Stern, *supra*, at 1199. In section 43(a) claims, the courts have generally subscribed to the rule concerning the parties' "zone of interest." Gerald P. Meyer, *Standing Out: A Commonsense Approach to Standing for False Advertising Suits Under Lanham Act Section 43(a)*, 2009 U. ILL. L. REV. 295, 318 (2009). This form of prudential standing is meant to "limit the class eligible to bring suit under Section 43(a) to those who Congress intended to protect." Massaro, *supra*, at 1679-80. As this Note asserts, Congress meant only to protect corporate competitors under section 43(a) of the Lanham Act.

51. Massaro, *supra* note 50, at 1679-80. R

52. *See* Tawnya Wojciechowski, *Letting Consumers Stand on Their Own: An Argument for Congressional Action Regarding Consumer Standing for False Advertising Under Lanham Act Section 43(a)*, 24 SW. U. L. REV. 213, 223 (1994).

53. George Russell Thill, *The 1988 Trademark Law Revision Act: Damage Awards for False Advertising and Consumer Standing Under Section 43 (a)—Congress Drops the Ball Twice*, 6 DEPAUL BUS. L.J. 361, 377 (1994) (quoting Colligan v. Activi-

In 1954, the Third Circuit Court of Appeals set the standard for prudential standing in section 43(a) cases in *L'Aiglon Apparel v. Lana Lobell, Inc.*, which held that corporate competitors had standing to bring suit in deceptive-advertising cases.[54] It was not until 1971, however, that the courts addressed the question of consumer standing.[55] The Second Circuit Court of Appeals decided in *Colligan v. Activities Club of New York, Ltd.* that consumers lacked standing to bring actions under section 43(a) of the Lanham Act.[56] Nearly forty years later, in 1993, the Third Circuit Court of Appeals rendered the same holding in *Serbin v. Ziebart International Corp.*[57] The vast majority of courts have fallen in line with the *Colligan* and *Serbin* decisions and denied a private right of action to consumers.[58] Further, both the Second and Third Circuit Courts have expressed that a private right of action for consumers under section 43(a) was not necessary due to other viable avenues, such as

ties Club of N.Y., Ltd., 442 F.2d 686, 692 (2d Cir. 1971)) (internal quotation marks omitted); *see also* 15 U.S.C. § 1127 ("The intent of this chapter is . . . to protect persons engaged in [ ] commerce against unfair competition.").

54. L'Aiglon Apparel v. Lana Lobell, Inc., 214 F.2d 649 (3d Cir. 1954). The *L'Aiglon* court went on to state that "[section 43(a)] is a provision of a federal statute which, with clarity and precision adequate for judicial administration, creates and defines rights and duties [for corporate competitors] and provides for their vindication in the federal courts." *Id.* at 651.

55. De Sevo, *supra* note 48, at 8. **R**

56. *Colligan*, 442 F.2d at 693.

57. Serbin v. Ziebart Int'l Corp., 11 F.3d 1163, 1175 (3d Cir. 1993).

58. Berni v. Int'l Gourmet Rests. of Am., Inc., 838 F.2d 642, 648 (2d Cir. 1988) ("Although a section 43 plaintiff need not be a direct competitor, it is apparent that, at a minimum, standing to bring a section 43 claim requires the potential for a commercial or competitive injury." (citations omitted)); FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35, 40 n.2 (D.C. Cir. 1985) ("The Lanham Act . . . constitute[s] a private remedial scheme for the benefit of disgruntled competitors whereas the FTC Act more specifically serves the public interest and is enforced by the FTC."); Albert Furst von Thurn und Taxis v. Karl Prince von Thurn und Taxis, No. 04 Civ. 6107 (DAB), 2006 WL 2289847, at *11 (S.D.N.Y. Aug. 8, 2006) ("Standing to assert a § 43(a) claim is limited to a 'purely commercial class' of plaintiffs." (quoting *Colligan*, 442 F.2d at 692)); Joint Stock Soc'y v. UDV N. Am., Inc., 53 F. Supp. 2d 692, 708 (D. Del. 1999) ("[I]n order to maintain standing under Section 43, a litigant must, at a minimum, establish the 'potential for a commercial or competitive injury.'" (quoting *Berni*, 838 F.2d at 648)); Katzman v. Victoria's Secret Catalogue, 167 F.R.D. 649, 658 (S.D.N.Y. 1996) ("[*O*]*nly* commercial entities with a reasonable interest to be protected may sue under [section 43(a)]."); Loy v. Armstrong World Indus., Inc., 838 F. Supp. 991, 994 (E.D. Pa. 1993) ("[I]f Congress had contemplated the major change urged . . . and bestowed standing under Section 43(a) on pure consumers, it would have done so explicitly."); Shonac Corp. v. AMKO Int'l, Inc., 763 F. Supp. 919, 926 (S.D. Ohio 1991) ("[T]he purpose of § 43(a) is revealed to be 'to protect persons engaged in . . . commerce against unfair competition.'" (quoting 15 U.S.C. § 1127)).

state consumer protection laws or Federal Trade Commission ("FTC") intervention.[59]

The courts have time and again followed the *L'Aiglon Apparel* decision and stated that only corporate competitors may bring suit under section 43(a) of the Lanham Act.[60] In support of these decisions, scholars have acknowledged that, had Congress intended to provide consumers any relief under section 43(a), there would have been some semblance of this intent in the statute's text or legislative history.[61] The *Colligan* and *Serbin* courts speculated that what Congress *did* intend to create was a remedy that protected *commercial* interests from unfair commercial conduct.[62] These inferences were drawn from consideration of whether the plaintiff had a "reasonable interest to be protected against false advertising."[63]

Accordingly, corporate competitors have been granted both economic and equitable remedies under section 43(a) of the Lanham Act.[64] The Lanham Act provides for both injunctive relief as well as damages.[65] As far as injunctions are concerned, section 43(a) claims do not require a plaintiff to show the full extent of actual damages; rather, plaintiffs need only demonstrate a "likelihood of deception" and "the fact of damage."[66] Perhaps the most attractive feature of the Lanham Act's remedies is the sheer broadness of its damages provisions, which empower courts to award

59. Thill, *supra* note 53, at 376-77. **R**

60. Robert S. Saunders, Note, *Replacing Skepticism: An Economic Justification for Competitors' Actions for False Advertising Under Section 43(a) of the Lanham Act*, 77 VA. L. REV. 563, 572 (1991); *see also supra* note 58 and accompanying text. **R**

61. *Colligan*, 442 F.2d at 693-94; De Sevo, *supra* note 48, at 26. **R**

62. *Serbin*, 11 F.3d at 1175; *Colligan*, 442 F.2d at 694; Ketterman, *supra* note 3, at 38. **R**

63. Smith v. Montoro, 648 F.2d 602, 608 (9th Cir. 1981).

64. Reed, *supra* note 10, at 259. It has been a long-standing rule among the courts that any consumer rights that may be embodied within section 43(a) "must be invoked by a competitor of the defendant, not by a buyer from the defendant." 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:25 (4th ed. 1996). In sum, it seems as if courts will continue to adhere to the belief that corporate competitors are "the ultimate beneficiar[ies]" of the Act, and consumers in turn will be protected by "competitor-instigated suits." Burns, *supra* note 48, at 837. **R**

65. Successful plaintiffs in section 43(a) Lanham suits may receive damages representing compensation for disgorgement of profits, dilution of the mark, harm to reputation and goodwill, cost of corrective advertising, as well as attorneys' fees and costs. Bundy Corp. v. Teledyne Indus., 748 F.2d 767, 771-74 (2d Cir. 1984). The typical damage award under section 43(a), however, may be limited to "the infringer's profits, any damages to the trademark owner, the costs of the action, and, in exceptional cases, reasonable attorneys' fees." ADAM L. BROOKMAN, TRADEMARK LAW: PROTECTION, ENFORCEMENT AND LICENSING § 9.05[B], at 9-102 (1999).

66. 1A ALTMAN & CALLMANN, *supra* note 30, § 5.5, at 5-38-39. **R**

treble damages in cases of particularly egregious conduct.[67] Since 1982, there have been approximately two hundred section 43(a) cases tried in federal courts where monetary damages were awarded.[68] Not surprisingly, eighty-six percent of the damages in those cases have been awarded since the rapid emergence of the Internet Age in the early 1990s.[69] Fifty percent of all trademark damages since 1982 included an award of enhanced damages, and seventy-seven percent of those damages were trebled.[70]

Because the courts perceived the Lanham Act as offering protection solely to corporate plaintiffs, the federal government acknowledged that consumers were left without remedy for similar causes of action.[71] This led to the modification of the FTCA, which, in turn, spurred the evolution of the DTPAs within the states. Like the Lanham Act, these state acts included their own standing requirements.[72] Ironically, these standing requirements are antithetical to those of the Lanham Act; oftentimes, standing is limited solely to consumers unless a corporate plaintiff can make some sort of special evidentiary showing.[73] It is these requirements that create problems for corporate plaintiffs when attempting to bring suit under the DTPAs.

67. 15 U.S.C. § 1117 (2006). By definition, treble damages are "[d]amages that, by statute, are three times the amount of actual damages that the fact-finder determines is owed." BLACK'S LAW DICTIONARY 449 (9th ed. 2009). Treble damages are typically awarded where the state regards the conduct involved to be "particularly reprehensible." Lindsey v. Normet, 405 U.S. 56, 78 (1972). Damages of this kind are almost always considered strictly penal in nature. Dunbar v. Jones, 87 A. 787, 788 (Conn. 1913).

68. GORDON V. SMITH & RUSSELL L. PARR, INTELLECTUAL PROPERTY: VALUATION, EXPLOITATION, AND INFRINGEMENT DAMAGES § 42.4, at 726 (2005).

69. *Id.* This high percentage of damages likely represents the ease with which one can infringe upon another's trademark via the Internet. *See Baker & McKenzie Seminar Series on International Litigation and Arbitration*, 11 WORLD ARB. & MEDIATION REP. 229, 230 (2000), *available at* 11 WAMREP 229 (Westlaw) ("Due to the Internet's ease of use and low cost in transmitting files globally, intellectual property rules are being tested when they attempt to adequately protect those who hold . . . trademarks."). The number of section 43(a) cases tried in federal courts with monetary damages awarded has likely risen since Smith and Parr's book was published in 2005.

70. *Id.* at 729-30.

71. *See* Burns, *supra* note 48, at 837-38. **R**

72. *See supra* notes 13-15 and accompanying text. **R**

73. *See supra* note 14 and accompanying text. **R**

II. Paving the Road to Consumer Protection: The Transition from the Federal Trade Commission Act to State Deceptive Trade Practices Acts

Despite the passing of the Sherman Antitrust Act in 1890,[74] companies within the United States continued to grow to epic proportions and monopolized industries to such an extent that the legislation attempting to cap their power was moot.[75] The FTC was created in 1914 with the passing of the FTCA to curtail such anticompetitive practices.[76] In its original form, the FTCA was meant only to ban practices that were detrimental to a competitor's business.[77] Years later, Congress amended section 5 of the FTCA to prohibit "unfair or deceptive acts or practices in or affecting commerce";[78] accordingly, the FTC was granted the power to protect consumers.[79]

The standard to bring suit under the FTCA is significantly less stringent than that of section 43(a) of the Lanham Act.[80] Currently, under the FTCA, it is illegal "to 'disseminate, or cause to be disseminated, any false advertisement . . . [which] induc[es], or . . . is likely to induce . . . the purchase of food, drugs, devices, services, or cosmetics.'"[81] In litigating these claims, the FTC developed the "reasonable consumer" test[82] to control in situations where mate-

74. 15 U.S.C. §§ 1-2 (2006).

75. Andy J. Miller, Note, *A Procedural Approach to "Unfair Methods of Competition*,*"* 93 Iowa L. Rev. 1485, 1491 (2008) (quoting Daniel J. Boorstin, The Americans: The Democratic Experience 418 (1973)). One of the companies in the forefront of the Sherman Act's "failure" was Standard Oil, which continued to expand and grow larger despite the presence of the Sherman Act. *Id.* Attempting to pass legislation against such monolithic companies has been compared to "passing a law against the wind." *Id.* Still, even after Standard Oil had been dissolved, the Sherman Act was not reformed. *Id.*

76. Federal Trade Commission Act of 1914, ch. 311, § 1, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41-58).

77. *See* Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 Harv. J. on Legis. 1, 11 (2006).

78. 15 U.S.C. § 45(a)(1); *see also* Jon Mize, *Fencing Off the Path of Least Resistance: Re-Examining the Role of Little FTC Act Actions in the Law of False Advertising*, 72 Tenn. L. Rev. 653, 656 (2005).

79. For a general discussion of the FTCA's legislative history, see *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 990-96 (D.C. Cir. 1973). *See also* Scheuerman, *supra* note 77, at 12. R

80. *See* Mize, *supra* note 78, at 654-58. R

81. *Id.* at 656-57 (alterations and omissions in original) (quoting 15 U.S.C. § 52).

82. Under the "reasonable consumer" test, the FTC must not only show that "deception was probable" but also that deception would occur to "consumers acting rea-

rial business deceptions are likely to cause injury to a consumer who "reasonably rel[ies]" on the offending deceptive material.[83]

Although the FTCA's provisions are clear, the Act has one flaw—it lacks a definition for the term "deceptive trade practice."[84] It merely provides several catch-all provisions under which a deceptive trade practice might occur.[85] The FTC is tasked with the enforcement of these policies and pursues only claims that "would be to the interest of the public."[86] However, claims brought under the FTCA do not equip potential plaintiffs—the members of the public—with a private right of action.[87]

The FTC was widely criticized throughout the 1950s and 1960s because it lacked the ability to fully and adequately address the problems of consumer fraud that the nation faced, particularly due to its failure to provide a private right of action for plaintiffs.[88] In response, beginning in the early 1960s, the National Conference of Commissioners on Uniform State Laws[89] ("NCCUSL") brought forth the UDTPA.[90] The UDTPA was created in order to delineate specific deceptive practices that may create a "likelihood of public deception."[91] The uniform act also expressly provided that corpo-

sonably in the circumstances." Lemley, *supra* note 26, at 318. The test only applies to material deceptions that have been reasonably relied upon and are likely to cause injury to a consumer. *Id.* R

83. *Id.*; *see* Karns, *supra* note 19, at 388. R

84. The FTCA states only that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are . . . declared unlawful." 15 U.S.C. § 45(a)(1); *see also* Lemley, *supra* note 26, at 319. R

85. Lemley, *supra* note 26, at 320. R

86. 15 U.S.C. §45(b); *see* Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 442 (1991).

87. Miller, *supra* note 75, at 1495. R

88. *See* DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 8:2 (2008); *see also* Mark D. Bauer, *The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent*, 73 TENN. L. REV. 131, 141 (2006).

89. The NCCUSL was created in 1892 with the united goal of bringing uniformity to the laws of the states. *See* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR 308 (1964). The NCCUSL attempts to bring about uniformity in the law "by creating potential laws that it then tries to get the states to adopt." Travis McDade, *Legal Research*, A.B.A. STUDENT LAW., Feb. 2009, at 12, 12.

90. *See generally* UNIF. DECEPTIVE TRADE PRACTICES ACT (amended 1966, withdrawn 2000), 7A U.L.A. 265 (1985), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf.

91. The UDTPA's prohibition of deceptive trade practices reads as follows:

> (a) A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he:

rate entities were entitled to protection under its auspices.[92] The UDTPA was revised in 1966 and provided that the prevailing party in suit be awarded costs and may receive attorneys' fees.[93]

Four years later, the FTC joined forces with the Committee on Suggested State Legislation of the Council of State Governments to draft the Unfair Trade Practices and Consumer Protection Law ("UTP/CPL").[94] The UTP/CPL provided a private right of action for consumers, allowing for not only damages with a statutory minimum but also for the institution of class actions.[95] Not to be outdone, the NCCUSL, with the aid of the American Bar Association,

(1) passes off goods or services as those of another;

(2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;

(4) uses deceptive representations or designations of geographic origin in connection with goods or services;

(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

(6) represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or second-hand;

(7) represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) disparages the goods, services, or business of another by false or misleading representation of fact;

(9) advertises goods or services with intent not to sell them as advertised;

(10) advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; or

(12) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

Id. § 2; *see also* Dole, *supra* note 11, at 486 (explaining that the UDTPA strictly forbade the substitution of goods, trademark infringement, false designations of origin, false advertising, disparagement, bait-and-switch advertising, pricing fraud, as well as conduct tending to create confusion, misrepresentations, and misunderstandings). R

92. UNIF. DECEPTIVE TRADE PRACTICES ACT § 1 (noting in the "Definitions" section that "[a] 'person' means an individual, *corporation*, government, or governmental subdivision or agency, business trust, estate, trust, *partnership*, *unincorporated association*, two or more of any of the foregoing having a joint or common interest, or any other legal or *commercial entity*" (emphases added)).

93. *Id.* § 3(b).

94. PRIDGEN & ALDERMAN, *supra* note 88, § 3:5. R

95. *See* Unfair Trade Practices and Consumer Protection Law §§ 8(a)-8(b) (suggested legislation), *in* THE COUNCIL OF STATE GOVERNMENTS, 1970 SUGGESTED STATE LEGISLATION 144, 148-49 (1969).

suggested another model act—the Uniform Consumer Sales Practice Act ("UCSPA"), which applied solely to transactions between consumers.[96] By the early 1970s, the majority of the states had adopted one form or another of the three proposed uniform models—which came to be known as DTPAs.[97]

96. JONATHAN SHELDON & CAROLYN L. CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 3.4.2.3 (5th ed. 2001).

97. The UDTPA has been adopted in twelve states, while the UCSPA has been adopted in four. Rachel S. Kowal, *Warranty and the Courts*, *in* PRODUCT WARRANTY HANDBOOK 97, 116 (Wallace R. Blischke & D. N. Prabhakar Murthy eds., 1996); *see also* LII: Uniform Business and Financial Laws Locator, http://www.law.cornell.edu/uniform/vol7.html (last visited May 13, 2010) (providing a table of uniform laws and the states that have enacted them, including the UDTPA and the UCSPA). The remaining states have adopted either some form of the UTP/CPL or statutes that prohibit specific unfair practices. D. Wes Sullenger, *Only We Can Save You: When and Why Non-Consumer Businesses Have Standing to Sue Business Competitors Under the Tennessee Consumer Protection Act*, 35 U. MEM. L. REV. 485, 492 (2005); *see, e.g.*, ALA. CODE §§ 8-19-1 to -15 (LexisNexis 2002); ALASKA STAT. §§ 45.50.471-.561 (2008); ARIZ. REV. STAT. ANN. §§ 44-1521 to -1534 (2003); ARK. CODE ANN. §§ 4-88-101 to -115 (2001); CAL. CIV. CODE §§ 1750-1784 (West 2009); CAL. BUS. & PROF. CODE §§ 17200-09, 17500-09 (West 2008); COLO. REV. STAT. ANN. §§ 6-1-101 to -115 (West 2001); CONN. GEN. STAT. ANN. §§ 42-110a to -110q (West 2007); DEL. CODE ANN. tit. 6, §§ 2511-2527, 2531-2536 (2005); D.C. CODE ANN. §§ 28-3901 to -3911 (LexisNexis 2001); FLA. STAT. ANN. §§ 501.201-.213 (West 2006); GA. CODE ANN. §§ 10-1-370 to -427 (2009); HAW. REV. STAT. ANN. §§ 480-21 to -24, 481A-1 to -5, 481B-1 to -25 (LexisNexis 2009); IDAHO CODE ANN. §§ 48-601 to -619 (2003); 815 ILL. COMP. STAT. ANN. 505/1 to /12, 510/1 to /7 (West 2008); IND. CODE ANN. §§ 24-5-0.5-1 to -12 (West 2005); IOWA CODE ANN. §§ 714.16-.16A (West 2002); KAN. STAT. ANN. §§ 50-623 to -640 (2005); KY. REV. STAT. ANN. §§ 367.110-.360 (LexisNexis 2008); LA. REV. STAT. ANN. §§ 51:1401-1420 (2002); ME. REV. STAT. ANN. tit. 5, §§ 205-A to 214 (2002); ME. REV. STAT. ANN. tit. 10, §§ 1211-1216 (2009); MD. CODE ANN., COM. LAW §§ 13-101 to -501 (LexisNexis 2005); MASS. GEN. LAWS ch. 93A, §§ 1-11 (2008); MICH. COMP. LAWS ANN. §§ 445.901-.922 (West 2002); MINN. STAT. ANN. §§ 325D.09-.16, 325D.43-.48 (West 2004); MISS. CODE ANN. §§ 75-24-1 to -27 (West 1998); MO. ANN. STAT. §§ 407.010-.307 (West 2000); MONT. CODE ANN. §§ 30-14-101 to -143 (2009); NEB. REV. STAT. §§ 59-1601 to -1623 (2004); NEB. REV. STAT. §§ 87-301 to -306 (2008); NEV. REV. STAT. ANN. §§ 598.0903-.0999 (LexisNexis 2004); NEV. REV. STAT. ANN. § 41.600 (LexisNexis 2006); N.H. REV. STAT. ANN. §§ 358-A:1 to -A:13 (2009); N.J. STAT. ANN. §§ 56:8-1 to -91 (West 2001); N.M. STAT. ANN. §§ 57-12-1 to -24 (West 2003); N.Y. EXEC. LAW § 63(12) (McKinney 2001); N.Y. GEN. BUS. LAW §§ 349-350 (McKinney 2004); N.C. GEN. STAT. §§ 75-1 to -42 (2007); N.D. CENT. CODE §§ 51-15-01 to -11 (2007); OHIO REV. CODE ANN. §§ 1345.01-.13, 4165.01-.04 (West 2007); OKLA. STAT. ANN. tit. 15, §§ 751-763 (West 1993 & Supp. 2010); OKLA. STAT. ANN. tit 78, §§ 51-55 (West 2001); OR. REV. STAT. §§ 646.605-.656 (2007); 73 PA. CONS. STAT. ANN. §§ 201-1 to -9.3 (West 2008); R.I. GEN. LAWS §§ 6-13.1-1 to -28 (2001 & Supp. 2008); S.C. CODE ANN. §§ 39-5-10 to -160 (1985 & Supp. 2009); S.D. CODIFIED LAWS §§ 37-24-1 to -40 (2004); TENN. CODE ANN. §§ 47-18-101 to -125 (2001); TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 2001); UTAH CODE ANN. §§ 13-5-1 to -18, 13-11-1 to -23 (2005); VT. STAT. ANN. tit. 9, §§ 2451-2480n (2006); VA. CODE ANN. §§ 59.1-196 to -207 (2006); WASH. REV. CODE ANN. §§ 19.86.010-.920 (West 1998 & Supp. 2010); W. VA. CODE ANN. §§ 46A-6-101 to -110 (LexisNexis 2006); WIS. STAT. ANN. §§ 100.18, 100.20-.264 (West

Unsurprisingly, because each state adopted a different form of the DTPA, each with different standing requirements, litigation across the states under these acts is tumultuous at best. Unfortunately, in early 2000, the NCCUSL withdrew the best option for uniformity, the UDTPA.[98] The NCCUSL believed that the UDTPA had been rendered obsolete by virtue of the Lanham Act's 1988 amendments.[99] However, section 43(a) of the Lanham Act is designed to have a symbiotic relationship with state law causes of action, supplementing the DTPAs as opposed to preempting them.[100] In light of this fact, the NCCUSL's argument for obsolescence seems to be moot. But the NCCUSL's obsolescence argument does give rise to the assertion that this relationship ought to be evaluated such that DTPA claims are afforded the same level of scrutiny in favor of corporate competitors as Lanham Act claims.

III. The Interaction Between Section 43(a) Lanham Act Claims and State Deceptive Trade Practice Act Claims

Because the DTPAs were crafted from the FTCA, they share a special relationship with section 43(a) of the Lanham Act—they are supposed to work together as opposed to separately.[101] The original purpose of both the Lanham Act and the DTPAs was the protection of business against undue competition and interference.[102] It is often the case in false-advertising claims between corporate

2004); Wyo. Stat. Ann. §§ 40-12-101 to -114 (2009); *see also* Scheuerman, *supra* note 77, at 18-19. R

98. Peter S. Menell, *Regulating "Spyware": The Limitations of State "Laboratories" and the Case for Federal Preemption of State Unfair Competition Laws*, 20 Berkeley Tech. L.J. 1363, 1392 (2005). The NCCUSL, which houses its archives at the University of Pennsylvania's Biddle Law Library, no longer maintains viable records regarding the UDTPA. *See* Penn Law—Biddle Law Library Archives: NCCUSL Drafts and Final Acts, http://www.law.upenn.edu/bll/archives/ulc/ulc.htm (last visited May 10, 2010) (detailing more than four dozen model acts but specifically excluding the UDTPA).

99. *See generally* Trademark Law Revision Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935.

100. Lemley, *supra* note 26, at 312-13. R

101. *Id.* at 327.

102. *See* 15 U.S.C. § 1127 (2006) ("The intent of this chapter is . . . to protect persons engaged in [ ] commerce against unfair competition."); Unif. Deceptive Trade Practices Act prefatory note (amended 1966, withdrawn 2000), 7A U.L.A. 265 (1985), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf (stating that the UDTPA was created in the hopes of stopping "[d]eceptive conduct constituting unreasonable interference with another's promotion and conduct of business").

competitors that one corporate entity has infringed upon the other's trademark.[103] In these cases, there may only be a federal remedy, in part because competitors are granted standing under the Lanham Act but not under all of the DTPAs. There can be no state remedy where the corporate competitor lacks standing in the state forum, and the absence of a state remedy can lead to irreparable harm to the corporation's reputation in the local marketplace.[104]

With the onset of the "heyday of consumerism," state legislators were eager to provide their constituents with a means of protecting themselves against unfair and deceptive trade practices.[105] Several policy considerations underlay the adoption of the DTPAs. First and foremost, there existed and still remains a great difference in bargaining power in the marketplace between consumers and merchants.[106] With the advancing corporate markets of the 1970s and 1980s, the doctrine of caveat emptor could no longer be applied because transactions were no longer made at arm's length.[107] This concept continues to prevail, especially in today's age of technology.

An equally important consideration in the adoption of the DTPAs was deterrence of future harm against the consuming pub-

103. *See* Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 20 (1992) ("Trademark infringers inflict injury not only on their competitors, . . . but they also inflict pervasive injuries on consumers.").

104. Attorney Garrett J. Waltzer gave voice to these concerns in a Comment written for the *UCLA Law Review*, stating,

> Because consumers are mostly incapable of distinguishing between the infringed product and the infringing product, any customer dissatisfaction resulting from inferior products bearing a false trademark detrimentally affects the reputation of the target of the infringement. Thus, [competitors who are] victims of trademark infringement [through false advertising] suffer additional injury to their reputations.

Garrett J. Waltzer, Comment, *Monetary Relief for False Advertising Claims Arising Under Section 43(a) of the Lanham Act*, 34 UCLA L. REV. 953, 971 (1987) (footnote omitted).

105. J.R. Franke & D.A. Ballam, *New Applications of Consumer Protection Law: Judicial Activism or Legislative Directive?*, 32 SANTA CLARA L. REV. 347, 347 (1992); *see also* Michael Flynn & Karen Slater, *All We Are Saying Is Give Business a Chance: The Application of State UDAP Statutes to Business-to-Business Transactions*, 57 CONSUMER FIN. L.Q. REP. 60, 60-61 (2003).

106. Note, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621, 1625-26 (1983).

107. *See* Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931) (discussing the origins and past development of the doctrine of caveat emptor); *see also* Olha N.M. Rybakoff, *An Overview of Consumer Protection and Fair Trade Regulation in Delaware*, 8 DEL. L. REV. 63, 64-66 (2005) (discussing the modern evolution of the doctrine of caveat emptor).

lic.[108] With a private right of action available, merchants seeking to defraud their customers would be on guard for fear that their less-than-pristine actions might result in a lawsuit.[109] In effect, consumers would gain not only the power of self-vindication but also the charge of becoming watchdogs in the marketplace.[110]

The DTPAs are composed of language lifted directly from either the FTCA or the provisions of the UDTPA, UTP/CPL, and the UCSPA,[111] thus earning the nickname "Little FTC Acts."[112] Unlike their federal counterpart, the DTPAs offer damages to their consumer-plaintiffs in various forms, including, but not limited to, treble damages,[113] other punitive damages, statutory minimum damages, and attorneys' fees.[114] Although due consideration has been given to the potential bonuses that may be afforded to plaintiffs bringing suit under the DTPAs, an evaluation of the DTPAs would not be complete without acknowledging what these statutes are missing.

A. *What Is a "Deceptive Trade Practice"?*

The DTPAs and the FTCA share a common feature: they both lack a concrete definition of "deceptive trade practices."[115] However, this ambiguity may well have been deliberate—it has been suggested that legislators feared that the inclusion of more specific language might fail to protect consumers against future, unforeseeable deceptive practices;[116] foreclose future avenues of litigation;

108. Note, *supra* note 106, at 1626. **R**

109. The House of Representatives noted that "[i]f deterrence is to be effective, the enforcement initiative must come from the private sector." H.R. REP. NO. 96-1008, pt. 1, at 5 (1980).

110. Note, *supra* note 106, at 1626. **R**

111. Karns, *supra* note 19, at 375-76. **R**

112. The term "Little FTC Acts" refers to consumer-protection statutes whose provisions are based upon the FTCA. Note, *supra* note 106, at 1622 n.5. **R**

113. *See supra* note 67 and accompanying text. **R**

114. *See, e.g.*, CONN. GEN. STAT. ANN. § 42-110g(a) (West 2007) (allowing for award of punitive damages); N.J. STAT. ANN. § 56:8-19 (West 2001) (instituting treble damages); N.Y. GEN. BUS. LAW § 349 (McKinney 2004) (instituting statutory minimum damages); *see also* Steven J. Cole, *State Enforcement Efforts Directed Against Unfair or Deceptive Practices*, 56 ANTITRUST L.J. 125, 130 (1987) ("All of those states that have private rights of action now have provisions for attorneys' fees.").

115. *See* Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 658 (1985) (acknowledging that a consensus has yet to have been reached as to the definition of a "deceptive trade practice"); *see also* Lemley, *supra* note 26, at 319-20. **R**

116. Lee Ann Bundren, *State Consumer Fraud Legislation Applied to the Health Care Industry*, 16 J. LEGAL MED. 133, 138 (1995).

and defeat the statute's original purpose[117]: to prohibit conduct that would likely cause confusion in the marketplace.[118]

Akin to section 43(a) Lanham Act actions, DTPAs also have mandatory standing requirements. The vast majority of states with DTPAs define potential plaintiffs as either "a person" or "a consumer."[119] Section 43(a)'s standing requirements and the DTPAs' standing requirements are on the opposite sides of the same coin. While section 43(a)'s "any person"[120] provision has been restricted to allow only corporate competitors to bring suit,[121] the DTPAs' "any person"[122] provision has been taken to exclude or restrict availability of remedy to corporate competitors in most cases.[123] To determine if a corporate competitor may bring suit under a DTPA, one must look not only to the statutory definitions involved but also to the particular injury alleged.[124] To perform this inquiry, Parts

117. HEALTH LAW DIV., AM. BAR ASS'N, E-HEALTH BUSINESS AND TRANSACTIONAL LAW 106 (Barbara Bennett ed., 2002). At the time the DTPAs were first written, the drafters could not foresee the advent of the technology age and the inception of the Internet. *Id.* These innovations are unique to our time, and no one could have anticipated their creation, much less the unparalleled illegalities they would have the potential to harbor.

118. UNIF. DECEPTIVE TRADE PRACTICES ACT § 2(a)(12) (amended 1966, withdrawn 2000), 7A U.L.A. 280 (1985), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf; *see also* Dole, *supra* note 11, at 486. Many courts in the northeastern United States have all but ruled out the validity of the *prime* cause of such effects—trademark infringement. *See* Karam Prasad, LLC v. Cache, Inc., No. 07 Civ. 5785 (PAC), 2007 WL 2438396, at *2 (S.D.N.Y. Aug. 27, 2007) ("'[T]rademark cases are outside the scope of [New York's] consumer protection statute.'" (quoting Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC, 221 F. Supp. 2d 410, 413 n.2 (S.D.N.Y. 2002))). This premise will be discussed further in Part IV of this Note. *See infra* notes 196-203 and accompanying text. R

119. For example, the DTPAs of Massachusetts, New Jersey, and New York each describe injured parties as "any person." MASS. GEN. LAWS ch. 93A, § 11 (2008); N.J. STAT. ANN. §§ 56:8-19; N.Y. GEN. BUS. LAW § 349(h); *see* Flynn & Slater, *supra* note 105, at 63. R

120. *See* De Sevo, *supra* note 48, at 2-3, 8. These questions of ability to bring suit R boil down to the federal courts' adherence to prudential standing limitations, which are "judicially self-imposed limits on the exercise of federal jurisdiction." Apgar, *supra* note 48, at 2394 (citation and internal quotation marks omitted). R

121. Serbin v. Ziebart Int'l Corp., 11 F.3d 1163, 1175 (3d Cir. 1993); Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686, 693 (2d Cir. 1971).

122. Flynn & Slater, *supra* note 105, at 63. R

123. Edward X. Clinton, Jr., *Do Businesses Have Standing to Sue Under State Consumer Fraud Statutes?*, 20 S. ILL. U. L.J. 385, 386-87 (1996).

124. *Id.* at 386. Although this Note focuses upon the states within the First, Second, and Third Federal Circuits (Connecticut, Delaware, Massachusetts, Maine, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, and Vermont), in the interest of brevity, only one state from each circuit will be discussed at length.

III.A.1-3 of this Note will explore the DTPAs of one state from each of the First, Second, and Third Circuits—specifically, Massachusetts, New York, and New Jersey.

1. Massachusetts

The Massachusetts DTPA, chapter 93A of the Massachusetts General Laws,[125] was amended in 1972 to address "unfair or deceptive act[s] or practice[s]" between corporate competitors.[126] To mount a successful suit against a competitor, a corporate plaintiff must prove that the corporate defendant acted with "rascality."[127] The rascality test is a difficult threshold to meet and oftentimes requires the corporate defendant to act as "a 'jackal,' guilty of 'manifest . . . rascality.' "[128] In addition to the strict rascality requirement, to bring suit under the Massachusetts DTPA, corporate competitors must prove that the alleged unfair or deceptive act is not a common business practice.[129] In light of these requirements, corporate plaintiffs under the Massachusetts act must claim that the defendant's behavior had a "rancid flavor of unfairness" to invoke 93A protection.[130]

Massachusetts's DTPA limits a corporate plaintiff's ability to bring a trademark suit against a competitor. In *McKernan v. Burek*, the plaintiff and the defendant were corporate competitors in the business of manufacturing novelty stickers.[131] The plaintiff claimed that the defendant copied his sticker and then attempted to sell it as if it were the defendant's own.[132] The district court found that the plaintiff's trademark infringement claims ultimately failed because the trademark in question was not inherently distinctive.[133] Furthermore, the court noted that had those claims been actionable under law, it is likely that judgment would still have been rendered for the defendant because the plaintiff would have been required to

125. MASS. GEN. LAWS ch. 93A, § 2 (2008).
126. *Id.* § 11.
127. Levings v. Forbes & Wallace, Inc., 396 N.E.2d 149, 153 (1st Cir. 1979) ("The objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce."). Rascality is defined as of or relating to a rascal, that is, "a mean, unprincipled, or dishonest person." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1031 (11th ed. 2005).
128. Atl. Cement Co. v. S. Shore Bank, 730 F.2d 831, 834 (1st Cir. 1984) (omission in original).
129. Spence v. Boston Edison Co., 459 N.E.2d 80, 88 (Mass. 1983).
130. Atkinson v. Rosenthal, 598 N.E.2d 666, 670 (Mass. App. Ct. 1992).
131. McKernan v. Burek, 118 F. Supp. 2d 119, 121 (D. Mass. 2000).
132. *Id.*
133. *Id.* at 124.

prove the appropriate level of "rascality" as well as an actual loss.[134]

2. New York

In contrast, to have standing under the New York DTPA, a corporation need only demonstrate that its competitor's action has had some effect on the public at large.[135] The New York DTPA, New York General Business Law section 349, declares unlawful "deceptive acts or practices in the conduct of any business, trade or commerce . . . in the furnishing of any service in [the] state"[136] and allows "any person who has been injured by reason of [such] violation" to bring suit.[137] An act is deceptive within the meaning of the New York DTPA only if it is "likely to mislead a reasonable consumer."[138] In providing that actions may be brought by "any person"[139] so injured, it appears that the legislators responsible for drafting the Act did not contemplate a proviso that limits potential plaintiffs solely to "consumers."[140] To bring forth a successful claim, a plaintiff must allege that the defendant's consumer-oriented acts were misleading in a material way such that the plaintiff was injured as a result.[141] In applying the New York DTPA to suits between corporate competitors, the courts have read in a "public interest requirement."[142] Specifically, "some harm to the public at large [must be] at issue."[143] Where the underpinning of

134. *Id.* at 125-26.

135. Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 264 (2d Cir. 1995); Gucci Am., Inc. v. Duty Free Apparel, Ltd., 277 F. Supp. 2d 269, 273 (S.D.N.Y. 2003). In examining claims made between corporate competitors, the courts have stated on multiple occasions that "the gravamen of the complaint must be consumer injury or harm to the public interest." Karam Prasad, LLC v. Cache, Inc., No. 07 Civ. 5785 (PAC), 2007 WL 2438396, at *2 (S.D.N.Y. Aug. 27, 2007) (quoting *Gucci Am., Inc.*, 277 F. Supp. 2d at 273) (internal quotation marks omitted).

136. N.Y. GEN. BUS. LAW § 349(a) (McKinney 2004).

137. *Id.* § 349(h).

138. Boule v. Hutton, 328 F.3d 84, 94 (2d Cir. 2003) (quoting Maurizo v. Goldsmith, 230 F.3d 518, 521 (2d Cir. 2000)).

139. N.Y. GEN. BUS. LAW § 349(h).

140. Joseph Thomas Moldovan, *New York Creates a Private Right of Action to Combat Consumer Fraud: Caveat Venditor*, 48 BROOK. L. REV. 509, 525-26 (1982). "Businessmen . . . are victimized by deceptive and fraudulent business practices and suffer from the unethical conduct of their competitors. Inasmuch as one of the main purposes of the Act is to deter the commission of such practices, . . . it is imperative that those with the greatest financial means available . . . bring suit." *Id.* at 527 n.67.

141. *Maurizio*, 230 F.3d at 521; Gucci Am., Inc. v. Duty Free Apparel, Ltd., 277 F. Supp. 2d 269, 273 (S.D.N.Y. 2003).

142. Moldovan, *supra* note 140, at 529. **R**

143. *See supra* note 135 and accompanying text. **R**

the complaint demonstrates only harm to another business, courts have routinely rejected corporate competitors' claims made under section 349.[144]

Karam Prasad, LLC v. Cache, Inc.[145] is the leading case in New York regarding corporate competitor claims made under the DTPA. *Karam Prasad* arose out of an action for trademark infringement after it was discovered that the defendant's retail chain had appropriated a crystalline logo from the plaintiff's high-end brand of designer jeans.[146] In addition to its federal trademark claim, the plaintiff claimed that the infringement constituted a violation of New York's DTPA.[147] The plaintiff's DTPA claim never made it to trial because the defendant filed a motion to dismiss as to that particular cause of action, the motion stating that the plaintiff had not "sufficiently alleged a harm to the public interest."[148] The district court agreed and dismissed the plaintiff's cause of action under the DTPA.[149] The court noted that "trademark infringement actions alleging only general consumer confusion do not threaten the direct harm to consumers that is required to state a claim under Section 349."[150] Interestingly, however, the *Karam Prasad* case created a split within the Federal District Court for the Southern District of New York.[151]

Five years earlier, in *GTFM, Inc. v. Solid Clothing, Inc.*, the district court found that the defendant had engaged in a deceptive act through its intentional use of the plaintiff's mark.[152] Here, the plaintiff was the master licensee for the successful "FUBU" fashion brand.[153] The plaintiff had launched a lucrative men's campaign using the number "05."[154] The defendant began to sell similarly de-

144. *See, e.g.*, Sports Traveler, Inc. v. Advance Magazine Publishers, Inc., No. 96 Civ. 5150, 1997 WL 137443, at *3 (S.D.N.Y. Mar. 24, 1997); Winner Int'l v. Kryptonite Corp., No. 95 Civ. 247, 1996 WL 84476, at *3 (S.D.N.Y. Feb. 27, 1996); Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., No. 91 Civ. 4544, 1992 WL 170559, at *4 (S.D.N.Y. July 2, 1992). The majority of these cases address the issue of trademark infringement in concert with false advertising of the plaintiff corporation's products.

145. Karam Prasad, LLC v. Cache, Inc., No. 07 Civ. 5785 (PAC), 2007 WL 2438396 (S.D.N.Y. Aug. 27, 2007).

146. *Id.* at *1.

147. *Id.*

148. *Id.* at *2.

149. *Id.*

150. *Id.* (quoting Sports Traveler, Inc. v. Advance Magazine Publishers, Inc., No. 96 Civ. 5150, 1997 WL 127443, at *3 (S.D.N.Y. Mar. 24, 1997)).

151. *Id.*

152. GTFM, Inc. v. Solid Clothing, Inc., 215 F. Supp. 2d 273, 302 (S.D.N.Y. 2002).

153. *Id.* at 279.

154. *Id.*

signed men's clothing using plaintiff's "05" mark.[155] The district court ruled in favor of the plaintiff and concluded that because the defendant had caused actual consumer confusion through its appropriation of the plaintiff's mark, it had engaged in a deceptive trade practice.[156] While this case was litigated only five years earlier, *GTFM* is at complete odds with *Karam Prasad*.

3. New Jersey

Although New Jersey is in New York's backyard, its laws concerning deceptive trade practices are completely different. Under the New Jersey DTPA, "[a]ny person who suffers any ascertainable loss of moneys or property, real or personal,"[157] has standing if that person has suffered the loss through "any unconscionable commercial practice,[158] deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise [or services]."[159] The New Jersey DTPA is designed "to protect consumers who purchase 'goods or services generally sold to the public at large.'"[160] Accordingly, to bring suit under the New Jersey DTPA, a corporate plaintiff must prove that it was acting as a consumer purchasing "'goods . . . sold to the public at large'" in the transaction in question.[161] "[T]he mere fact that a corporation purchases the goods for use in

155. *Id.* at 284.

156. *Id.* at 302.

157. N.J. STAT. ANN. § 56:8-19 (West 2001) (stating that "any person who suffers any ascertainable loss . . . may bring an action or assert a counterclaim"); *see* Cox v. Sears Roebuck & Co., 647 A.2d 454, 463-64 (1994) (noting that plaintiffs are entitled to treble damages only if they can prove an ascertainable loss).

158. In *Kugler v. Romain*, the New Jersey Supreme Court defined the phrase "unconscionable commercial practices" as "an amorphous concept obviously designed to establish a broad business ethic . . . [implying a lack of] good faith, honesty in fact and observance of fair dealing." Kugler v. Romain, 279 A.2d 640, 651-52 (N.J. 1971).

159. N.J. STAT. ANN. § 56:8-2. For an in-depth discussion of the evolution of the New Jersey DTPA, see Lisa J. Trembly & Michael F. Bevacqua, *Back to the Future with the Consumer Fraud Act: New Jersey Sets the Standard for Consumer Protection*, 29 SETON HALL LEGIS. J. 193 (2004).

160. Arc Networks, Inc. v. Gold Phone Card Co., 756 A.2d 636, 637-38 (N.J. Super. Ct. Law Div. 2000) (quoting Marascio v. Campanella, 689 A.2d 852, 857 (N.J. Super. Ct. App. Div. 1997)). The New Jersey DTPA has been construed to afford protection to both corporate and commercial entities that "purchase goods and services for use in their business operations." *Id.* at 638.

161. *Id.* at 637-38 (quoting *Marascio*, 689 A.2d at 857).

its business does not preclude invocation of the [New Jersey DTPA] and its regulations."[162]

While some state laws give varying measures of relief for such conduct, general reliance on state protection has led to inconsistency and unpredictability as well as to important gaps in protection.[163] As has been shown, in Massachusetts, New York, and New Jersey—neighboring states in the First, Second, and Third Circuits, respectively—what is required of a corporate plaintiff to bring suit differs tremendously among the three. Inconsistencies in the law would be abundant if a corporate plaintiff were to litigate a DTPA claim among these three states. It is alarming to think about the financial hardship that a corporate entity would incur if it had to litigate DTPA claims in all eleven states that compose the First, Second, and Third Circuits, let alone the rest of the states across the country. To remedy this unique problem and avoid legal chaos, something must be done.

IV. Protecting Corporate Competitors: The Argument for Transforming the Deceptive Trade Practices Acts to Accommodate Business-to-Business Transactions

The special relationship between the Lanham Act and the FTCA,[164] both originally created in order to protect business competitors,[165] yielded the inception of the DTPAs.[166] Surprisingly, most of the DTPAs do not afford the same consideration to corporate entities as was originally intended by the model acts.[167] Often, corporate competitors are denied the right to bring suit under the DTPAs in the Northeast,[168] especially in trademark infringement

162. *Marascio*, 689 A.2d at 857. For the purposes of the New Jersey DTPA, merchandise, or, in other words, goods sold to the public at large, is defined as "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." N.J. Stat. Ann. § 56:8-1(c).

163. Flynn & Slater, *supra* note 105, at 65. **R**

164. Both the Lanham Act and the FTCA address deceptiveness via means of false advertising and other unfair trade practices, seeking to prohibit "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (2006); *see also* Wrona, *supra* note 4, at 1091-92. **R**

165. *See* Scheuerman, *supra* note 77, at 11. **R**

166. *See supra* notes 71-73 and accompanying text. **R**

167. *See, e.g.*, Me. Rev. Stat. Ann. tit. 10, § 1212 (2009); 73 Pa. Cons. Stat. Ann. § 201-3 (West 2008); R.I. Gen. Laws 1956, §§ 6-13.1-2, 6-13.1-5 (2001); Vt. Stat. Ann. tit. 9, § 2453 (2006).

168. *See* statutes cited *supra* note 167. **R**

actions.[169] If corporate competitors are allowed to file suit under the DTPAs at all, it is often with rigid restrictions.[170] In fact, in most states in the Northeast, trademark infringement actions arising out of false advertising between corporate competitors are all but precluded from litigation under state law.[171]

The DTPAs ought to provide corporate competitors the same sort of protection and uniformity that federal legislation such as the Lanham Act affords.[172] The lack of uniformity present within the DTPAs has led not only to a dearth of successful litigation on the part of corporate plaintiffs but also to an intracircuit split, predominantly in cases involving trademarks.[173] To remedy these issues, it is necessary for state legislative bodies to reconsider the current DTPAs in favor of a new system. Ideally, a new system would enable corporate competitors to stand in the much-favored shoes of the consumer plaintiff and to succeed on their claims, even across state lines.[174]

169. *See, e.g.*, Winner Int'l v. Kryptonite Corp., No. 95 Civ. 247, 1996 WL 84476, at *2-3 (S.D.N.Y. Feb. 27, 1996); EFS Mktg., Inc. v. Russ Berrie & Co., 836 F. Supp. 128, 136-37 (S.D.N.Y. 1993); Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 786 F. Supp. 182, 216 (E.D.N.Y. 1992); MasterCard Int'l, Inc. v. Arbel Corp., No. 86 Civ. 6801, 1989 WL 125781, at *10 (S.D.N.Y. Oct. 18, 1989).

170. CONN. GEN. STAT. ANN. § 42-110b (West 2007); MASS. GEN. LAWS ch. 93A, §§ 2, 11 (2008); N.H. REV. STAT. ANN. § 358-A:2 (2009); N.J. STAT. ANN. §§ 56:8-19 (West 2001); N.Y. GEN. BUS. LAW § 349 (McKinney 2004).

171. It is the author's opinion that the judicial interpretation of this issue paints a poor picture of corporations. The motivation behind each and every corporate entity's suit is not necessarily driven by financial reasons—conversely, consumer opinion plays a very strong role in the equation. Robert C. Bird, Assistant Professor of Marketing and Law at the University of Connecticut, School of Business, notes that "[c]onsumer perceptions of market information are critically important . . . . For example, when a brand owner sues a rival to stop trademark infringement, harm to the brand owner is not the main focus . . . . [I]t is proof that . . . consumers will be likely to confused [sic] between the established and the challenged mark . . . ." Robert C. Bird, The Impact of Legal Standing Rules on Deceptive and Legitimate Advertising Activity 19 (Apr. 1, 2008) (unpublished working paper, on file with the University of Connecticut–Department of Marketing), *available at* http://ssrn.com/abstract=1123676.

172. Glen E. Weston, Trademarks and Unfair Competition *by J. Thomas McCarthy*, 54 GEO. WASH. L. REV. 143, 150-51 (1985) (book review) ("The little FTC Acts . . . may be sleeping giants with the potential to become major remedies against almost any type of unfair competition involving consumer transactions.").

173. Flynn & Slater, *supra* note 105, at 65; Karam Prasad, LLC v. Cache, Inc., No. 07 Civ. 5785 (PAC), 2007 WL 2438396, at *2 (S.D.N.Y. Aug. 27, 2007) ("[T]here is a split in this Circuit regarding infringement claims under [New York's DTPA]."). R

174. Flynn & Slater, *supra* note 105, at 67 ("Effective consumer protection in the Twenty-First Century will mean that consumers and businesses increasingly will need to be treated alike."). R

Part IV of this Note will examine the origins and various judicial interpretations of the DTPAs of Massachusetts, New Jersey, and New York, in terms of their rocky relationships with—and oft-adverse attitudes towards—corporate competitors. In particular, special attention will be paid to the judicial conflict involving New York's DTPA due to the intracircuit split that has arisen as a result of differing interpretations of the statute. Because of the discord among the courts on the issue of whether corporate competitors may bring trademark infringement actions under the DTPAs, it has become obvious that some sort of solution to this problem must be reached. Part IV will introduce a workable revision of the UDTPA that, if adopted, would bring much-needed equality to the northeastern United States with regard to the status of corporate competitors' ability to bring trademark actions under DTPAs.

A. *Looking to the Past to Gain Understanding for the Future: Interpretation of the DTPAs*

To understand the DTPAs and their resistance to offering corporate competitors the same protections as they would the ordinary consumer, one must consider their statutory language, their legislative history, and the case law that further interprets them. The Supreme Court has stated that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."[175] Accordingly, an analysis of the DTPAs' applicability to corporate competitors must begin with the language of the statutes themselves.

1. The Plain Language of Each Statute Does Not Exclude Corporate Competitors

The DTPAs of Massachusetts, New Jersey, and New York each provide in their plain language that "any person" that has been damaged by a deceptive trade practice may bring suit for their injuries.[176] For the purposes of the Massachusetts DTPA, the term

175. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

176. MASS. GEN. LAWS ch. 93A, § 11 (2008) (stating that "[a]ny person who engages in the conduct of any trade or commerce and who suffers any loss . . . as a result of . . . an unfair or deceptive act or practice . . . may . . . bring an action . . . for damages"); N.J. STAT. ANN. § 56:8-19 (West 2001) (stating that "[a]ny person who suffers any ascertainable loss . . . as a result of the use . . . of any . . . practice declared unlawful under this act . . . may bring an action . . . in any court of competent jurisdic-

"person" includes "natural persons, *corporations*, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity."[177] The New Jersey DTPA's definition of "person" is similar and includes "any natural person or his legal representative, partnership, *corporation*, *company*, trust, *business entity* or association."[178] Thus, the plain language of both the Massachusetts and New Jersey DTPAs requires only that the plaintiff be a person who has suffered an injury due to the deceptive trade practice of the defendant.[179] Nothing in the language of the statutes requires the plaintiff to be a consumer or that a consumer be injured by a deceptive trade practice to bring suit.

Although New York's DTPA does not provide a definition for the term "person," guidance is provided by New York's Rules of Construction, which state that "statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction."[180] In terms of New York's DTPA, courts have observed that the definition of the word "person," in its most obvious sense, deals with more than just natural persons,[181] since the DTPA deals with "the conduct of any business, trade or commerce."[182] Accordingly, the term "person" under New York's statute may be considered to mean natural persons or business entities entitled to the same rights as natural persons.[183] Thus, like the DTPAs of Massachusetts and New Jersey, New York's statute requires nothing more from a plaintiff than a showing that the injury claimed has been caused by a deceptive trade practice.

tion"); N.Y. GEN. BUS. LAW § 349(h) (McKinney 2004) (stating that "any person who has been injured by reason of any violation of this section may bring an action . . . to enjoin such unlawful act or practice [or] an action to recover his actual damages").

177. MASS. GEN. LAWS ch. 93A, § 1 (emphasis added).

178. N.J. STAT. ANN. § 56:8-1(d) (emphasis added).

179. MASS. GEN. LAWS ch. 93A, § 11; N.J. STAT. ANN. § 56:8-19.

180. N.Y. STAT. § 94 (1971).

181. "[A]s a threshold matter, plaintiffs [may] claim[ ] the benefit of section 349—whether individuals or *entities* . . . ." Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 647 N.E.2d 741, 744 (N.Y. 1995) (emphasis added).

182. N.Y. GEN. BUS. LAW § 349(a).

183. *Black's Law Dictionary* defines "person" as a "human being . . . . [or] *natural person*" and "[a]n entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being." BLACK'S LAW DICTIONARY 1257 (9th ed. 2009).

2. The Legislative Histories of the Statutes Supports the Inclusion of Corporate Competitors Within the Scope of Their Protection

Although the statutory language of the DTPAs appears to be plain in terms of the right of corporate competitors to bring suit, the statutes have been subject to a host of interpretations regarding whether corporate competitors ought to be afforded the right to bring trademark infringement actions. To reconcile these issues, it then becomes necessary to look to the intent of the state legislatures in order to determine the correct interpretation.[184] Legislative intent can be culled from the legislature's history leading up to the enactment of the statute at issue.[185] If legislative intent warranting the ability of corporate competitors to bring suit under the DTPAs is found, case law interpreting that intent may dictate whether those competitors may bring trademark actions.

To discuss the legislative intent of the DTPAs of Massachusetts, New Jersey, or New York, one must look to the legislative history of the FTCA. All three statutes are based, in part, upon this federal act, and all three claim in construing their statements on deceptive trade practices that it was the intent of their individual state legislatures to follow the guidance provided by, and interpretations of, section 5(a)(1) of the FTCA.[186]

The original legislative mandate of the FTCA was to "inhibit restraints against trade and protect business from the unfair trade practices of their competitors."[187] In 1938, however, Congress passed the Wheeler-Lea Amendment to the 1914 version of the

184. "Consideration of the 'specific history of the legislative process that culminated in the [statute at issue] affords . . . solid ground for giving it appropriate meaning' and for resolving ambiguity present" in interpretation. YULE KIM, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 42 (2008) (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 222 (1952)), *available at* http://fas.org/sgp/crs/misc/97-589.pdf.

185. Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 10 (2003).

186. Section 45(a)(1) of the FTCA states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." *Id.* § 45(a)(1). For example, the rules and regulations section of the Massachusetts DTPA states, in relevant part, that "[i]t is the intent of the legislature that in construing . . . [the Act], the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act." MASS. GEN. LAWS ch. 93A, § 2 (2008).

187. JEF I. RICHARDS, DECEPTIVE ADVERTISING: BEHAVIORAL STUDY OF A LEGAL CONCEPT 9 (1990).

FTCA,[188] which allowed the FTC to extend its reach to the protection of not only businesses but consumers as well.[189] The purpose of the FTCA, then, is to "preserve, for the benefit of the public, active competition" in the marketplace.[190] In order to maintain the sort of "active competition" in the marketplace that is desired by the FTCA, trademarks and other varieties of intellectual property must be protected.[191]

The fact that the DTPAs of Massachusetts, New Jersey, and New York all purport to stand in the shadow of the FTCA in terms of interpretation of deceptive acts bodes well for corporate competitors seeking to bring suit under the DTPAs,[192] largely because the DTPAs are applied to "matters affecting the consumer public at large."[193] The maintenance of active competition in the marketplace certainly affects the consumer public at large.[194] And, without corporate competitors, there would be no marketplace at all. To achieve this goal, the DTPAs must be read broadly to remain consistent with their drafters' wishes.[195] Such a reading will afford protection to corporate competitors.

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188. Wheeler-Lea Act, ch. 49, § 3, 52 Stat. 111, 111-14 (1938) (amending 15 U.S.C. § 45 (1934)).

189. "[T]he Commission could thenceforth prevent unfair or deceptive acts or practices in commerce which injuriously affected the public interest alone . . . ." Scientific Mfg. Co. v. FTC, 124 F.2d 640, 643-44 (3d Cir. 1941).

190. FTC v. Paramount Famous-Lasky Corp., 57 F.2d 152, 157 (2d Cir. 1932).

191. Gen. Elec. Co. v. Home Utils. Co., 131 F. Supp. 838, 839 (D. Md. 1955).

192. MASS. GEN. LAWS ch. 93A, § 2(b) (2008) ("It is the intent of the legislature that . . . the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act."); N.Y. GEN. BUS. LAW § 349(d) (McKinney 2004) ("In any such action it shall be a complete defense that the act or practice is . . . subject to and complies with the rules and regulations of, and the statutes administered by, the federal trade commission."); *see also* State *ex rel.* Lefkowitz v. Colo. State Christian Coll. of Church of Inner Power, Inc., 346 N.Y.S.2d 482, 487 (Sup. Ct. 1973).

193. Kirk v. Heppt, 532 F. Supp. 2d 586, 591 (S.D.N.Y. 2008).

194. Lily Transp. Corp. v. Royal Inst. Servs., Inc., 832 N.E.2d 666, 673 (Mass. App. Ct. 2005) ("The Legislature originally enacted c. 93A to improve the commercial relationship between consumers and businessmen. By requiring proper disclosure of relevant information and proscribing unfair or deceptive acts or practices, the Legislature strove to encourage more equitable behavior in the marketplace.").

195. St. Paul Fire & Marine Ins. Co. v. Ellis & Ellis, 262 F.3d 53, 66 (1st Cir. 2001) ("[C]h. 93A provides a broad remedy."); REPORT OF THE COMMITTEE ON NEW YORK STATE ANTITRUST LAW OF THE ANTITRUST LAW SECTION OF THE NEW YORK STATE BAR ASSOCIATION, A PROPOSED NEW STATE LAW MAKING DECEPTIVE ACTS OR PRACTICES UNLAWFUL (1968), *reprinted in* 1968 N.Y. ST. B.A. ANTITRUST L. SYMP. 114, 129 (1968).

3. Legal Chaos: Examination of Case Law in the Northeast to Determine Competitors' Rights in Trademark Infringement Actions

As both the plain meaning and legislative intent of the DTPAs indicate that corporate competitors have a right to protection, it is necessary to evaluate the attendant case law on the topic to determine whether, if at all, corporate competitors ought to be afforded the right to bring trademark infringement actions under these statutes. Case law from Massachusetts, New Jersey, and New York indicates that although there does seem to be a way for corporate competitors to make trademark infringement claims under the DTPAs, there is a great discrepancy between the various statutes. As it stands, each state requires a plaintiff to prove different elements of a deceptive-trade-practice claim.[196]

As opposed to working together harmoniously, the DTPAs of Massachusetts, New Jersey, and New York exist in antinomy. It is almost impossible to compare the statutes due to the many different judicial interpretations. For example, the successful trademark infringement plaintiff under New York's *GTFM* standard,[197] who is able to prove that the corporate defendant's consumer-oriented actions were so materially misleading that the plaintiff was damaged as a result,[198] would fail under the same basis in Massachusetts for want of the requisite level of "rascality."[199] Similarly, while a successful corporate plaintiff in New Jersey may be able to win its trademark case by proving it was acting as a consumer in the transaction in question and that it suffered an ascertainable loss,[200] that same action would most certainly fail in New York under the standard set in *Karam Prasad*[201] for a lack of harm to the public interest.[202]

The inequities present in the DTPAs of just three states in the northeastern United States produce questionable results when attempting to move across state lines. It is overwhelming to ponder

196. *See supra* notes 125-163 and accompanying text. R

197. GTFM, Inc. v. Solid Clothing, Inc., 215 F. Supp. 2d 273 (S.D.N.Y. 2002).

198. Gucci Am., Inc. v. Duty Free Apparel, Ltd., 277 F. Supp. 2d 269, 273 (S.D.N.Y. 2003).

199. Levings v. Forbes & Wallace, Inc., 396 N.E.2d 149, 153 (1st Cir. 1979).

200. N.J. STAT. ANN. § 56:8-19 (West 2001); Arc Networks, Inc. v. Gold Phone Card Co., 756 A.2d 636, 637-38 (N.J. Super. Ct. Law Div. 2000).

201. Karam Prasad, LLC v. Cache, Inc., No. 07 Civ. 5785 (PAC), 2007 WL 2438396, at *2 (S.D.N.Y. Aug. 27, 2007).

202. Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 264 (2d Cir. 1995); *Gucci Am., Inc.*, 277 F. Supp. 2d at 273.

what would occur if a large business were to find itself in the unfortunate position of having to bring an infringement action under a DTPA in all fifty states due to widespread appropriation of its mark.[203] To avoid that sort of a situation, the standing requirements of DTPA laws must change.

B. *Leveling the Playing Field—The Readoption of a True Uniform Deceptive Trade Practices Act*

With NCCUSL's withdrawal of the UDTPA, the American Bar Association's "goal of creating 'uniformity in the law of unfair competition among the respective states' through adoption of a uniform state law" has yet to be fulfilled.[204] There can be no uniformity in the law when an entire class of potential plaintiffs is excluded from the possibility of litigation that is solely dependent upon the state in which they reside.[205] There appears to be no rhyme or reason to the DTPAs' "restricting their coverage to individual consumers."[206] Consumers, however, are not the only ones affected by deceptive trade practices in the marketplace.[207] Both large corporations and small businesses encounter these legal issues, often due to trademark infringement arising out of false advertising by competing commercial venues. There is a need for consuming businesses and corporate competitors alike to have an avenue of recourse in such situations. Perhaps the NCCUSL found the UDTPA to be obsolete in 2000, when the economy was booming prior to President Clin-

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203. "[Uniform laws] are like the interstate highway system. The less different the rules of the road are from one state to the next, the easier it will be for people to travel." McDade, *supra* note 89, at 12. To continue with the interstate highway analogy, the current DTPAs act as roadblocks and checkpoints, making it incredibly difficult for the competitor-plaintiff to travel across state lines. **R**

204. Menell, *supra* note 98, at 1392 (quoting UNIF. DECEPTIVE TRADE PRACTICES ACT prefatory note (amended 1966, withdrawn 2000), 7A U.L.A. 266 (1985), available at http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf); *see also* Note, *supra* note 106, at 1640 ("[P]rotecting and promoting . . . businesses is an important American policy goal."). **R** **R**

205. Some might argue that the DTPAs' gross exclusion of business entities from protection *does* represent a form of uniformity. However, the DTPAs are so vastly different from state to state that such an argument would not be viable. Even in states where corporate plaintiffs are restricted from bringing suit under the DTPAs, the statutory language that ostracizes those commercial institutions is dissimilar.

206. Note, *supra* note 106, at 1626-27. **R**

207. An early FTC case exemplifies this concept, noting that "[l]aws are made to protect the trusting as well as the suspicious." FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116 (1937). Although business entities may be deemed experts in the field, purportedly transacting at arm's length, the author acknowledges that this is not always the case and believes that "suspicious" corporate competitors are just as worthy of the protection of the laws as their "trusting" consumer counterparts.

ton's exit from office,[208] but in today's economy, there is a greater need to protect our businesses from further financial losses.

Although it could be argued that large corporations have no place in the DTPA framework because of their status as established businesses,[209] this same bone of contention does not apply to the Northeast's small businesses. Not all victims of wrongdoing in business are consumers—it is all too often the case that small businesses are preyed upon by larger, more experienced companies. In addition, large corporations are apt to become overwhelmed with legal issues regarding the deceptive use of their famous trademarks by their similarly situated corporate competitors. Because of the lack of similarity in the DTPAs, it is nearly impossible for a corporation in the Northeast to protect itself from potentially devastating attacks of false advertising through trademark infringement and unfair trade practices.

As of 2003, approximately "[t]wenty-one million Americans [were] engaged in some kind of entrepreneurial activity."[210] However, owners and operators of small businesses are often "inexperienced entrepreneurs"[211] with little to no business knowledge—effectively putting their business entities in the same shoes as the "trusting" consumer in the marketplace.[212] Due to their lack of experience in the industry, small businesses may not have the ability to transact at arm's length with their vendors or their customers.[213] Furthermore, unlike large, perhaps famous, corporations, small businesses may not have the financial means necessary to litigate against a business competitor.[214] It is indeed true that "small businesses are 'revolutionizing the business of business,'"[215] because

208. Associated Press, *Booming Economy of Clinton Years May Cost Bush*, PRESS ATL. CITY, Dec. 25, 2000, at A9, *available at* 2000 WLNR 7516503 ("Whatever else is said about President Clinton's stewardship over the past eight years, one fact is indisputable: He presided over one of the most remarkable periods of prosperity in the nation's history.").

209. Note, *supra* note 106, at 1627. **R**

210. Flynn & Slater, *supra* note 105, at 61. **R**

211. Note, *supra* note 106, at 1629. **R**

212. *See supra* note 207 and accompanying text. **R**

213. Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 151-52 (2005) ("[G]iven the importance of small businesses to the American economy in general, the unavailability of remedial . . . doctrines to such entities may have real and significant negative impacts upon economic activity.").

214. Note, *supra* note 106, at 1629. **R**

215. Flynn & Slater, *supra* note 105, at 61 (quoting OFFICE OF ADVOCACY, U.S. SMALL BUS. ADMIN., SMALL BUSINESS EXPANSIONS IN ELECTRONIC COMMERCE 2 (2000), *available at* http://www.sba.gov/advo/stats/e_comm2.pdf). **R**

the laws must adapt to the emergence of these new "consumers" (or, rather, be carried out as they were intended).[216]

In an effort to provide a legal remedy to corporate competitors across state lines, the NCCUSL must reconvene to discuss a possible reenactment of the UDTPA[217] with the following reforms: (1) clear guidelines as to standing requirements for business plaintiffs; (2) revised terms for what a competitor-plaintiff must prove in order to succeed on its claim;[218] and (3) a final, concise definition of what constitutes a "deceptive trade practice."[219] To achieve this goal, the NCCUSL might look to several states within the Northeast with viable DTPAs in practice.

1. Standing Requirements of a Revised UDTPA

As discussed above, the UDTPA defines a "person" as "an individual, *corporation*, government, or governmental subdivision or agency, business trust, estate, trust, *partnership*, *unincorporated association*, two or more of any of the foregoing having a joint or

216. In order to accommodate these new "consumers," the law must recognize that "[s]mall businesses are an integral part of the country's social and economic fabric. Americans have long championed the essential role that so-called 'mom-and-pop' stores play in promoting our society's basic values and in our economy." Chad Moutray, *Looking Ahead: Opportunities and Challenges for Entrepreneurship and Small Business Owners*, 31 W. NEW. ENG. L. REV. 763, 779 (2009).

217. Better still, Congress could adopt an across-the-board federal rule on deceptive trade practices, as "the need for uniformity is great." UNIF. DECEPTIVE TRADE PRACTICES ACT prefatory note (amended 1966, withdrawn 2000), 7A U.L.A. 266 (1985), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf. In fact, a federal rule would serve the country greatly, since "[t]he sad fate of most uniform laws . . . [is that] fewer than half have been fully adopted by more than 20 jurisdictions." McDade, *supra* note 89, at 13. The problem with the DTPAs is that they R
have adopted the UDTPA in piecemeal form. Professor McDade's article even goes so far as to tout that "[u]niform laws aren't always uniform or law." *Id.* at 12. Federal legislation other than the FTCA concerning deceptive trade practices would be a cornerstone of this area of the law. However, this seems an unlikely course, since "Congress has not responded to the request for federal uniformity . . . ." UNIF. DECEPTIVE TRADE PRACTICES ACT prefatory note.

218. For example, in order to mount a successful suit against a competitor in the Commonwealth of Massachusetts, a corporate plaintiff must prove that the corporate defendant acted with "rascality." Levings v. Forbes & Wallace, Inc., 396 N.E.2d 149, 153 (Mass. App. Ct. 1979) ("The objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce."). The "rascality" standard would serve as an excellent addition to a revised UDTPA because it would lend some guidance as to the level of deception a defendant must rise to in order to be found in violation of the act.

219. The UDTPA, as it stood at the time of its withdrawal in 2000, did not provide a succinct definition for "deceptive trade practice." Instead, the UDTPA included twelve catch-all provisions detailing what kinds of activities might amount to a "deceptive trade practice." UNIF. DECEPTIVE TRADE PRACTICES ACT § 2.

common interest, or any other legal or *commercial entity*."[220] Moreover, the UDTPA incorporates within its provisions a section detailing which practices carried out "in the course of . . . business" would amount to a deceptive trade practice.[221] Included in this section is a subsection pertaining to business-disparagement claims, which states, in relevant part, that "a person engages in a deceptive trade practice when, in the course of . . . business, . . . he . . . disparages the goods, services, or business *of another* by false or misleading representation of fact."[222] The comment on this subsection acknowledges that the NCCUSL's decision to include section 2(a)(8) of the UDTPA reflected the courts' growing trend of considering business disparagement claims.[223] When read together, it certainly seems that the UDTPA intended to afford protection to corporate competitors. If, under the UDTPA, a "person" can be a corporation, and that corporation engages in a deceptive act when disparaging the business "of another,"[224] it follows that the NCCUSL's inclusion of the "of another" language was for the purpose of allowing corporate competitors to bring suit.

The majority of the states in the Northeast, however, have taken a diametric reading of the DTPAs currently enacted, to the point of excluding or limiting corporate competitors from bringing suit.[225] This conflict of opinions relates back to the debate concerning the standing requirements of section 43(a) of the Lanham Act.[226] There, in order to reach a consensus as to the standing requirements necessary to bring suit under the federal act, the courts have looked to Congress's intent in crafting the Act—that is, to "exclusively . . . protect the interests of a purely commercial class against unscrupulous commercial conduct."[227] Thus, it is evident that Congress did not intend to abrogate standing requirements from the Lanham Act, despite its broad "any person" language.[228] In the instance of clear congressional intent, it makes sense to limit

220. *Id.* § 1(5) (emphasis added).

221. *Id.* § 2(a).

222. *Id.* § 2(a)(8) (emphasis added).

223. *Id.* § 2(a)(8) cmt. Specifically, the NCCUSL sought to "allow[ ] businessmen to enjoin disparagement by *competitors* . . . ." *Id.* (emphasis added).

224. Put simply, "of another" can be taken to mean another person's business. Or, in the case of the UDTPA's definition of "person," another corporation's business. *Id.* § 1.

225. *See* sources cited *supra* notes 13-14. **R**

226. *See* Apgar, *supra* note 48, at 2400. **R**

227. *See* Thill, *supra* note 53, at 377 (quoting Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686, 692 (2d Cir. 1971)). **R**

228. 15 U.S.C. § 1125(a) (2006).

the protections of section 43(a) of the Lanham Act strictly to corporate competitors. With regard to the DTPAs, such judge-made law does not prove as elementary as the Lanham Act's standing requirements.

The purpose inherent in the UDTPA was to achieve "uniformity in the law of unfair competition among the respective states."[229] Although the northeastern states may have adopted the UDTPA in whole or in part to serve as their respective DTPAs, the standing requirements that are associated with them do not achieve the UDTPA's ultimate goal of uniformity.[230] There can be no uniformity in the law when standing requirements have resulted in new legislation from the bench[231] that reads in otherwise unneeded criteria to the law. Therefore, it certainly cannot be said that the DTPAs' current standing requirements, which prohibit corporate competitors from bringing suit, are appropriate or even correct. Prior to the enactment of a revised UDTPA, the NCCUSL must issue a policy statement regarding standing requirements under the Act to specifically include corporate competitors within the Act's reach.

2. Adapting the Requirements Necessary to Bring a Successful Claim as a Corporate Competitor Under a Revised UDTPA

In addition to a clear policy statement on standing requirements, a revised UDTPA must contain new terms concerning the elements a competitor-plaintiff must prove to bring a successful claim. In the prefatory note to the UDTPA, the NCCUSL states that the "Act is designed to . . . remov[e] undue restrictions on the

229. UNIF. DECEPTIVE TRADE PRACTICES ACT prefatory note (amended 1966, withdrawn 2000), 7A U.L.A. 266 (1985) (citation omitted), available at http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf.

230. "The more states that adopt the exact same law, the more uniformity there is. The more uniformity, the easier it is to work from state to state." McDade, *supra* note 89, at 12. The current DTPAs equate to what could be considered the very antithesis of uniformity, creating laws that are nearly unnavigable from state to state. R

231. The term "legislating from the bench" has come to be known as a form of "judicial activism"—when the court oversteps its bounds to serve as an activist for a particular cause. *See* Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 207 (2007). But, "judge[s] should merely interpret laws and not make them." Press Release, Widener University School of Law, Professor Barnett Speaks to Students about Constitutional Clichés (Apr. 25, 2008), *available at* 2008 WLNR 9873528. That is, the courts are prohibited from "overreaching their authority by creating laws or . . . construing laws based on their notions of what is best for public policy." Katherine Rengel, *The Americans with Disabilities Act and Internet Accessibility for the Blind*, 25 J. MARSHALL J. COMPUTER & INFO. L. 543, 556 (2008).

common law action for deceptive trade practices."[232] Keeping this goal in mind, section 2(b) of the UDTPA states that "a complainant need not prove competition between the parties or actual confusion or misunderstanding"[233] in order to succeed upon its claims. Section 3(a) of the act further states that "[p]roof of monetary damage, loss of profits, or intent to deceive [on the part of the defendant] is not required"[234] in order for a plaintiff to receive legal remedy. The prefatory note goes on to say that the UDTPA affords a private right of action to "persons likely to suffer pecuniary harm . . . ."[235] In effect, through these policy disclosures and the plain language of the UDTPA itself, the NCCUSL has significantly lessened the plaintiff's evidentiary burden. One of the only requirements necessary to bring suit under the UDTPA is that the "person," or here, the corporation, may suffer some form of monetary harm. It seems that the only thing a plaintiff must prove is the "likelihood of public deception,"[236] which can be mounted through evidence of violation of any of the twelve separate categories the UDTPA provides for acts of deception.[237]

Although the UDTPA plainly states that a plaintiff need only prove a possibility of monetary damage as a result of a "likelihood of public deception,"[238] many of the states of the Northeast have contradicted these rather simple rules through judicial decisions when dealing with competitor-plaintiffs. In particular, New Jersey requires proof of ascertainable loss.[239] New Jersey further states that corporate competitors may only be afforded rights under the act if they can prove that they "purchase[d] goods and services for use in their business operations";[240] Massachusetts requires proof

232. UNIF. DECEPTIVE TRADE PRACTICES ACT prefatory note (amended 1966, withdrawn 2000), 7A U.L.A. 266 (1985), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf.

233. *Id.* § 2(b).

234. *Id.* § 3(a).

235. *Id.* prefatory note. The term "pecuniary" is defined as "[o]f or relating to money; monetary." BLACK'S LAW DICTIONARY 1245 (9th ed. 2009).

236. UNIF. DECEPTIVE TRADE PRACTICES ACT prefatory note.

237. *See supra* note 91 and accompanying text. R

238. UNIF. DECEPTIVE TRADE PRACTICES ACT prefatory note.

239. N.J. STAT. ANN. §§ 56:8-19 (West 2001). Connecticut, a state within the Second Circuit, has a similar provision. CONN. GEN. STAT. ANN. § 42-110b (West 2007). Both Connecticut and New Jersey's requirement of proof of ascertainable loss is in clear opposition to section 3(a) of the UDTPA, which states, in relevant part, that "[p]roof of monetary damage[ ] [or] loss of profits . . . is not required" in order for a plaintiff to succeed on its claim. UNIF. DECEPTIVE TRADE PRACTICES ACT § 3(a).

240. Arc Networks, Inc. v. Gold Phone Card Co., Inc., 756 A.2d 636, 638 (N.J. Super. Ct. Law Div. 2000). This requirement, although judge-made, is similar to Penn-

of the defendant's "rascality";[241] and, finally, New York requires proof of actual harm to the public.[242]

In a reenactment of a revised UDTPA, it may be worthwhile for the NCCUSL to draw from the laws of states where these additional requirements have worked, such as Massachusetts's "rascality" rule. Conversely, it would behoove the NCCUSL to consider making a policy statement against the extraneous requirements of both New York and New Jersey, since they serve only to limit the plaintiff pool in deceptive trade practices actions.[243]

New York's DTPA, General Business Law section 349, allows corporate competitors to bring suit only in extremely limited circumstances because of its requirement of actual harm to the public. Although the New York statute purports to allow "any person"[244] to bring suit, the "public interest requirement" virtually excludes nearly all potential corporate claims for want of being able to prove actual harm.[245] Despite this "public interest" requirement, nowhere in the text of section 349 is a requirement of "public harm"

sylvania's statutory requirement that only transactions in which goods purchased for "personal, family, or household" uses are protected under the state DTPA. 73 PA. CONS. STAT. ANN. § 201-9.2 (West 2008); *see* Weinberg v. Sun Co., 777 A.2d 442, 445-46 (Pa. 2001); *see also* World Wrestling Fed'n Entm't Inc. v. Big Dog Holdings, Inc., 280 F. Supp. 2d 413, 446 (W.D. Pa. 2003). The wording of this statute negates the possibility of corporate action. *See infra* notes 260-265 and accompanying text. R

241. MASS. GEN. LAWS ch. 93A §§ 2, 11 (2008); *see* Damon v. Sun Co., 87 F.3d 1467, 1483 n.8 (1st Cir. 1996); Atl. Cement Co. v. S. Shore Bank, 730 F.2d 831, 834 (1st Cir. 1984); Spence v. Boston Edison Co., 459 N.E.2d 80, 88 (Mass. 1983); Atkinson v. Rosenthal, 598 N.E.2d 666, 670 (Mass. App. Ct. 1992); Levings v. Forbes & Wallace, Inc., 396 N.E.2d 149, 153 (Mass. App. Ct. 1979).

242. N.Y. GEN. BUS. LAW § 349 (McKinney 2004). New York's requirement of actual harm to the public runs afoul of the UDTPA's policy statement that a plaintiff need only prove a "likelihood of public deception." UNIF. DECEPTIVE TRADE PRACTICES ACT prefatory note.

243. Opponents to such a course of action may argue that considerations of judicial economy are at play when courts choose to specifically limit a relative plaintiff pool to a certain class of individuals or entities. Judicial economy relates to the "[e]fficiency in the operation of the courts and the judicial system . . . [and] the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources." BLACK'S LAW DICTIONARY 923 (9th ed. 2009). Eliminating a party's right to be heard deprecates fairness and encroaches upon rights established by the Constitution. Windsor v. McVeigh, 93 U.S. 274, 280 (1876) (asserting that the right to be heard is one that is "founded in the first principles of natural justice"). The author argues that the avoidance of trampling upon the rights of American citizens will defeat any compelling interests in judicial economy.

244. N.Y. GEN. BUS. LAW § 349(h).

245. "[T]he gravamen of the complaint must be consumer injury or harm to the public interest." Gucci Am., Inc. v. Duty Free Apparel, Ltd., 277 F. Supp. 2d 269, 273 (S.D.N.Y. 2003).

touched upon or mentioned.[246] The lack of any plain language in the statute concerning the concept of "public harm" leads to the conclusion that it is a standard that has been prudentially read into New York's DTPA.[247] In contrast, even a brief reading of the UDTPA reveals that a plaintiff need not prove an element of public harm.[248] Under the requirements of the UDTPA, a plaintiff need only prove a "likelihood of public deception,"[249] or, in the case of New York's statute, a likelihood of public harm.[250] There is a vast difference between a likelihood of harm and actual harm.[251]

Additionally, New York's standard of "public harm" necessarily requires that the courts differentiate between "harm to a business as opposed to [harm to] the public at large."[252] Such a requirement forces the court to decide on a case-by-case basis what qualifies as substantially a business harm and what qualifies as substantially a public harm. Moreover, courts often will decide that the "gravamen"[253] of the competitor-plaintiff's claim is harm to his business without realizing that harm to a business and harm to the public interest are not mutually exclusive.[254] Proving otherwise is

246. N.Y. GEN. BUS. LAW § 349.

247. Genesco Entm't v. Koch, 593 F. Supp. 743, 751 (S.D.N.Y. 1984) (concluding that a commercial claim is not within the ambit of section 349 "[d]espite the absence of controlling New York precedent"). *But cf.* Constr. Tech., Inc. v. Lockformer Co., 704 F. Supp. 1212, 1222 (S.D.N.Y. 1989) ("Inquiry in [section 349] cases thus need focus only on whether deception was practiced, not on any separate public interest question. And either the consumer or an injured competitor may sue." (citation and internal quotation marks omitted)).

248. UNIF. DECEPTIVE TRADE PRACTICES ACT § 3 (amended 1966, withdrawn 2000), 7A U.L.A. 289-90 (1985), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf.

249. *Id.*

250. N.Y. GEN. BUS. LAW § 349; *see also* Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 264 (2d Cir. 1995) ("'[C]orporate competitors now have standing to bring a claim under this [statute] . . . so long as *some harm to the public at large is at issue*.'" (emphasis added) (quoting Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 786 F. Supp. 182, 215 (E.D.N.Y. 1992))).

251. "Actual" is defined as "existing in act and not merely potentially." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 13 (11th ed. 2005). Compare this with the definition of "likelihood," which is taken to mean "probability," *id.* at 721, which in turn is defined as "something (as an event or circumstance) that is probable," *id.* at 989. An act that is probable is "supported by evidence strong enough to establish presumption but not proof." *Id.*

252. Gucci Am., Inc. v. Duty Free Apparel, Ltd., 277 F. Supp. 2d 269, 274 (S.D.N.Y. 2003).

253. Karam Prasad, LLC v. Cache, Inc., No. 07 Civ. 5785 (PAC), 2007 WL 2438396, at *2 (S.D.N.Y. Aug. 27, 2007).

254. In an interview with Robert C. Hinkley of the law firm Jones Day, Hinkley suggested that corporations can operate without "damag[ing] the public interest in the pursuit of profits." Chris Luis, *People v. Profits: A False Dichotomy?*, 5 U.C. DAVIS

difficult—it is only with formal economics or business training that one can accurately predict what effects harm to a business will have on the public.[255]

It is too burdensome, and simply unfair, to subject competitor-plaintiffs to a standard that requires sophisticated training and anticipation of unpredictable (or unforeseeable) effects. As discussed above, in the case of small businesses, most entrepreneurs are young and inexperienced—further, they are new to the industry.[256] Without a high level of business expertise, it would be nearly impossible for such a plaintiff to sufficiently plead "public harm" under such stringent circumstances. For these reasons, it is imperative that the NCCUSL disregard such requirements in a redrafting of the UDTPA. New York's interpretation of the law defeats the NCCUSL's original purpose as stated in the UDTPA's prefatory note: "to . . . remov[e] undue restrictions on . . . action[s] for deceptive trade practices."[257]

Along the same lines, the DTPA in states like New Jersey carries with it a requirement that is not within the plain language of the UDTPA. In 1971, New Jersey's DTPA was legislatively expanded to afford a right of action to "[a]ny person who suffers any ascertainable loss of moneys or property, real or personal."[258] Such a requirement is nowhere to be found within the regulations of the UDTPA, and, in fact, section 3(a) of the UDTPA explicitly states that "[p]roof of monetary damage [or] loss of profits . . . is not re-

BUS. L.J. 6 (2004), *available at* http://blj.ucdavis.edu/archives/vol-5-no-1/People-v-Profits-A-False-Dichotomy.html. Hinkley goes on to state that people have long assumed that the connection between business and public harm was "mutually exclusive." *Id.* Hinkley asserts that "[t]hey are not, and the sooner we realize this, the better off mankind will be." *Id.*

255. "[T]he higher the level of education of the entrepreneur, the higher the level of performance of the venture—whether measured as growth, profits, or earnings power of the entrepreneur." Mark Weaver, *Entrepreneurship and Education: What Is Known and Not Known About the Links Between Education and Entrepreneurial Activity*, *in* THE SMALL BUSINESS ECONOMY 113, 117 (2006), *available at* http://www.sba.gov/advo/research/sbe_06_ch05.pdf.

256. *See generally* Manuel A. Utset, *Reciprocal Fairness, Strategic Behavior & Venture Survival: A Theory of Venture Capital-Financed Firms*, 2002 WIS. L. REV. 45, 100-01.

257. UNIF. DECEPTIVE TRADE PRACTICES ACT prefatory note (amended 1966, withdrawn 2000), 7A U.L.A. 266 (1985), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf.

258. N.J. REV. STAT. § 56:8-19 (West 2001); *see also* Meshinsky v. Nichols Yacht Sales, Inc., 541 A.2d 1063, 1067 (N.J. 1988). The word "ascertain" is a transitive verb defined as "to find out or learn with certainty." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 71 (11th ed. 2005). That being the case, logic demands that the term "ascertainable loss" be associated with *certain* loss, or, more commonly, *actual* loss.

quired" in order for a plaintiff to receive remedy under the act.[259] Although the New Jersey legislature was attempting to further expand the possible plaintiff pool under the DTPA with the addition of this language, in terms of the UDTPA, New Jersey did the opposite, foreclosing the avenue of litigation to competitor-plaintiffs unable to prove an ascertainable loss.

New Jersey supports businesses that use the DTPA. This much was made clear in *Hundred East Credit Corp. v. Eric Shuster Corp.*, a case that involved a dispute over computer parts between two corporate entities.[260] There, the court stated that

> [b]usiness entities, like individual consumers, cover a wide range. Some are poor, some wealthy; some are naive, some sophisticated; some are required to submit, some are able to dominate. Even the most world-wise business entity can be inexperienced and uninformed in a given consumer transaction. Unlawful practices thus can victimize business entities as well as individual consumers. It may well be, of course, that certain practices unlawful in a sale of personal goods to an individual consumer would not be held unlawful in a transaction between particular business entities; the Act largely permits the meaning of 'unlawful practice' to be determined on a case-by-case basis. But to exclude business entities from any protection of the Act would contravene its manifest purpose as well as its unambiguous language.[261]

Although this statement by the court seems to afford great leniency to business plaintiffs as far as protection under the New Jersey DTPA, in reality, it only serves to limit corporate competitors to claims involving the "sale of personal goods."[262]

Such an interpretation precludes New Jersey's corporate competitors from bringing suit under the New Jersey DTPA for any of the deceptive trade practices affecting businesses that are clearly delineated under the UDTPA. In New Jersey, corporate competitors can *only* sue under the DTPA when they are considered consumers, in the literal sense of the word.[263] In a revised version of

259. UNIF. DECEPTIVE TRADE PRACTICES ACT § 3(a).

260. Hundred E. Credit Corp. v. Eric Schuster Corp., 515 A.2d 246, 247 (N.J. Super. Ct. App. Div. 1986).

261. *Id.* at 249 (citations omitted).

262. *Id.* The New Jersey DTPA has been construed "to afford protection to corporate and commercial entities who purchase goods and services for use in their business operations." Arc Networks, Inc. v. Gold Phone Card Co., 756 A.2d 636, 638 (N.J. Super. Ct. Law Div. 2000).

263. *Arc Networks, Inc.*, 756 A.2d at 638 ("[T]he Act has been interpreted to afford protection to corporate and commercial entities who purchase goods and ser-

the UDTPA, it would be advisable to mention that although New Jersey's method seems to be a fair reading of the DTPA, it is not fair to limit corporate competitors to suits that are not in concert with the full spectrum of the UDTPA's purpose. The UDTPA's original purpose was to offer "remedy to persons likely to suffer pecuniary harm for conduct involving either misleading identification of business or goods or false or deceptive advertis[ement]."[264] Considering that deceptive trade practice actions originated from common-law actions for trademark infringement,[265] this sort of limitation is largely inappropriate.

Comparatively, the Massachusetts DTPA affords equal rights to both consumers and corporations alike.[266] By 1986, the Massachusetts legislature had amended chapter 93A such that section 11 provided a plausible cause of action for business plaintiffs.[267] In contrast to other DTPAs of the Northeast, the Massachusetts DTPA is a viable statute in terms of providing guidance for a revision of the UDTPA. Massachusetts law requires that the plaintiff prove that the defendant acted with a degree of "rascality" in the business scenario at hand.[268] This requirement demands that the

vices for use in their business operations."). This sounds of Pennsylvania's UTP/CPL, where private actions are restricted to "person[s] who purchase[ ] or lease[ ] goods or services primarily for personal, family or household purposes." 73 PA. CONS. STAT. ANN. § 201-9.2 (West 2008). Due to this limitation, corporate competitors in the Commonwealth of Pennsylvania may only bring suit if they themselves are acting in the capacity of consumers. *See* Weinberg v. Sun Co., 777 A.2d 442, 445-46 (Pa. 2001); *see also* World Wrestling Fed'n Entm't Inc. v. Big Dog Holdings, Inc., 280 F. Supp. 2d 413, 446 (W.D. Pa. 2003). Competitors wishing to bring unfair competition claims must rely upon "the Attorney General and district attorneys to bring actions in the name of the Commonwealth," thus negating a private right of action for the competitor-plaintiff. Granite State Ins. Co. v. Aamco Transmissions, Inc., 57 F.3d 316, 320 n.3 (3d Cir. 1995).

264. UNIF. DECEPTIVE TRADE PRACTICES ACT prefatory note (amended 1966, withdrawn 2000), 7A U.L.A. 266 (1985), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf.

265. *Id.*

266. *See* MASS. GEN. LAWS ch. 93A §§ 2, 11 (2008).

267. Franke & Ballam, *supra* note 105, at 383. R

268. Levings v. Forbes & Wallace, Inc., 396 N.E.2d 149, 153 (Mass. App. Ct. 1979). *Contra* Mass. Employers Ins. Exch. v. Propac-Mass, Inc., 648 N.E.2d 435, 438 (Mass. 1995) ("We view as uninstructive phrases such as 'level of rascality' and 'rancid flavor of unfairness' in deciding questions of unfairness under G.L. c. 93A. We focus on the nature of the challenged conduct and on the purpose and effect of that conduct as the crucial factors in making a G.L. c. 93A determination." (citations omitted)). The First Circuit Court of Appeals sought to clarify the *Propac-Mass* language:

> The [plaintiffs] argue that . . . the SJC abandoned the "rascality test" in stating that it "view[s] as uninstructive phrases such as 'level of rascality' and 'rancid flavor of unfairness.'" Contrary to the [plaintiffs'] interpretation, the SJC was simply recognizing that the mentioned phrases do not, despite their frequent

defendant's "objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce."[269] To determine what kinds of behavior rise to the level of rascality the Massachusetts DTPA refers to, it is necessary to look to earlier cases interpreting section 11. These cases indicate that to act with a sufficient level of rascality, one's acts must be within a "recognized conception of unfairness."[270] Further, these acts must be "immoral, unethical, oppressive [or] unscrupulous"[271] and of the kind that "would . . . cause substantial injury to consumers, competitors or other businessmen."[272]

Although the UDTPA specifically provides in section 3(a) that "[p]roof of . . . intent to deceive is not required" for a plaintiff to succeed on its claims,[273] the Massachusetts rascality requirement does not necessarily speak to a requirement of intent. It is wholly possible for a defendant to act "immoral[ly], unethical[ly], oppressive[ly] . . . unscrupulous[ly]"[274] without the intent of doing so.[275] In fact, this concept is likely the reason why the UDTPA does not carry an intent requirement. Rather, the Massachusetts requirement addresses the level of deception necessary for a defendant to be found in violation of the DTPA. This standard would be a sound addition to a revised UDTPA simply because it would provide some amount of guidance as to the degree of the deception necessary for a corporate defendant to be found in violation of the act.

> citation, lend much guidance in the fact-specific context of a chapter 93A claim.

Damon v. Sun Co., 87 F.3d 1467, 1483 n.8 (1st Cir. 1996) (citations omitted).

269. *Levings*, 396 N.E.2d at 153.

270. PMP Assocs. v. Globe Newspaper Co., 321 N.E.2d 915, 918 (Mass. 1975).

271. *Id.*

272. *Id.*

273. UNIF. DECEPTIVE TRADE PRACTICES ACT § 3(a) (amended 1966, withdrawn 2000), 7A U.L.A. 289-90 (1985), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf.

274. *PMP Assocs.*, 321 N.E.2d at 918.

275. The American Bar Association's Section of Antitrust Law has spoken to this effect, stating that

> a party can be found to have committed a deceptive practice, including false advertising, under the FTC Act, the Lanham Act, and/or most state consumer protection statutes . . . without intending to make a false representation, without knowing its representation to be false, with good faith in the truth of the claim, and without actually having deceived any particular consumer or number of consumers.

ABA SECTION OF ANTITRUST LAW, CONSUMER PROTECTION HANDBOOK 5 (2004).

3. The Final Word: The Definition of "Deceptive Trade Practice"

The term "deceptive trade practice" is not defined in the Lanham Act,[276] the FTCA,[277] the UDTPA,[278] or any of the DTPAs of the northeastern United States.[279] In 1983, however, the FTC issued a Policy Statement on Deception, under which deception would be found if "a representation, omission or practice is likely to mislead consumers" who are presumed by the FTC to be "acting reasonably in the circumstances."[280] Further, the deceptive practices "must be . . . material."[281] Despite what seemed to be a clear-cut definition of the term, Congress did not amend the FTCA to include that definition within its provisions.[282] Although this ambiguity may have been intentional, there remains a way to provide a firm definition for the term while still leaving the floodgates open to the multitude of present and future violations.

In a revision of the UDTPA, the NCCUSL would be prudent to allow the FTC's definition of "deceptive trade practice" to supplement the current twelve-part UDTPA list of possibly deceptive acts[283] and simply change it to address the acts listed within the UDTPA.[284] But, the FTC's definition[285] must be changed to reflect that the deceptive act or practice is likely to mislead any "person,"[286] as opposed to only "consumers." According to *Black's Law Dictionary*, a consumer is defined as "[a] person who buys goods or services for personal, family, or household use, with no intention of resale; a natural person who uses products for personal

276. 15 U.S.C. §§ 1051-1072 (2006).

277. *Id.* § 41.

278. UNIF. DECEPTIVE TRADE PRACTICES ACT, 7A U.L.A. 265.

279. *See* CONN. GEN. STAT. ANN. § 42-110a (West 2007); DEL. CODE ANN. tit. 6, § 2531 (2005); MASS. GEN. LAWS ch. 93A, § 1 (2008); ME. REV. STAT. ANN. tit. 10, § 1211 (2009); N.H. REV. STAT. ANN. § 358-A:1 (2009); N.J. STAT. ANN. §§ 56:8-1 (West 2001); N.Y. GEN. BUS. LAW § 349 (McKinney 2004); 73 PA. CONS. STAT. ANN. § 201-2 (West 2008); R.I. GEN. LAWS §§ 6-13.1-1 (2001); VT. STAT. ANN. tit. 9, § 2451a (2006).

280. Letter from James C. Miller III, FTC Chairman, to John D. Dingell, Chair of House Comm. on Energy & Commerce (Oct. 14, 1983) [hereinafter Miller Letter], *reprinted in In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174-84 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm.

281. *Id.*

282. *See id.*

283. UNIF. DECEPTIVE TRADE PRACTICES ACT § 2.

284. *Id.* § 1.

285. *See* Miller Letter, *supra* note 280. R

286. *See supra* note 220 and accompanying text (noting UDTPA's definition of a "person"). R

rather than business purposes."[287] The UDTPA is written such that it affords a private right of action to corporate competitors—to include the word "consumers" in a definition of "deceptive trade practice" would undermine that very provision of the act. Accordingly, the NCCUSL should adopt the following language to provide a clear definition of the term deceptive trade practice: *a deceptive trade practice is a representation, omission, practice, or act that is likely to mislead a person in a material way, despite the presumption of that person's reasonable actions under the circumstances.*[288] This new definition would not supplant the original UDTPA's definition; rather, it would support it by negating confusion as to what exactly constitutes a "deceptive trade practice" in the future.

C. *Allowing the DTPAs to Address the Purpose for Which They Were Created—Unfair Competition Through Trademark Infringement*

The DTPAs all have one trait in common—the federal and model acts out of which they were born all carry the goal of banning deceptive practices considered detrimental to competitors' businesses.[289] Even after the FTC was granted the power to protect consumers,[290] Congress drafted the language of the FTCA such that the act would serve as prohibitive of "unfair or deceptive acts or practices *in or affecting commerce*."[291] The fact that, for this alleged consumer protection provision, Congress chose language that is indicative of a relation to business competition speaks volumes as

287. BLACK'S LAW DICTIONARY 358 (9th ed. 2009).

288. The applicable statutes and case law inspired this author-written definition. For example, the part of the definition specifying "reasonable actions under the circumstances" came from the FTCA's "reasonable consumer" standard. Lemley, *supra* note 26, at 318. The word "consumer" was removed from the FTCA standard in order to both reflect the fact that the vast majority of the DTPAs cite plaintiffs as "any person" (i.e., both consumers and corporations), and also to reflect the UDTPA's less stringent statutory requirements, such that corporate plaintiffs would be able to bring suit without any ambiguity. *See* Clinton, *supra* note 123, at 387-88. The language concerning being materially misled was lifted partially from New York's DTPA. N.Y. GEN. BUS. LAW § 349 (McKinney 2004); Boule v. Hutton, 328 F.3d 84, 93-94 (2d Cir. 2003). Finally, the phrase "representation, omission, practice, or act" was borrowed from the language of the most prominent sections of the UDTPA. UNIF. DECEPTIVE TRADE PRACTICES ACT, 7A U.L.A. 265. R R

289. *See* Scheuerman, *supra* note 77, at 11. R

290. *Id.* at 12.

291. 15 U.S.C. § 45(a)(1) (2006) (emphasis added); *see also* Mize, *supra* note 78, at 656. According to *Black's Law Dictionary*, the phrase "affecting commerce" is defined as "touching or concerning business, industry, or trade." BLACK'S LAW DICTIONARY 65 (9th ed. 2009). R

to the drafters' intent. This being the case, Congress likely did not intend to close the door on business protection in its pursuit to afford consumers a private right of action for deceptive trade practices.[292] This conclusion is further evidenced by one of the reasons cited for the creation of the UDTPA—the need to stop "[d]eceptive conduct constituting unreasonable interference with another's promotion and conduct of business."[293]

In recognizing that the UDTPA addresses unfair competition methods that arguably could be covered by either the FTCA or the Lanham Act,[294] one question is begged: why do the majority of the DTPAs[295] fail to recognize that trademark infringement[296] is a valid cause of action?[297] As noted above, the courts of New York have

292. At its core, a deceptive trade practice action can be said to be loosely framed around an action for trademark infringement. The vast majority of deceptive trade practices claims center on the act of "passing off," or the "imitation of . . . marks . . . which had developed trade significance." *Id*. The UDTPA recognizes that most deceptive trade practice actions are born out of disputes of or relating to trademark matters and divides deceptive conduct into two classes—those "involving . . . misleading trade identification" and those involving "false or deceptive advertising." UNIF. DECEPTIVE TRADE PRACTICES ACT prefatory note. As a clear-cut rule concerning infringement suits brought under the state's DTPA is currently debated in New York, *see* Karam Prasad, LLC v. Cache, Inc., No. 07 Civ. 5785 (PAC), 2007 WL 2438396, at *2 (S.D.N.Y. Aug. 27, 2007), the majority of this section will focus on the differences in opinion in that state.

293. UNIF. DECEPTIVE TRADE PRACTICES ACT prefatory note.

294. Dole, *supra* note 11, at 486 (explaining that the UDTPA strictly forbade the substitution of goods, trademark infringement, false designations of origin, false advertising, disparagement, bait-and-switch advertising, pricing fraud, as well as conduct tending to create confusion, misrepresentations, and misunderstandings). R

295. The DTPAs are in theory (but perhaps not in practice) the statutory offspring of a model act meant to bring "uniformity [to] the law of unfair competition." UNIF. DECEPTIVE TRADE PRACTICES ACT prefatory note.

296. Professor McCarthy notes that a finding of trademark infringement hinges upon the public's likelihood of confusion. 1 MCCARTHY, *supra* note 64, § 2:8. He goes on to state that "trademark infringement is a type of unfair competition." *Id.* § 2.7. R

> In many factual situations, the same result is reached whether the legal wrong is called trademark infringement or unfair competition. In such cases the courts often lump them together and speak of them as identical concepts. Today, *the keystone of that portion of unfair competition law which relates to trademarks is the avoidance of a likelihood of confusion in the minds of the buying public*. Whatever route one travels, whether by trademark infringement or unfair competition, the signs give direction to the same enquiry—whether defendant's acts are likely to cause confusion.

Id. § 2.8 (emphasis added) (citations omitted).

297. One can only assume that New York law correlates trademark infringement actions brought under DTPAs with business harm as opposed to consumer harm. However, one commentator recently asserted the following: "[T]he aim [of trademark] is to provide consistency for the *consumer* who has previously purchased and been satisfied by a product bearing the mark XYZ. When another firm labels its product as XYZ, the

not yet reached a consensus as to the status of the state's DTPA trademark infringement actions brought by corporate competitors.[298] The prevailing opinion in New York is that trademark actions brought by competitor-plaintiffs arising under the DTPA generally fail to allege a sufficient level of harm to the public interest.[299] Moreover, "trademark infringement actions alleging only general consumer confusion do not" rise to the level of harm to the public interest required to bring a successful motion under the state's DTPA.[300]

When one looks to an analogous area of the law—the issuance of injunctions in trademark infringement actions—it seems as if New York's stance on the issue of harm to the public interest is way off the mark. When considering whether to issue an injunction in a trademark infringement action, the courts use a four-factor test to determine whether such relief is appropriate.[301] Part of this test provides that the court must evaluate whether the defendant's infringement of the plaintiff's mark will harm "the public interest."[302] In discussing the public-interest factor in relation to the issuance of injunctions, district courts have acknowledged that "[i]nfringement of a trademark is inherently contrary to the public interest."[303]

The Third Circuit has previously ruled that the public interest, when viewed through the prism of trademark litigation, should be considered "a synonym for the right of the public not to be deceived or confused."[304] As injunctions are the most common

real damage is to the *consumer* . . . ." Ryan McLeod, iBrief, *Injunction Junction: Remembering the Proper Function and Form of Equitable Relief in Trademark Law*, 2006 DUKE L. & TECH. REV. 0013, ¶ 19 (2006), http://www.law.duke.edu/journals/dltr/articles/pdf/2006DLTR0013.pdf (emphases added).

298. Karam Prasad, LLC v. Cache, Inc., No. 07 Civ. 5785 (PAC), 2007 WL 2438396, at *2 (S.D.N.Y. Aug. 27, 2007) (noting an intracircuit split).

299. Sports Traveler, Inc. v. Advance Magazine Publishers, Inc., No. 96 Civ. 5150, 1997 WL 137443, at *3 (S.D.N.Y. Mar. 24, 1997).

300. *Id.*; *see* N.Y. GEN. BUS. LAW § 349 (McKinney 2004).

301. Prior to issuing a remedial injunction, the courts must consider whether "(1) [the] plaintiff prevailed on the merits of its claim; (2) [the] plaintiff would suffer irreparable harm absent injunctive relief; (3) the harm to the plaintiff would outweigh any harm to [the] defendant; and (4) the injunction [will] adversely affect the public interest." Metro-Goldwyn Mayer, Inc. v. 007 Safety Prods., Inc., 183 F.3d 10, 15 n.2 (1st Cir. 1999) (citing A.W. Chesterton Co. v. Chesterton, 128 F.3d 1, 5 (1st Cir. 1997)).

302. *Id.*

303. Connelly v. ValueVision Media, Inc., 393 F. Supp. 2d 767, 777 (D. Minn. 2005).

304. Optician's Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 197 (3d Cir. 1990); *see also* James Burrough Ltd. v. Sign of Beefeater, Inc., 540 F.2d 266, 274 (7th Cir. 1976) ("A 'trademark' is not that which is infringed. *What is infringed is the right of the public to be free of confusion* . . . ." (emphasis added)).

form of relief under both the UDTPA and the DTPAs,[305] it follows that the same terms that apply to the issuance of an injunction in a common-law trademark-infringement action—that trademark infringement is contrary to the public interest—ought to be included in the requirements of an action for trademark infringement under a DTPA.[306]

New York's stance on the matter of harm to the public interest is diametrically opposed to the regulations set forth in the UDTPA. In contrast to the New York statute,[307] the UDTPA proscribes deceptive conduct that will "create[ ] a likelihood of confusion or of misunderstanding."[308] If consumer confusion is a sufficient basis for bringing an action under the UDTPA, how can the State of New York claim that under its DTPA, consumer confusion is simply not enough?[309]

Similarly, with the surrounding circuits asserting that trademark infringement is indeed contrary to the public interest, how can judicial interpretations of New York's DTPA claim otherwise? As stated in a recent law review article, "For a law with the purpose of protecting the public, the actual consideration of the public's interest . . . would seem necessary."[310]

The "keystone"[311] here is the public's likelihood of confusion. New York's DTPA is missing this keystone, and the competitor-plaintiff's option to bring forth a trademark action has crumbled entirely due to a faulty interpretation of the law. The DTPAs were crafted such that competitors and consumers alike could bring suit for deceptive acts. To strip one class of plaintiffs of its rights to bring what ought to be the most common form of action under the DTPA's tenets—trademark infringement—is inherently unfair.

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305. UNIF. DECEPTIVE TRADE PRACTICES ACT § 3(a) (amended 1966, withdrawn 2000), 7A U.L.A. 289-90 (1985), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf.

306. The author is of the opinion that the courts ought to allow larger, more financially stable corporations to act as the "'vicarious' avenger of consumer rights," such that the voice of the "trusting" consumer can be heard. Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp., 799 F.2d 6, 15-16 (1st Cir. 1986).

307. N.Y. GEN. BUS. LAW § 349 (McKinney 2004).

308. UNIF. DECEPTIVE TRADE PRACTICES ACT § 2(a)(12).

309. *See* Sports Traveler, Inc. v. Advance Magazine Publishers, Inc., No. 96 Civ. 5150, 1997 WL 137443, at *3 (S.D.N.Y. Mar. 24, 1997).

310. McLeod, *supra* note 297, ¶ 25. R

311. 1 MCCARTHY, *supra* note 64, § 2:8 ("[T]he keystone of that portion of unfair competition law which relates to trademarks is the avoidance of a likelihood of confusion in the minds of the buying public."). R

CONCLUSION

In light of the impossible puzzle that has been made of corporate rights under the various DTPAs, now is not a good time to be a competitor-plaintiff that needs to litigate in more than one state. With judicial interpretations of the DTPAs that virtually eliminate any chance that a competitor-plaintiff may have had to win its case, businesses, both small and large, will have to resign to the fact that they will not be able to fully litigate their claims in a court of law unless the DTPAs undergo an overhaul. The missing piece to this puzzle, the competitor-plaintiff's last bastion of hope, rests with the UDTPA, which was withdrawn in the year 2000 due to its alleged obsolescence.[312]

The cases that deny standing to corporate competitors seeking to bring trademark infringement actions under DTPAs have erred on the wrong side of the law. How can a system that has put forth laws to protect its citizens against unfair and deceptive trade practices reconcile the assertion that consumer confusion, which is the basis of deceptive trade practice theory, does not rise to the level of importance necessary to warrant being a public interest? If anything, consumer confusion is the hallmark of a dysfunctional system at odds with its legislative goals.

Through examination of the actual language of the DTPAs, it becomes clear that the majority of these statutes do not seek to exclude corporate competitors from bringing suit. In fact, in most cases, their very language encourages such legal action. Judicial interpretation of these statutes has created confusion—where one competitor-plaintiff may succeed on its claims, another may fail simply for crossing another state's border. It simply cannot be the case that the states desire this sort of confusion and inequality between their laws, especially when such a viable alternative exists.

The legislative purpose of the DTPAs, to protect consumers through the maintenance of a competitive marketplace,[313] would best be served by the adoption of a revised UDTPA. The UDTPA is a champion of trademark law and recognizes that immeasurable value is attached to each product's individual mark. Trademark functions to inform the public, and, in this time of economic uncertainty, we as a nation need the stability that trademark can offer the marketplace more than ever. If the states wish to have any sort of

312. Menell, *supra* note 98, at 1392. **R**

313. Lily Transp. Corp. v. Royal Institutional Servs., Inc., 832 N.E.2d 666, 673 (Mass. App. Ct. 2005).

uniformity among their laws, or even a functioning free market, they must be willing to take another chance on the UDTPA.

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* J.D., Business Law Concentration, Western New England College School of Law, 2010. I would like to express my sincere gratitude to my family and friends for their never-ending love, support, and encouragement throughout my three years at Western New England.