An Antitrust Framework for False Advertising

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ABSTRACT: Federal law presumes that false advertising harms competition. Federal law also presumes that false advertising is harmless or even helpful to competition. Contradiction is not unknown to the law, of course. This contradiction, though, is acute. For not only are both regimes at issue designed to protect competition, but they are both enforced by the same agency: the Federal Trade Commission, which targets "unfair competition" through antitrust and consumer protection enforcement.

Courts' treatment of false advertising in antitrust cases makes no sense. While courts have reasonably evidenced concern that not all false advertising violates antitrust law, the remedy is not to abandon the false advertising/antitrust interface. Instead, the solution is to focus on the actors most likely to harm the market: monopolists and attempted monopolists.

This Essay proposes an antitrust framework for false advertising claims. It introduces a presumption that monopolists engaging in false advertising violate antitrust law and a rebuttal if the false advertising is ineffective. The framework also applies to attempted monopolization by incorporating factors such as falsity, materiality, and harm inherent in false advertising law, along with competition-centered issues like targeting new market entrants.

Antitrust has dismissed false advertising that entrenches monopoly power for too long. This Essay seeks to resolve the contradiction in the law by showing how false advertising threatens the proper functioning of markets. Such an approach promises benefits for false advertising law, antitrust law, and consumers.

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I. INTRODUCTION

Federal law presumes that false advertising harms competition. Federal law also presumes that false advertising is harmless or even helpful to competition. Contradiction is not unknown to the law, of course. This contradiction, though, is acute. For not only are both the regimes at issue designed to protect competition, but they are both enforced by the same agency: the Federal Trade Commission ("FTC"), which targets "unfair competition" through antitrust and consumer protection enforcement.

Anticompetitive conduct, the focus of antitrust law, increases price and reduces quality. False advertising, the focus of much consumer protection law, deceives consumers and distorts markets. Both types of conduct harm consumers. Despite this overlap, nearly all courts have dismissed private antitrust claims based on false advertising. They have concluded that the conduct cannot violate antitrust law. Or they have presumed that the harm is *de minimis*. This makes no sense. As the Supreme Court has long established, "false or misleading advertising has an anticompetitive effect."[1]

Courts' concerns stem from the reasonable notion that not every instance of false advertising violates antitrust law. And (usually implicitly) they have worried about applying antitrust's robust remedies of treble damages and attorneys' fees. These courts fear that antitrust liability will disincentivize companies from engaging in advertising that is merely questionable and that might provide useful information to some consumers. But false advertising law preserves a robust space for puffery and debatable opinions; overdeterrence concerns don't justify analysis that is inconsistent with both the economics and psychology of advertising and that, at a minimum, essentially makes it impossible to bring a successful antitrust case based on false advertising. Nor do the Lanham Act's remedies for false advertising fully address harms to competition. Reasoning that conduct that is already illegal on other grounds need not concern antitrust law ignores the multiple other contexts in which breaches of non-antitrust laws are considered to be potential antitrust violations.

One example illustrates how false advertising can entrench powerful positions that harm consumers and the market as a whole.[2] In 2010, AT&T was worried that it was about to lose its exclusivity as sole provider of the iPhone. So it adopted a bait-and-switch plan: it offered "unlimited" data to consumers who signed long-term contracts. But this was a ruse. The company wasn't planning to make good on its promise. It was already clear that smartphone-owning customers used much more data than previous customers had.

AT&T then began to throttle data to its consumers so that webpages took longer to load, streaming video failed to stream, and GPS and email failed.[3] To make the switch stick, AT&T imposed expensive termination fees on consumers who did not want to be bound by the deceptive "unlimited" contracts or encouraged them to buy far more expensive plans.[4] In short, AT&T used deceptive behavior to extend its competitive advantage over other carriers.

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1. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 n.9 (1999) (citing FTC v. Algoma Lumber Co., 291 U.S. 67, 79–80 (1934)).

2. For additional examples in an industry in which the problem is getting worse, see *infra* Section IV.D (discussing the biologics industry).

3. Complaint for Permanent Injunction and Other Equitable Relief at 4–7, FTC v. AT&T Mobility LLC, 87 F. Supp. 3d 1087 (N.D. Cal. 2015) (No. C-14-4785 EMC), *rev'd and remanded*, 835 F.3d 993 (9th Cir. 2016), *reh'g en banc granted*, 864 F.3d 995 (9th Cir. 2017).

4. Fed. Trade Comm'n, Statement of Commissioner Rohit Chopra re: AT&T Mobility, LLC, Commission File No. X150009 (Nov. 5, 2019).

False advertising law allows consumers to receive some redress for the money they paid for "unlimited" data that wasn't,[5] but there's no obvious remedy for the damage AT&T caused to the market as a whole. Antitrust law has been kneecapped by the courts and thus is powerless to act. In short, the law's neglect of the injuries caused by false advertising threatens structural harm to competitive markets.

In this Essay, we address these problems. We do so by focusing on the actors most likely to harm the market: monopolists and attempted monopolists. These actors are a numerically small percentage of businesses (and of false advertising defendants), but they can do great harm. Our emphasis on monopolists and attempted monopolists addresses courts' concerns of overbroad enforcement, preventing false advertising from morphing automatically into an antitrust violation. And it carves out a critical role for antitrust while embracing—rather than neglecting—antitrust's partner in fighting unfair competition, false advertising law.

We begin by introducing the laws of antitrust and false advertising, explaining the regimes' objectives and methods. We then survey the antitrust caselaw, critiquing three approaches courts considering false advertising claims have taken. Finally, we introduce our antitrust framework for false advertising claims. At the heart of the framework is a presumption that monopolists engaging in false advertising violate antitrust law, with that presumption rebuttable if the defendant can show that the false advertising was ineffective. The framework also applies to cases of attempted monopolization by incorporating factors (falsity, materiality, and harm) inherent in false advertising law, along with competition-centered issues on targeting new market entrants and entrenching barriers to entry. To illustrate how our framework should work, we apply it to an important area: advertising for biosimilars, which are pharmaceutical products with a substantial and growing role in treating numerous diseases.

False advertising that exacerbates monopoly power has been dismissed by antitrust law for too long. This Essay seeks to resolve the contradiction in the law by showing how false advertising threatens the proper functioning of markets.

5. With AT&T's false "unlimited promise," the FTC acted. But without government intervention, consumers likely would not have had options for redress because of mandatory arbitration that removes the ability to bring a consumer-protection class action. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350–52 (2011). The use of adhesion contracts to prevent consumers from obtaining restitution for false advertising is one significant distortion in the current competitive environment. The ironic result is that competitors may have an easier time suing each other for false advertising than consumers do. But private antitrust enforcement has also been limited by arbitration. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and* Illinois Brick, 100 IOWA L. REV. 2115, 2116 (2015).

II. Antitrust and False Advertising

Antitrust and false advertising bear some overlap in goals and methods but operate in different ways. This Part separately considers antitrust and false advertising law before comparing the two.

A. Antitrust

Antitrust's widely acknowledged goal is to promote competition.[6] A competitive market maximizes "consumer welfare."[7] Operationalizing this, antitrust law targets conduct that reduces competition and harms consumer welfare by increasing price, reducing output, or offering consumers inferior options.

One central element of a competitive market is advertising, which, as the Supreme Court has recognized, plays "an indispensable role . . . in a free enterprise system."[8] Restrictions on truthful advertising harm competition by "mak[ing] it more difficult for consumers to discover information about the price and quality of goods or services, thereby reducing competitors' incentives to compete with each other with respect to such features."[9] For that reason, the FTC sued 1-800 Contacts, the largest online U.S. retailer of contact lenses, for its "web of anticompetitive agreements with rival online contact lens sellers that suppress[ed] competition in certain online search advertising auctions and that restrict[ed] truthful and non-misleading internet advertising to consumers."[10]

The advertising cases courts have considered have addressed agreements between competitors. But antitrust law also scrutinizes single-firm conduct, which occurs when a firm unilaterally engages in false advertising.[11] The

6. *E.g.*, 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 100a (4th ed. 2013).

7. *E.g.*, *id.*; Maureen K. Ohlhausen, Acting Chair, Fed. Trade Comm'n, Roundtable Conference with Enforcement Officials at the ABA Section of Antitrust Law Spring Meeting (Mar. 31, 2017), *in* ANTITRUST SOURCE, June 2017, at 1, 20. The consumer-welfare standard is under attack by the "neo-Brandeisian" movement, though it is unclear what standard would replace it. Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 67 (2019).

8. Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977).

9. Polygram Holding, Inc., 136 F.T.C. 310, 355 (2003); *see also* Brief of the Federal Trade Commission at 1, 1-800 Contacts, Inc. v. FTC, No. 18-3848 (2d Cir. Oct. 7, 2019) ("Without timely information about competing products and sellers, . . . consumers cannot make informed choices and markets cannot function properly.").

10. *1-800 Contacts, Inc., In the Matter of*, FED. TRADE COMM'N (Oct. 8, 2019), https://www.ftc.gov/enforcement/cases-proceedings/141-0200/1-800-contacts-inc-matter [https://perma.cc/CQ4C-LY5Q]; *see also Polygram Holding*, 136 F.T.C. at 354 (finding agreement among rivals not to advertise products was "presumptively anticompetitive").

11. Other examples of single-firm conduct include predatory pricing (in which a monopolist lowers its price below cost to drive a rival out of the market and then raises it), tying (in which a monopolist sells a product only on the condition that the buyer purchases a second

relevant law in this setting is Section 2 of the Sherman Act, which targets monopolization.[12] This offense has two elements: (1) monopoly power and (2) exclusionary conduct.

First, a plaintiff needs to show that a defendant has monopoly power, which has been defined as "the power to control prices or exclude competition."[13] Monopoly power can be shown in one of two ways. First, it can be proved indirectly by examining a defendant's market share along with barriers to entry that could entrench that market position.[14] Courts regularly hold that a 90 percent market share supports market power, with some courts finding a 75 percent share to be sufficient.[15] Second, monopoly power can be proved directly,[16] such as when a brand firm is able "to maintain the price of [a] drug . . . at supracompetitive levels without losing substantial sales."[17] Direct proof of monopoly power also can consist of observable effects on the market such as a price increase or output reduction.[18]

High market share alone, however, is not sufficient for the offense. The defendant also must engage in exclusionary conduct. Courts typically address this question by relying on the distinction in *United States v. Grinnell Corp.* between "the willful acquisition or maintenance of [monopoly] power" and "growth or development as a consequence of a superior product, business acumen, or historic accident."[19]

The monopolization caselaw has developed conservatively, with courts finding violations, for example, when the defendant's conduct does not bear any legitimate justification and where there are harms to the market as a whole. For example, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the owner of three downhill skiing facilities in Aspen, Colorado failed to offer a justification for withdrawing from a joint ticketing arrangement with the

product from it), and refusals to deal (in which a monopolist refuses to deal with a competitor). *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE ch. 6 (5th ed. 2016).

12. Section 2 punishes "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." 15 U.S.C. § 2 (2018).

13. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

14. *See* HOVENKAMP, *supra* note 11, § 6.2b, at 359–60.

15. *Id.* § 6.2a, at 357.

16. I ABA SECTION OF ANTITRUST L., ANTITRUST LAW DEVELOPMENTS 70 (Jonathan I. Gleklen et al. eds., 7th ed. 2012) (noting that "direct proof has provided the basis for findings of substantial anticompetitive effects in some prominent cases").

17. *In re* Nexium (Esomeprazole) Antitrust Litig., 968 F. Supp. 2d 367, 389 n.19 (D. Mass. 2013)*; see also, e.g.*, *In re* Aggrenox Antitrust Litig., 94 F. Supp. 3d 224, 246 (D. Conn. 2015) ("[W]hen direct evidence is available that a party profitably charges supracompetitive prices, the existence of market power can be established from that fact alone.").

18. Michael A. Carrier, *Sharing, Samples, and Generics: An Antitrust Framework*, 103 CORNELL L. REV. 1, 22 (2017); *see* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007).

19. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

owner of the only other facility.[20] The Supreme Court found that the monopolist was willing to forgo ticket sales and consumer goodwill in order to harm its smaller competitor.[21] Although monopolization claims often are brought by competitors, consumers also can sue for harm caused by exclusionary conduct.

B. False Advertising

The goal of false advertising law is to protect consumers and competitors from decisions distorted by deception. When consumers make purchasing choices based on sellers' false or misleading claims, they lose and so do honest competitors.[22] There are multiple possible enforcers of false advertising law. Federal and state regulators can sue businesses for deceptive advertising under the Federal Trade Commission Act and similar state "little FTC" acts. Businesses can sue other businesses under the federal Lanham Act, which covers trademark infringement and false advertising. And consumers can bring state-law claims under consumer protection laws barring deceptive trade practices.[23]

Public enforcers have highly limited resources and responsibility for entire markets. They tend to focus on outright scams and on situations in which no single competitor suffers so greatly that it has an incentive to sue. As a result, the most relevant body of law for the false advertising/antitrust interface is the Lanham Act, which allows private parties to challenge the use in commerce of

> any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . 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.[24]

Courts have added doctrinal flourishes to this broad language. Lanham Act plaintiffs must suffer injury to their interests as commercial entities, which means that consumers don't have standing, but victims of disparagement may even if they aren't direct competitors.[25] Courts have also interpreted the

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20. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608–11 (1985).

21. *Id.* at 608.

22. Of course, the details can be contentious, raising questions like: What counts as deceptive? When is failure to disclose deceptive? How many consumers need be diverted for a remedy to be appropriate? But the core commitment to honesty in material claims is clear.

23. *See generally* REBECCA TUSHNET & ERIC GOLDMAN, ADVERTISING & MARKETING LAW: CASES AND MATERIALS ch. 3 (5th ed. 2020) (providing an overview of varying sources of regulatory authority).

24. Lanham Act § 43(a)(1)(B), 15 U.S.C. § 1125(a)(1)(B) (2018).

25. Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 131–32, 138 (2014).

statute to make clear that the false or misleading advertising must be material—likely to influence a purchasing decision—and must deceive or be likely to deceive a substantial segment of the relevant audience.[26] When advertising is explicitly (also known as literally) false, courts presume that it is deceptive. And when advertising is ambiguous but potentially misleading, courts generally require the plaintiff to show that a substantial number of consumers receive a false message, usually by a consumer survey.[27] Lanham Act liability is strict; even an advertiser's good-faith belief in the truth of its claims is no defense.[28]

C. Comparative Assessment

The primary goal of antitrust law is to enhance consumer welfare by targeting anticompetitive conduct. The primary goal of false advertising law is to provide consumers with truthful information so that rivals can compete on the merits. Both can be seen as variants of a general idea of "unfair competition." But the mechanisms of the unfairness targeted differ.

On the most general level, there is a higher bar to the application of antitrust law, as harm is required to the market as a whole. False advertising, in contrast, can occur even if just an individual competitor is injured (along with the deceived consumers who are both the mechanisms by which harm is inflicted on a competitor and victims in their own right). Reciprocally, there are significant barriers to proving a monopolization claim. Demonstrating monopoly power involves the challenges of defining a market and showing power within that market. And showing exclusionary conduct also presents hurdles, such as rebutting procompetitive justifications the defendant offers. When these stringent requirements are satisfied, antitrust comes down hard on the defendant, who is potentially liable for treble damages, attorneys' fees, and costs.[29]

False advertising is more granular than antitrust law in protecting against not only structural harms to the market, but also economic injuries to

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

27. *See, e.g.*, Design Res., Inc. v. Leather Indus. of Am., 789 F.3d 495, 501 (4th Cir. 2015); C.B. Fleet Co., Inc. v. SmithKline Beecham Consumer Healthcare, L.P., 131 F.3d 430, 434 (4th Cir. 1997).

28. *See, e.g.*, AMCO Ins. v. Inspired Techs., Inc., 648 F.3d 875, 882 (8th Cir. 2011) (noting that neither knowledge nor intent is an element of false advertising under the Lanham Act); Vector Prods., Inc. v. Hartford Fire Ins., 397 F.3d 1316, 1319 (11th Cir. 2005) (per curiam) ("It is well-settled that no proof of intent or willfulness is required to establish a violation of Lanham Act § 43(a) for false advertising. Rather, Section 43(a) provides a strict liability tort cause of action." (footnote omitted) (citations omitted)); Castrol Inc. v. Pennzoil Co., 987 F.2d 939, 944 (3d Cir. 1993) (holding that even false statements made with a reasonable, but wrong, basis are actionable).

29. 15 U.S.C. § 15.

individual competitors. It does so even if other competitors remain and the particular competitor (though not unscathed) survives. For consumers, protection against false advertising serves a number of goals that could be described in general terms as "consumer welfare." Harms from false advertising can be economic, when deceived consumers are deprived of the benefits of their bargains. The harms also can be physical, when safety or health characteristics are involved. And they can be moral, when an advertiser deliberately deceives and thus disrespects the autonomy of consumers.[30]

False advertising can also harm markets and competitors in a more general way. Consumers expecting false advertising are likely to distrust even truthful claims. The false advertiser thus erects barriers to the success of truthfully advertising competitors, creating a "market for lemons."[31] Bad advertising, that is, is likely to drive out good. This principle is generally accepted (indeed, it won George Akerlof, who coined the phrase "market for lemons," a Nobel prize in economics). False advertising law implements the idea that promoting the flow of truthful information can prevent a destructive cycle of consumer cynicism and lower investment in truthful claims.[32] As one court recently explained, "the harm the Lanham Act addresses is one shared by all competitors in the market—the encroachment on the ability to compete in a fair market."[33] This makes it even more puzzling that courts in antitrust cases have explicitly endorsed the contrary proposition.

III. ANTITRUST'S FALSE ADVERTISING FAILURE

For several reasons, antitrust courts have not sufficiently recognized the harms presented by false advertising. One reason seems to be the perceived comparative ease of alleging false advertising claims, which makes courts hesitant to allow such allegations to form the basis for antitrust claims. A related rationale is antitrust's powerful remedies that include treble damages, or three times the damages suffered. Courts' hesitation to award such damages often affects their substantive analysis of whether an antitrust violation has occurred.

This skepticism of antitrust claims based on false advertising, however, is fundamentally dishonest when it maintains, as too many cases do, that false advertising is never or rarely a competitive concern. This rationale for

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30. *See, e.g.*, TUSHNET & GOLDMAN, *supra* note 23, ch. 4; Lee Goldman, *The World's Best Article on Competitor Suits for False Advertising*, 45 FLA. L. REV. 487, 494 (1993).

31. *See generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (analyzing "the interaction of quality differences and uncertainty" in the labor market and "the economic costs of dishonesty").

32. *See, e.g.*, Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 513 (1981).

33. Boltex Mfg. Co. v. Ulma Piping USA Corp., No. 4:17-CV-01400, 2020 WL 598284, at *6 (S.D. Tex. Feb. 7, 2020).

excluding false advertising from antitrust coverage flies in the face of the Supreme Court's longstanding acknowledgement "[t]hat false or misleading advertising has an anticompetitive effect, as that term is customarily used."[34]

The idea that antitrust's powerful remedies should be reserved for the worst cases is not inherently dubious. But greater honesty about that rationale would allow courts to confront directly the question of when false advertising is poisonous to competition. Even accepting that most instances of false advertising do not violate antitrust law, it doesn't make sense to immunize conduct when monopolists controlling the market entrench their power by engaging in false advertising. And as a baseline principle, the presence of one set of remedies is not preclusive of another set when the facts implicate both bodies of law.[35]

Cases addressing the false advertising/antitrust intersection fall into three groups. The first category completely absolves false advertisers of antitrust liability. The second assumes that false advertising causes *de minimis* harm. The third offers a "case by case" approach. This Part introduces and critiques the tests.

A. *ABANDONED ANALYSIS*

The U.S. Courts of Appeals for the Fifth and Seventh Circuits offer examples of the first approach: an abandonment of antitrust analysis. These courts have reasoned that false statements enhance competition in advertising markets and that antitrust claims based on disparaging rivals are not actionable. For example, the Seventh Circuit in *Sanderson v. Culligan International Co.* stated bluntly that "[c]ommercial speech is not actionable under the antitrust laws."[36] In particular, the court asserted that "[a]ntitrust law condemns practices that drive up prices by curtailing output" but that "[f]alse statements about a rival's goods do not curtail output in either the short or the long run," but instead "just set the stage for competition in a different venue: the advertising market."[37]

Similarly, the Fifth Circuit in *Retractable Technologies v. Becton Dickinson* drew a distinction between "business torts, which harm competitors, and truly anticompetitive activities, which harm the market," and stated that "absent a demonstration that a competitor's false advertisements had the potential to

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34. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 n.9 (1999) (citing *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 79–80 (1934), which held a false advertisement to be unfair competition).

35. *See, e.g.*, POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 112–13 (2014) (holding that the Lanham Act and Food, Drug, and Cosmetic Act both apply to regulate advertising claims about food and finding that a Lanham Act claim is not precluded even if the FDA has also issued regulations about the relevant advertising); *see infra* Section IV.A.2 (discussing antitrust cases based on non-antitrust causes of action).

36. Sanderson v. Culligan Int'l Co., 415 F.3d 620, 624 (7th Cir. 2005).

37. *Id.* at 623.

eliminate, or did in fact eliminate, competition, an antitrust lawsuit will not lie."[38] The court found that the plaintiff "may have lost some sales or market share because of [the defendant's] false advertising, but it remains a vigorous competitor" and did not face "barriers to entry" from the conduct.[39]

The court endeavored to support its conclusion that "false advertising alone hardly ever operates in practice to threaten competition" based not only on a "dearth of Fifth Circuit precedent" but also on "two other considerations."[40] First, it relied on *Culligan* to assert that "false or misleading advertising generally sets competition into motion."[41] And second, it found it "difficult to determine whether such false statements induced reliance by consumers and produced anticompetitive effects, or whether the buyer attached little weight to the statements and instead regarded them as biased and self-serving," which might occur where "the relevant consumers are sophisticated."[42]

The Fifth and Seventh Circuits correctly conclude that some (in fact, many) instances of false advertising will not violate antitrust law and that the receivers of the information will have different abilities to assess it. But the answer to these scenarios is not to abandon antitrust analysis. The fact that most acts of false advertising—or arson or bribery—don't violate the antitrust laws says nothing about how to identify the subset that could.

By engaging in deception that resembles exclusionary conduct, a company—in particular, a monopolist—could entrench its position in the market. There is not, in fact, a "rigid distinction" "between business torts, which harm competitors, and truly anticompetitive activities, which harm the market," since competitors make a market.[43] For one thing, many false statements are made about the defendant's *own* products; a false superiority claim, like AT&T's false "unlimited" data promise, can discourage consumers from trying *any* competitor. For another, many false claims can readily be repurposed when a new competitor appears. Further undermining the Seventh Circuit's rationale, deceptive disparaging statements could readily depress demand for the criticized product, thereby reducing output and increasing price: classic antitrust concerns.[44]

38. Retractable Techs., Inc. v. Becton Dickinson & Co., 842 F.3d 883, 895 (5th Cir. 2016).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Shubha Ghosh, *The Antitrust Logic of Biologics*, 2018 U. ILL. L. REV. ONLINE 46, 53 (quoting *Retractable Techs.*, 842 F.3d at 895).

44. *See* Kevin S. Marshall, *Product Disparagement Under the Sherman Act, Its Nurturing and Injurious Effects to Competition, and the Tension Between Jurisprudential Economics and Microeconomics*, 46 SANTA CLARA L. REV. 231, 253 (2006) (finding it "short-sighted to conclude that the intentional dissemination of false information about a rival's product does not constitute a

The deeper problem is the premise that misleading advertising "generally sets competition into motion."[45] This reasoning makes "competition" an empty term and specifically erases the governing concept of *unfair* competition. Burning a building down generally sets firefighters into motion and can trigger insurance payouts and new construction, but we don't think that makes arson productive for the overall economy. At best, misleading advertising forces competitors to fight back on unfair ground, expending resources defending truth against falsehood instead of investing them elsewhere, harming their overall ability to compete. The Supreme Court has reasoned similarly: False and misleading advertising harms competition because it can confuse consumers and make it harder for them to believe any claim they encounter.[46] Furthermore, as one of us has written elsewhere, "corrective advertising, especially by an inherently-less-credible-because-self-interested competitor, is unlikely to fix all the damage of false advertising."[47] That is why false advertising law recognizes that self-help is not a sufficient remedy and intervenes on the side of the victim.

The Fifth and Seventh Circuits also expressed concerns that defendants shouldn't be punished just for promoting their own products.[48] We agree, and so does false advertising law, which requires showings of falsity and materiality, and which has developed a number of doctrines identifying the type of proof required in particular situations.

The Fifth Circuit in *Retractable Technologies* additionally reasoned that advertising that was "wrong, misleading, or debatable" was "indicative of competition on the merits," as opposed to, for example, bribery.[49] But by definition, false advertising is *not* competition "on the merits" because it is

restraint of trade" since it "restrains the autonomous forces of supply and demand, and is therefore injurious to competition").

45. *Retractable Techs.*, 842 F.3d at 895.

46. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 n.9 (1999); *see id.* at 773–74 (providing that "reducing the occurrence of unverifiable and misleading . . . advertising" would promote competition).

47. Rebecca Tushnet, *Fifth Circuit Reverses Multimillion-Dollar Antitrust Verdict Based on False Advertising, Remands*, TUSHNET.COM (Dec. 6, 2016), https://tushnet.com/2016/12/06/fifth-circuit-reverses-multimillion-dollar-antitrust-verdict-based-on-false-advertising-remands-2 [https://perma.cc/7KVC-GNEY]; *see* Akerlof, *supra* note 31, at 495 (explaining that "dishonest dealings tend to drive honest dealings out of the market"); Stephan Lewandowsky, Ullrich K.H. Ecker, Colleen M. Seifert, Norbert Schwarz & John Cook, *Misinformation and Its Correction: Continued Influence and Successful Debiasing*, 13 PSYCH. SCI. PUB. INT. 106, 124 (2012) (discussing the many difficulties of correcting misinformation); *cf.* Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333, 345 n.21 (2013) (noting that studies of corrective advertising ordered as a remedy for false advertising "typically show small but non-zero effects on consumer beliefs" (citations omitted)).

48. *E.g.*, Sanderson v. Culligan Int'l Co., 415 F.3d 620, 623 (7th Cir. 2005); Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 526 (5th Cir. 1999).

49. *Retractable Techs.*, 842 F.3d at 894 (quoting *Stearns*, 170 F.3d at 523–25).

deceptive about the merits. And on the Fifth Circuit's theory, if competitors also have the ability to engage in bribery, antitrust should not worry about that either—it is all fair game, and the parties compete on their ability to most effectively seduce or bribe officials (or burn down each other's factories).

A better conclusion would be that both bribery and false advertising are unlawful and that both lead to decisions based on something other than the actual merits of the parties' products. Stated differently, both bribery and false advertising undermine trust and corrode the actual mechanisms of marketplace competition.

The strongest distinction between bribery and false advertising involves an epistemological intuition: Factfinders might be wrong about whether false advertising occurred, and if they were wrong, then they might block truthful advertising, which is good for competition. Of course, factfinders might also be wrong about whether bribery occurred, but if they were wrong, it is less likely they would have deterred procompetitive conduct. Given recent Supreme Court precedents, one could characterize many bribery situations as businesses merely giving their opinions to regulators on matters of policy and engaging in First Amendment-protected political speech through money, but that is not (yet) accepted by the courts.[50] Still, the intuition remains that the competitive consequences of factfinders being wrong about false advertising are more dangerous than those accompanying errors about bribery.

We think this concern is vastly overstated. Because false advertising already is illegal, there are well-recognized mechanisms for identifying falsifiable and false statements in advertising. Moreover, this concern should be confronted directly, rather than being buried in statements about the good that false advertising can do.[51] In other areas of antitrust law, the idea that there are procompetitive reasons for conduct does not immunize that conduct from antitrust scrutiny. False advertising is anticompetitive conduct that is theoretically confusable with procompetitive truthful advertising. The solution is to work on minimizing that confusion, not to abandon the field.

50. For example, the Court narrowed the "official acts" that can justify a bribery charge so that arranging a meeting only if a constituent agrees to pay is not itself an "official act." McDonnell v. United States, 136 S. Ct. 2355, 2372 (2016); *cf.* McCutcheon v. FEC, 572 U.S. 185, 227 (2014) (holding that "corruption" requires a quid pro quo exchange); Fred Wertheimer, *Symposium:* McDonnell *Decision Substantially Weakens the Government's Ability to Prevent Corruption and Protect Citizens*, SCOTUSBLOG (June 28, 2016, 12:38 PM), https://www.scotusblog.com/2016/06/symposium-mcdonnell-decision-substantially-weakens-the-governments-bbility-to-prevent-corruption-and-protect-citizens [https://perma.cc/2K8K-5TYZ].

51. The term "falsifiable" signifies that it is capable of being proved false, as opposed to a statement that is so vague or ambiguous that it cannot reasonably be deemed either true or false. An unfalsifiable statement is often labeled "puffery," which is nonactionable. *See, e.g.*, Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997).

B. De Minimis Approach

The second approach, represented by the Second, Sixth, Ninth, Tenth, and Eleventh Circuits, applies a presumption that the exclusionary effects of false advertising are *de minimis*.[52]

1. Introduction: The Treatise and Its Framework

The *de minimis* framework originated in the leading antitrust treatise, *An Analysis of Antitrust Principles and Their Application*.[53] First introduced in 1978 by Philip Areeda and Donald Turner and continued by Areeda and Herbert Hovenkamp, the treaty's influence is unmatched.[54] Justice Breyer has remarked that "most practitioners would prefer to have two paragraphs of Areeda's treatise on their side than three Courts of Appeals or four Supreme Court Justices."[55] "Courts commonly quote portions of the treatise at length . . . . And courts will often explicitly adopt propositions offered by the treatise as law."[56]

The skepticism of antitrust's application to false advertising claims traces back to the 1978 version of the treatise, written at a time before courts had developed robust doctrines establishing the boundaries of Lanham Act false advertising.[57] In considering the relationship between false advertising and antitrust, the treatise highlights the "key problem" presented by "the difficulty of assessing the connection between any improper representations and the speaker's monopoly power."[58] It posits that the "more typical deception defendant is the smaller firm or recent entrant that makes its false claims, collects the payments from deceived consumers, and then disappears or becomes judgment-proof."[59] In contrast, the "false claim leading to or perpetuating durable market power by a firm capable of being sued is much

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52. *See* Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Lab'ys, 850 F.2d 904, 916 (2d Cir. 1988); Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 370 (6th Cir. 2003); Am. Pro. Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Pro. Publ'ns, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997); Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 762 F.3d 1114, 1126–28 (10th Cir. 2014); Duty Free Ams., Inc. v. Estée Lauder Cos., 797 F.3d 1248, 1268–69 (11th Cir. 2015).

53. *See* 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶¶ 738c, 739 (1978).

54. *See* Rebecca Haw Allensworth, *The Influence of the Areeda–Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust*, 100 IOWA L. REV. 1919, 1921 (2015).

55. Justice Stephen Breyer, *In Memoriam: Phillip E. Areeda*, 109 HARV. L. REV. 889, 890 (1996).

56. Allensworth, *supra* note 54, at 1922 (footnote omitted).

57. AREEDA & TURNER, *supra* note 53, ¶ 738c, at 281 (finding a "serious de minimis test" to be "[e]ssential" and "go[ing] further" to "suggest that [disparagement] claims should presumptively be ignored").

58. 3B AREEDA & HOVENKAMP, *supra* note 6, ¶ 782b, at 351.

59. *Id.*

less likely."[60] Relying on these claims, the treatise then concludes that "[b]ecause the likelihood of significant creation of durable market power is so small in most observed instances—and because the prevalence of arguably improper misrepresentation is so great—the courts would be wise to regard misrepresentations as presumptively de minimis."[61]

Before analyzing the treatise's suggested test, it is worth noting that its description of the "typical deception defendant" is not reflected in the case law. Although public enforcers often go after such fly-by-night entities, they also successfully challenge household names like Kellogg and AT&T.[62] Lanham Act false advertising cases are rarely brought against judgment-proof defendants and, in the cases we are concerned with, are brought against monopolists or plausible attempted monopolists—entities distinct from those that concern the treatise—whose market power and durability themselves make their claims more credible and thus more harmful than the claims of unknown market entrants.[63] The treatise accurately describes a set of fraudsters, and we agree that those actors are not good targets for antitrust law. But it does not capture the full scope of consumer deception—nor, in all likelihood, the vast majority of damages done by false advertising. AT&T can take a lot more money from consumers than a small dietary supplement seller that operates only until discovered.[64]

The treatise (again, beginning in 1978) suggests that a plaintiff can rebut the *de minimis* presumption by showing that the alleged anticompetitive conduct is: (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offsets by rivals.[65] Although it is appropriate to ensure that the vast majority of false advertising, perpetuated by firms lacking market

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60. *Id.*

61. *Id.*

62. *See, e.g.*, Complaint for Permanent Injunction and Other Equitable Relief, *supra* note 3, at 1–2; *Kellogg Settles FTC Charges that Ads for Frosted Mini-Wheats Were False*, FED. TRADE COMM'N (Apr. 20, 2009), https://www.ftc.gov/news-events/press-releases/2009/04/kellogg-settles-ftc-charges-ads-frosted-mini-wheats-were-false [https://perma.cc/R7UJ-WVHP].

63. *See generally* Anne L. Roggeveen & Gita Venkataramani Johar, *Perceived Source Variability Versus Familiarity: Testing Competing Explanations for the Truth Effect*, 12 J. CONSUMER PSYCH. 81 (2002) (discussing strong evidence that repetition of an advertising message increases belief).

64. *See* Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211, 214–15 (2019) (noting that deceptive conduct by major entities such as Amazon, Facebook, and credit card companies substantially harms consumers, with these harms likely underestimated).

65. Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 371 (6th Cir. 2003) (citing AREEDA & TURNER, *supra* note 53, ¶ 738a, at 278–79). Courts are not consistent on whether a plaintiff must show each of the six factors. *See, e.g.*, *id.* ("[W]e decline to consider each element or hold that all elements must be satisfied to rebut the *de minimis* presumption.").

power, does not automatically violate antitrust law, the *de minimis* approach overshoots the mark by making it nearly impossible to find antitrust liability even for monopolists bringing about substantial competitive harm. Below, we directly address the concern that animates the test—that most false advertising is not carried out by firms with market power—by focusing on false advertising by firms with monopoly power or a real threat of becoming monopolists.

Although courts have not explicitly invoked it to defend their test, the *de minimis* approach's best theoretical defense comes from an advertising model in which what matters to consumers is merely the fact of advertising rather than its content, meaning that consumers don't actually believe specific factual claims in advertising.[66] In the content-is-meaningless account, the fact that the advertiser is spending money touting its products is credible evidence that the advertiser believes it has something worth consumers' money, and that general assertion is the only thing consumers are likely to rely on.[67] In this theory, extensive advertising is like the biologically costly peacock's tail that demonstrates reproductive fitness to potential mates: Costly advertising evidences marketplace fitness, with the specific claims just window dressing for consumers. If this were true, then we could indeed expect that the effects of false advertising would be *de minimis.*

The content-indifferent approach, however, contradicts what courts, advertisers, and marketing researchers think about the power of advertising generally. Advertisers don't just buy ad space and tell consumers how much they spent on it. Instead, they routinely focus on product features that consumers care about, from price to health and safety, revealing their own expectations that factual claims in advertising influence consumers.[68] Advertisers carefully test marketing claims, and a persuasive claim can drive changes in market share.[69] In fact, false advertising/antitrust claims often arise in highly concentrated markets with consumers who, despite a generally

66. *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, 8 (1992); Phillip Nelson, *Advertising as Information*, 82 J. POL. ECON. 729, 730–31 (1974); Phillip Nelson, *The Economic Consequences of Advertising*, 48 J. BUS. 213, 214 (1975).

67. BeVier, *supra* note 66, at 10–11.

68. *See* Beales et al., *supra* note 32, at 492–95; Goldman, *supra* note 30, at 491–94; Roger E. Schechter, *Additional Pieces of the Deception Puzzle: Some Reactions to Professor BeVier*, 78 VA. L. REV. 57, 68–79 (1992); *see also* Schick Mfg., Inc. v. Gillette Co., 372 F. Supp. 2d 273, 278 (D. Conn.) ("Because of the expense of television advertising, companies have a very short period of time in which to create a 'reason to believe' and are generally forced to pitch only the key qualities and characteristics of the product advertised."), *modified*, No. 3-05-cv-174 (JCH), 2005 WL 8168764 (D. Conn. June 20, 2005); *id.* at 286–87 ("Gillette's employees testified that television advertising time is too valuable to include things that are 'unimportant.'").

69. *See, e.g.*, Novartis Consumer Health, Inc. v. Johnson & Johnson–Merck Consumer Pharms. Co., 290 F.3d 578, 584, 595–96 (3d Cir. 2002) (detailing how the new antacid product claiming nighttime superiority has quickly gained market share).

high level of sophistication, lack the ability to verify technical claims. For example, product manufacturers who pay intermediaries to put promotional material in grocery stores care very much about how well the stores implement the promotions, but cannot necessarily perform nationwide audits themselves, making them vulnerable to misrepresentations about competitors' performance.[70]

2. Specific Problems with the Multifactor Test

Not only does the *de minimis* approach conflict with false advertising law, but the individual factors themselves also are not justified, as they are disconnected from the ways in which false advertising does harm. As we discuss the elements of the *de minimis* approach, we will explain why false advertising law's simpler framework accommodates the relevant concerns without discounting the damage false advertising can do.

The first factor requires the advertising to be "clearly false." Although antitrust courts have never had to explain exactly what they mean by that factor, it seems to be something like "not capable of some innocent interpretation."[71] But false advertising law has long recognized that statements that are misleading—literally true[72] or ambiguous, but which induce consumers to reach false conclusions—are actionable.[73] It makes sense for false advertising law to cover both literally false and literally true but

70. *See* Insignia Sys., Inc. v. News Am. Mktg. In-Store, Inc., 661 F. Supp. 2d 1039, 1049–53 (D. Minn. 2009).

71. In theory, it could also mean something like "false or misleading by clear and convincing evidence," but that's an awkward way to specify a quantum of evidence, and courts have not provided a reason for requiring a higher standard of proof for antitrust claims based on false advertising.

72. For example, the truthful statement "BMW vehicles passed their emissions tests" implies that their emissions were within legal limits, but this implication is false when BMW designed its vehicles to pass the tests while otherwise emitting unlawful amounts of pollutants. *Cf. Volkswagen to Spend up to $14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles*, FED. TRADE COMM'N (June 28, 2016), https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating [https://perma.cc/DK2Z-KTDH].

73. All three types of advertising regulation (FTC/state regulators, competitor Lanham Act claims, and state consumer protection law allowing consumer suits) prohibit both false and misleading claims. *See, e.g.*, Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1260–61 (11th Cir. 2004) (applying the Lanham Act); FTC v. Roca Labs, Inc., 345 F. Supp. 3d 1375, 1384–85 (M.D. Fla. 2018) (following usual FTC practice of alleging "false or misleading" claims); Hoang v. Reunion.com, Inc., No. C-08-3518 MMC, 2010 WL 1340535, at *5 (N.D. Cal. Mar. 31, 2010) ("Historically, many states have enacted consumer protection laws prohibiting the dissemination of false or misleading statements made in connection with the advertising of products or services, and have not required the plaintiff to prove actual reliance on the false or misleading statement, but, rather, to prove that the false or misleading statement is, objectively, the type of statement likely to deceive a reasonable consumer."); *cf.* 15 U.S.C. §§ 52, 55 (2018) (defining "false advertisement" for "food, drugs, devices, services, or cosmetics" as any advertisement that is "misleading in a material respect").

misleading claims. Claims that mislead a substantial number of consumers can cause the same kinds of harm as literally false statements. In fact, the literature shows that implications can be *more* persuasive than literal statements, even when they convey the same message to consumers: by making the relevant inferences, consumers essentially persuade themselves.[74] Indeed, the Supreme Court has specifically recognized that confusing and misleading advertising can harm competition, both by distorting consumer decisions and by clouding the market generally, eroding consumers' willingness to rely on advertising.[75]

The factor of clear falsity seems to be motivated by the concern that courts should not impose antitrust liability unless they are absolutely certain it is justified. The treatise worries that "distinguishing false statements on which buyers do, or ought reasonably to, rely from customary puffing is not easy."[76] But 70 years of Lanham Act precedents (and an even longer record of FTC enforcement) establish that false advertising law maintains a robust doctrine of puffery that excuses claims that are too vague or multivalent to be falsifiable, while identifying claims that are capable of being proven false. When an advertiser makes a factual, falsifiable claim, that claim should be true, and if it is not, the advertiser proceeds at its peril.

Especially in combination with the other factors, the first factor works to preclude liability if there is any way the defendant can spin its advertising, regardless of how the relevant consumers actually understood the message. It is a mistake, however, to ignore how the market in fact reacted to the advertising. If we are hesitant to impose antitrust liability, we should choose a limiting principle focused more on the actual market effects than on the difference between that which is "clearly" false and that which is misleading.

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74. "Consumers are less likely to argue against associations they came up with themselves, and more likely to remember and act on them." Edward F. McQuarrie & Barbara J. Phillips, *Indirect Persuasion in Advertising: How Consumers Process Metaphors Presented in Pictures and Words*, ASS'N FOR CONSUMER RSCH., https://www.acrwebsite.org/web/acr-content/749/indirect-persuasion-in-advertising-how-consumers-process-metaphors-presented-in-pictures-and-words.aspx [https://perma.cc/LW8V-8J3D] (summarizing Edward F. McQuarrie & Barbara J. Phillips, *Indirect Persuasion in Advertising: How Consumers Process Metaphors Presented in Pictures and Words*, J. ADVERT., Summer 2005, at 7); Alan G. Sawyer, *Can There Be Effective Advertising Without Explicit Conclusions? Decide for Yourself*, *in* NONVERBAL COMMUNICATION IN ADVERTISING 159, 170 (Sidney Hecker & David W. Stewart eds., 1988) ("Research . . . offers strong evidence that audience members will spontaneously strive to make inferences and conclusions under certain conditions. . . . [A]dvertising audiences are also very likely to 'complete' ambiguous advertising statements or claims. Under conditions [where consumers aren't paying extremely careful attention], . . . subjects tended to make false conclusions . . . which, if the advertiser could or should be considered as the cause of the incorrect conclusion, would be judged deceptive." (footnote omitted) (citations omitted)).

75. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 778 (1999) (noting the "procompetitive effect" of "preventing misleading or false claims that distort the market").

76. 3B AREEDA & HOVENKAMP, *supra* note 6, ¶ 782d, at 356.

The law of false advertising itself strikes an appropriate balance in requiring a showing of falsity or misleadingness—both of which can be shown by a preponderance of the evidence—to a substantial number of reasonable consumers.

The second factor requires the false advertising to be "clearly material." Again, it's not entirely clear what this means; it could be something like "material to every consumer." This is another example of antitrust stepping in with its own formulation of a test that false advertising law has already developed. The ordinary standard for materiality in false advertising law provides that the fact at issue must be one (like a medication's effectiveness or price) that reasonable consumers would consider relevant to purchase decisions.[77] Materiality focuses on whether a claim is likely to influence a *reasonable* consumer's decision, not whether *every* consumer's behavior is changed as a result.[78] False advertising law offers a definition of "reasonable" consumers as ordinary consumers entitled to their preferences, whether those preferences are rational or not.[79] And false advertising law makes clear that not every consumer needs to be affected for there to be serious competitive injury.[80] Indeed, it's easy to imagine scenarios in which competition could be suppressed particularly effectively by targeting specific subgroups, such as price-sensitive consumers (as AT&T did with its false claims), early adopters, or risk-averse consumers.

Another reason why clear materiality is not needed is that false advertising already has a harm causation requirement. A plaintiff is required to show that they suffered (or is likely to suffer) a real injury from the false

77. *See, e.g.*, U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 922 (3d Cir. 1990) (requiring that misrepresentations in advertisements be "likely to influence the purchasing decision[s]" of the public to satisfy the materiality requirement (quoting Toro Co. v. Textron, Inc., 499 F. Supp. 241, 251 (D. Del. 1980))); AT&T Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1428 n.9 (3d Cir. 1994) (holding that materiality should be assessed from the consumer's perspective).

78. *See* Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305, 1345 (2011) ("Materiality is an intuitive part of harm, because harm only comes when there is a causal link between the falsehood and consumers' behavior. Materiality is now generally enumerated as a separate requirement in the more elaborate modern multifactor test for false advertising." (footnote omitted)).

79. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 389 (1965); *cf.* Benton Announcements, Inc. v. FTC, 130 F.2d 254, 255 (2d Cir. 1942) (per curiam) ("[P]eople like to get what they think they are getting, and courts have steadfastly refused in this class of cases to demand justification for their preferences. Shoddy and petty motives may control those preferences; but if the buyers wish to be snobs, the law will protect them in their snobbery.").

80. Most strikingly, courts routinely find false advertising when 15 percent or more of consumers are deceived (net of a control group not exposed to the accused advertising); there is no required percentage of deception, but it is clear that deceiving a majority of the relevant consumers is not required for liability. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:193 (5th ed. 2021).

advertising, though that injury need not be precisely quantifiable.[81] If there was more than a trivial injury from the false advertising, it naturally follows that consumers were in fact deceived by the falsity: They acted on it.[82] In short, an additional requirement that the false advertising be "clearly material" is not necessary.

The third factor provides that the false advertising must be "clearly likely to induce reasonable reliance." On its face, such a requirement may sound justifiable. But it duplicates the materiality factor while overemphasizing the fraud-like idea of "reasonable" reliance. Consumers are not required to treat advertising like the testimony of a hostile witness, parsing each statement for small ambiguities and investigating each one.[83] They need not do this because hundreds of years of history have shown that they don't and won't treat ads with that level of suspicion.[84] As a result, false advertising law has long recognized that protecting consumers from deception requires a standard other than that appropriate for a lawyer in an adversarial process. And while there are reasons that consumers might disbelieve advertising, even about factual and material claims, there is no reason to presume such disbelief. Once again, a requirement to show actual harm from the false advertising more directly addresses the question of whether the false advertising worked.

Fourth, the false advertising must be directed to buyers without knowledge of the subject matter. This, however, is just a reason that consumers might believe claims made to them. There's no need for a separate requirement. If a statement is false or misleading, material, and actually deceived consumers, their knowledge of the subject matter demonstrably was not enough to protect them from deception.[85] For example, in a recent false

81. *See, e.g.*, Groupe SEB USA, Inc. v. Euro-Pro Operating LLC, 774 F.3d 192, 204 (3d Cir. 2014) (accepting lost control of reputation and lost goodwill caused by false comparative advertising as irreparable harm); PBM Prods., LLC v. Mead Johnson & Co., No. 3:09-CV-269, 2010 WL 957756, at *1 (E.D. Va. Mar. 12, 2010) (evidence of harm to goodwill and lost market share resulted in $13.5 million in damages).

82. Again, one could argue that there is residual uncertainty: Maybe the consumers did not really rely on the false advertising and the harm shown by the plaintiff resulted from something else. But if courts seek to impose a clear and convincing standard on false advertising/antitrust cases, they should do so outright, and explain why the ordinary preponderance of the evidence standard is unjustified or why factfinders shouldn't be allowed to make causation judgments based on the evidence before them.

83. *See, e.g.*, Am. Home Prods. Corp. v. FTC, 695 F.2d 681, 689 (3d Cir. 1982) (declining to require ordinary consumers to read ads with "sedulous" attention).

84. *See generally* DEE PRIDGEN, RICHARD M. ALDERMAN & JOLINA C. CUARESMA, CONSUMER PROTECTION AND THE LAW § 2:10 (2020) (discussing policymakers' reasons for removing traditional stringent fraud requirements in modern consumer protection law); Jessica M. Choplin, Debra Pogrund Stark & Jasmine N. Ahmad, *A Psychological Investigation of Consumer Vulnerability to Fraud: Legal and Policy Implications*, 35 L. & PSYCH. REV. 61 (2011) (discussing how consumers fall for fraud because they do not carefully evaluate details).

85. One consequence of this factor's disconnection from reality is that courts will interpret it in varying ways. In *Chase Mfg., Inc. v. Johns Manville Corp.*, No. 19-cv-00872-MEH, 2020 WL

advertising case, the sellers falsely advertised to large, experienced oil and gas companies about the characteristics of their carbon steel flanges, which are used to attach parts together in, among other things, oil and gas pipelines. As the court pointed out, the technical claims made by the defendant about its production process were difficult to verify; buyers had no practical alternative to relying on the sellers' representations, which included falsified test results.[86] Again, the underlying intuition might be that correcting the record should be easy with knowledgeable consumers, and thus that antitrust remedies are heavy-handed and unnecessary. But there is no reason to make such an assumption. (Indeed, the flange manufacturer instead doubled down and sent letters to customers accusing the plaintiff of lying; only years later did it admit the truth.[87]) And, as we noted in the previous Section, there are many reasons why misinformation can be hard to correct, especially for new entrants that do not yet have an established base of customers.[88]

Fifth, the false advertising must be continued for prolonged periods. This factor also seems to be a rough proxy for likelihood and amount of harm. But it does not justify duration as an independent requirement and does not offer a metric by which duration could be measured.[89]

Finally, the false advertising must not be readily susceptible of neutralization by rivals. Like other factors, this one duplicates deceptiveness and harm. If the false advertising worked, then it damaged the fair functioning of the marketplace, regardless of what theoretically could have happened. Relatedly, this factor, like the fourth factor, is inconsistent with what we know about the difficulty of correcting a misperception once established.[90] Presuming that neutralization is possible does not reflect marketplace reality.[91]

As a final point, putting the burden on competitors to correct material falsehoods is inconsistent with the basic antitrust concept that incumbents

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1433504, at *13 (D. Colo. Mar. 23, 2020), for example, the court held that buyers in a highly concentrated, sophisticated market lacked firsthand knowledge of the "subject matter" primarily because most of them had never bought the plaintiff's product, and it was not clear that the plaintiff's advertising of its own test results was widely disseminated or that it covered the alleged misrepresentations about asbestos content. The real issue was not that these parties lacked information about the product, but that the plaintiff was a new market entrant and that the defendant's alleged misrepresentations related to product safety and litigation risk, where buyers might be particularly cautious. *Id.*

86. Boltex Mfg. Co. v. Ulma Piping USA Corp., No. 4:17-CV-01400, 2020 WL 598284, at *5 (S.D. Tex. Feb. 7, 2020).

87. *Id.* at *3.

88. *See supra* notes 46–47 and accompanying text.

89. *See Chase*, 2020 WL 1433504, at *14 (finding that misstatements that occurred over a period of months, during the plaintiff's attempt to launch its business, were of sufficient duration).

90. *See supra* notes 46–47 and accompanying text.

91. *See* Maurice E. Stucke, *When a Monopolist Deceives*, 76 ANTITRUST L.J. 823, 829 (2010) ("If product disparagement is ineffectual, why would any firm, much less a monopolist, engage in it?").

shouldn't be able to erect barriers to market entry just to deter rivals. To the contrary, the multifactor test, as well as the no-liability rule, bakes in the idea that it is legitimate for entrants to face additional costs to overcome exclusionary false advertising. False advertising law is designed to take false advertising off the table as a method of competition. It substitutes for countermeasures because, among other things, of the waste and lack of trust such free-for-all systems generate. Antitrust should not undercut false advertising law by presuming that already-illegal conduct is easy to correct.

In short, false advertising doctrine makes clear that none of the factors in the current test justifies a presumption that harm to competition is *de minimis*. The factors and the general assumption that false advertising has only a minimal effect on competition have been influential but not supported by evidence.

C. Case-by-Case Approach

A third group of courts, led by the Third, Eighth, and D.C. Circuits, takes a case-by-case approach in assessing whether the conduct violates antitrust law. For example, the Third Circuit in *West Penn Allegheny Health System, Inc. v. UPMC* explained "that anticompetitive conduct can include . . . making false statements about a rival to potential investors and customers" and that "defamation, which plainly is not competition on the merits, can give rise to antitrust liability, especially when it is combined with other anticompetitive acts."[92] Similarly, the D.C. Circuit in *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC* noted that "fraudulent misrepresentations" are "well within" the recognition that there are multiple forms of anticompetitive conduct.[93] And the Eighth Circuit in *International Travel Arrangers, Inc. v. Western Airlines, Inc.* explained that a concerted campaign by an alleged monopolist involving newspaper advertisements, radio commercials, and a letter to customers was "a form of competition[,] and because competition is the object sought to be preserved by the antitrust laws, [courts] must be careful in drawing a line between fair competition, unfair competition and competition that is so unfair as to rise to the level of an unreasonable restraint of trade."[94]

Courts applying the case-by-case approach have appreciated that anticompetitive conduct takes "too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties."[95] Under this approach, one relevant factor has been the role the conduct plays in a competitor's ability to finance itself. In one case, for example, the Third Circuit determined that false statements to

92. W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 109 & n.14 (3d Cir. 2010).
93. Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C. Cir. 1998).
94. Int'l Travel Arrangers, Inc. v. W. Airlines, Inc., 623 F.2d 1255, 1267 (8th Cir. 1980).
95. *Caribbean Broad.*, 148 F.3d at 1087.

investors about a competitor's financial health caused the rival to pay inflated financing costs on its debt and demonstrated anticompetitive conduct sufficient to survive a motion to dismiss.[96]

A second factor that courts have analyzed under the case-by-case approach is the extent to which false statements lock in decision-making. In *United States v. Microsoft Corp.*, for example, the D.C. Circuit found that deceptive statements to Java-based software developers about the interoperability of Windows-based systems with other platforms resulted in developers' inadvertently producing software compatible only with Windows and demonstrated anticompetitive conduct violating Section 2 of the Sherman Act.[97]

By analyzing conduct as a whole without requiring a showing exceeding *de minimis* harm, the case-by-case approach offers flexibility. This is the most justifiable of the three approaches. But the approach could be strengthened by highlighting relevant factors and drawing on learning from false advertising law.

IV. AN ANTITRUST FRAMEWORK

As the previous Part showed, antitrust could benefit from a new framework for false advertising. The approaches abandoning antitrust liability and applying a *de minimis* analysis are not justified: The law and practice of false advertising is far more consistent with antitrust's own general vision of the marketplace. And the case-by-case evaluation could use development.

The reasons courts have not applied approaches faithful to false advertising are not hard to see. The leading antitrust treatise has worried that "plaintiffs are often less disciplined in making tort-like claims in antitrust suits than in tort suits."[98] Courts also reasonably want to impose requirements that prevent every false advertising case from morphing into an antitrust case. Antitrust analysis could use assistance since the "exclusionary conduct" needed for monopolization doesn't have much content. This Part explains the need for antitrust and offers frameworks that courts can apply to monopolists and those seeking to become monopolists.

A. ANTITRUST'S NECESSITY

False advertising liability alone cannot address the marketwide harms caused by deceptive behavior. This Section first addresses antitrust's comparative advantage for marketwide harms. It then offers examples of antitrust properly targeting conduct that violates other, non-antitrust laws, demonstrating that antitrust's treatment of false advertising is an outlier. It

96. *W. Penn Allegheny*, 627 F.3d at 109–10.

97. United States v. Microsoft Corp., 253 F.3d 34, 76–77 (D.C. Cir. 2001).

98. 3B AREEDA & HOVENKAMP, *supra* note 6, ¶782a, at 345.

concludes by showing that false advertising's remedies cannot fully protect competition on their own.

1. Antitrust's Comparative Advantage

An antitrust-based framework for false advertising claims is necessary because of the unique role that the discipline can play. When companies engaging in false advertising have monopoly power, they possess the ability to harm not only an individual competitor but also the market as a whole. The consequences can be significant, especially for nascent competitors not able to enter the market, as the deception of consumers deprives them of the opportunity to obtain lower prices, more options, or enhanced quality.

One way to understand the harms of false advertising to the market as a whole is revealed by George Akerlof's classic explanation of the market for lemons.[99] As Akerlof explains, in the absence of some way to guarantee the truth of claims about products, such as a used car's quality, consumers reasonably respond by discounting all such claims. This distrust means that producers with actually superior products cannot charge the amount consumers would pay if they believed the superiority claim, which pushes superior (but more expensive to produce) products out of the market.

If truthful advertisers are not able to guarantee their claims, producers unable to compete on their product characteristics suffer. And consumers are harmed by an unattractive (and perhaps even harmful, in the case of false health or safety claims) mix of products. Meanwhile, many false advertising techniques can be readily repurposed for new uses, meaning that a false advertiser can go from success to success in the absence of false advertising liability.[100] Regulation that suppresses false claims—especially where such claims are most likely to have an effect—thus does more than protect individual consumers from fraud. It allows truthful producers to compete on a level playing field. In other words, addressing false advertising protects competition, not just competitors.

The Supreme Court relied on Akerlof's insights when it endorsed the pro-competitive effects of restrictions on false advertising. In *California Dental Ass'n v. FTC*, the Court addressed a dental association's attempts to restrict "false or misleading" advertising that imposed significant limits on advertising

99. Akerlof, *supra* note 31, at 488–90. Akerlof focuses on information asymmetry, but if consumers trusted that producers were constrained to make only truthful claims, the asymmetry would disappear because producers with above-average products would be credible when they said so, and the failure to disclose quality information would itself be a worthwhile signal. As a result, falsity (either explicit or through implication) is a key driver of the degeneration in the market. *See* Beales et al., *supra* note 32, at 505–06, 510–11.

100. *Cf.* Telebrands Corp. v. FTC, 457 F.3d 354, 361 (4th Cir. 2006) (noting that certain falsities may be readily replicable).

"low prices" or other general price claims.[101] The Court rejected the idea that such limits were inherently anticompetitive. Especially where information is hard to evaluate, even broad restrictions with the aim of preventing false advertising can be procompetitive.[102]

When false advertising threatens harms to the market as a whole, antitrust liability offers advantages over false advertising law. For starters, antitrust offers a more powerful toolkit deterring this conduct. Although false advertising law allows recovery of damages (albeit not as a penalty) and disgorgement of the profits from false advertising, courts impose high barriers to disgorgement, including requiring a showing of willfulness. In addition, courts have required plaintiffs to show a robust connection to the harm suffered to receive damages or disgorgement of profits. As a result, courts have denied awards in precisely the cases of concern: where there are a small number of potential competitors and where some of the monopolist's gains from false advertising likely came at the expense of the overall market rather than a single plaintiff, making it difficult to allocate false advertising-based damage awards.[103]

There are two key ways in which antitrust offers more powerful protection against monopolists' false advertising than federal false advertising law: remedies and eligible plaintiffs. First, antitrust offers the more powerful remedies of treble damages and automatic (as opposed to the Lanham Act's exceptional[104]) attorneys' fees that promise to provide robust deterrence against companies considering this behavior. Antitrust also offers injunctive relief preventing the continuation of the conduct. While a Lanham Act false advertising injunction generally is limited to the specific false claims that have been proven, an antitrust injunction could more generally target false advertising and marketwide harm to competition.[105] Antitrust offers a more expansive territorial jurisdiction.[106]

Second, unlike the federal Lanham Act, which denies consumers standing to sue despite the direct harm they suffer from false advertising, antitrust law, importantly, allows customers to challenge the harms they experience from false advertising. State consumer protection laws are limited in important ways, including state-law variation that makes multistate

101. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 783 (1999).

102. *Id.* at 771–73 (noting that customers' access to information in the dental market was limited and the implemented restriction increased the reliability of the information consumers had).

103. *See, e.g.*, Retractable Techs., Inc. v. Becton Dickinson & Co., 842 F.3d 883, 893–97 (5th Cir. 2016).

104. *See* 15 U.S.C. § 1117 (2018).

105. When the FTC sues, courts often recognize that a particular false advertising technique (e.g., false claims of efficacy) can readily be adapted to new products or situations. *See, e.g.*, *Telebrands Corp.*, 457 F.3d at 361–62. With its competition focus, an antitrust injunction could similarly protect against repurposing false advertising to exclude other competitors.

106. 3B AREEDA & HOVENKAMP, *supra* note 6, ¶782a, at 344 & n.1.

consumer class actions all but impossible[107] and restrictions in many states that preclude businesses from bringing claims in their roles as consumers[108] even though businesses are often important customers for the subset of false advertising cases involving monopolists and would-be monopolists. Thus, antitrust provides remedies that would otherwise be unavailable to plaintiffs who were themselves deceived by a monopolist or threatened monopolist's false advertising.

A separate and independently compelling reason to use antitrust where appropriate is that, in antitrust law, it would be possible to consider false advertising as part of an overarching scheme used to harm a competitor, something false advertising law by definition can't do. In fact, the inclusion of this behavior could push the range of conduct over the threshold of antitrust liability. For example, in *In re Suboxone Antitrust Litigation*, the court found that the plaintiff could not demonstrate that its claim that the defendant had refused to participate in a safety program required by the U.S. Food and Drug Administration ("FDA") individually made out a violation of antitrust law.[109] But it found that "a plaintiff can allege a series of actions that when taken together make out antitrust liability even though some of the individual actions, when viewed independently, are not all actionable."[110] Such global assessment can allow consideration of a monopolist software provider's practices of promising "vaporware" that it couldn't deliver to prevent customers from turning to competing software alternatives and of creating fear, uncertainty, and doubt about the competition as part of a larger constellation of anticompetitive activities.[111] As the Third Circuit noted in

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107. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance.").

108. *See, e.g.*, MacDonald v. Thomas M. Cooley L. Sch., 724 F.3d 654, 660–61 (6th Cir. 2013) (noting that the Michigan Consumer Protection Act does not protect against false advertising claims involving commercial purchases).

109. *In re* Suboxone Antitrust Litig., No. 13-MD-2445, 2017 WL 36371, at *7–9 (E.D. Pa. Jan. 4, 2017).

110. *Id.* at *8; *see also, e.g.*, Abbott Lab'ys v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 428 (D. Del. 2006) ("Plaintiffs are entitled to claim that individual acts are antitrust violations, as well as claiming that those acts as a group have an anticompetitive effect even if the acts taken separately do not."); *In re* Gabapentin Pat. Litig., 649 F. Supp. 2d 340, 359 (D.N.J. 2009) ("If a plaintiff can allege that a series of actions, when viewed together, were taken in furtherance and as an integral part of a plan to violate the antitrust laws, that series of actions, as an overall scheme, may trigger antitrust liability."); *In re* Neurontin Antitrust Litig., MDL No. 1479, 2009 WL 2751029, at *15 (D.N.J. Aug. 28, 2009) ("The distinction is between analyzing individual acts or categories of anticompetitive conduct as contrasted with individual theories of liability derived from those acts.").

111. Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295, 1300–01, 1309–20 (D. Utah 1999) (discussing alleged use of vaporware and "fear, uncertainty, and doubt" to harm competitors); *cf.* Robert Prentice, *Vaporware: Imaginary High-Tech Products and Real Antitrust Liability in a Post-Chicago World*, 57 OHIO ST. L.J. 1163, 1172–73 (1996).

LePage's Inc. v. 3M, "courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation."[112]

2. Need for Two Regimes

We suspect that much of the courts' hostility to considering false advertising as part of an antitrust claim comes from the conviction that antitrust remedies are harsh, and that false advertising remedies are thus more appropriate, even for false advertising with anticompetitive effects. This Section shows how this approach is inconsistent with antitrust's treatment of other illegal conduct. Indeed, to the extent that courts want to constrain antitrust's scope to avoid over deterring legitimate behavior, it is illogical to be *less* willing to deter conduct that is already illegal than to deter conduct that is otherwise legal. Although there are some areas (specifically, parts of the telecommunications industry) in which competition is so closely regulated that antitrust has a limited role, that is not true across the wide range of industries where false advertising can be successful in harming competition. Thus, antitrust remedies are desirable even if false advertising remedies are also available.

Antitrust's hostility to false advertising as a basis for liability becomes even more puzzling when we look at the overall legal environment. There is a strong basis in twentieth century Supreme Court precedent for considering deception to be anticompetitive in the antitrust sense. For example, the Supreme Court in *FTC v. Winsted Hosiery Co.* found that false labeling that "deceive[d] a substantial portion of the purchasing public" constituted an "unfair method of competition" because "when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods."[113] The Court also held, in *FTC v. R.F. Keppel & Bro.*, that "[i]t would seem a gross perversion of the normal meaning of the word . . . to hold that the [conduct at issue] is not 'unfair'" when "it [was] clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy."[114]

More broadly, as *Keppel* suggests, there are many examples of courts finding antitrust liability in cases in which the conduct also violates a separate legal regime. In one of the most oft-cited cases, the court in *Conwood Co. v. U.S. Tobacco Co.* upheld a jury verdict of monopolization based on tortious

112. LePage's Inc. v. 3M, 324 F.3d 141, 162 (3d Cir. 2003); *see also, e.g.*, Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 698–99 (1962) (concluding that it is improper to treat antitrust claims as "separate and unrelated lawsuits" and that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each").

113. FTC v. Winsted Hosiery Co., 258 U.S. 483, 493 (1922).

114. FTC v. R.F. Keppel & Bro., 291 U.S. 304, 313 (1934).

conduct in the moist snuff (smokeless tobacco) market.[115] In this market, point of sale advertising (through racks in stores containing the product) is crucial because of advertising restrictions.[116] One manufacturer, Conwood, challenged multiple types of tortious conduct by another, U.S. Tobacco Company ("USTC"), claiming:

> that USTC (1) removed racks from stores without . . . permission . . . and discarded and/or destroyed these racks, while placing Conwood products in USTC racks . . . to bury Conwood's products and reduce their facings; (2) trained their "operatives to take advantage of inattentive store clerks with various 'ruses' such as obtaining nominal permission to reorganize or neaten the moist snuff section," in an effort to destroy Conwood racks; (3) misused its position as category manager by providing misleading information to retailers in an effort to dupe retailers into believing, among other things, that USTC products were better selling so that retailers would carry USTC products and discontinue carrying Conwood products; and (4) entered into exclusive agreements with retailers in an effort to exclude rivals' products.[117]

After a trial, the jury found that this behavior constituted "exclusionary conduct without a sufficient justification, and that USTC maintained its monopoly power by engaging in such conduct."[118] The Sixth Circuit affirmed the jury's verdict.[119] Similarly, the Fifth Circuit, in *Associated Radio Service Co. v. Page Airways, Inc.*, found exclusionary conduct from "evidence of foreign bribes" and "a contract [that] was the result of improper influence."[120]

The pharmaceutical industry has provided the setting for other examples of antitrust scrutiny of conduct that violates non-antitrust rules, particularly those relating to fraud. The *Walker Process*[121] line of cases holds that the fraudulent procurement of a patent or enforcement of a patent obtained by fraud can violate antitrust law.[122] Other cases involve the allegedly fraudulent

115. Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 795 (6th Cir. 2002).

116. *Id.* at 774.

117. *Id.* at 783.

118. *Id.* at 788.

119. *Id.* at 795; *cf.* Byars v. Bluff City News Co., 609 F.2d 843, 854 n.30 (6th Cir. 1979) (discussing allegations similar to *Conwood*'s that "if credited, could result in a finding of predatory conduct"). Nonetheless, shortly afterwards, the Sixth Circuit explicitly adopted the *de minimis* approach to false advertising. Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 370 (6th Cir. 2003).

120. Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342, 1354 (5th Cir. 1980).

121. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

122. *See, e.g.*, *In re* Lipitor Antitrust Litig., 868 F.3d 231, 271 (3d Cir. 2017) (refusing to dismiss the "plausibl[e] alleg[ation] that the PTO did not find a lack of fraud in initial patent proceedings through its reissuance of the . . . [p]atent"); *In re* Loestrin 24 Fe Antitrust Litig., 261 F. Supp. 3d 307, 346 (D.R.I. 2017) (denying motion to dismiss because "[p]laintiffs plead

listing of patents in the "Orange Book,"[123] an annual compilation of drugs and their associated patents.[124] And courts have recognized antitrust liability when a brand company makes "repeated and allegedly false patent descriptions" to the FDA.[125]

Despite these cases, one could conceivably argue that antitrust should not apply to actions that are also governed by a separate regulatory regime. In *Verizon Communications v. Law Offices of Curtis V. Trinko*, the Supreme Court indicated that where another regulatory regime is guaranteeing competition, there may not be a need for antitrust enforcement.[126] That case can only be fully understood, however, in relation to the industry in which it arose. The Court in the case was evaluating the Telecommunications Act, which provides the Federal Communications Commission ("FCC") with general—and *effective*—regulatory authority over the industry, including its competitive structure (e.g., restrictions on concentrated ownership and must-carry requirements).[127]

Other settings require more robust antitrust enforcement. For example, the FDA has very specific authority over drugs and medical devices, but it does not pervasively regulate industry structure in the way that the FCC does. Instead, the FDA has concluded "that issues related to ensuring that marketplace actions are fair and do not block competition would be best addressed by the FTC, which is the Federal entity most expert in investigating and addressing anticompetitive business practices."[128] Much more similar to

sufficient underlying facts to support a reasonable inference of intent to deceive the PTO and materiality").

123. U.S. DEP'T OF HEALTH & HUM. SERVS., FDA APPROVED DRUG PRODUCTS WITH THERAPEUTIC EQUIVALENCE EVALUATIONS (41st ed. 2021), https://www.fda.gov/media/71474/download [https://perma.cc/DZ8W-9D7H].

124. *E.g.*, *In re* Buspirone Pat. Litig., 185 F. Supp. 2d 363, 366–67 (S.D.N.Y. 2002).

125. *E.g.*, *In re* Actos End-Payor Antitrust Litig., 848 F.3d 89, 100 (2d Cir. 2017).

126. Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 411–12 (2004).

127. For an argument supporting antitrust enforcement in settings covered by heavy regulation, see Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685 (2009).

128. Food & Drug Admin., Ctr. for Drug Evaluation & Rsch., Opinion Letter for Docket No. FDA-2009-P-0266 (Aug. 7, 2013), at 7; *see also* Scott Gottlieb, Comm'r of Food & Drugs, Food & Drug Admin., Remarks at the FTC Workshop Understanding Competition in Prescription Drug Markets: Entry and Supply Chain Dynamics (Nov. 8, 2017) (indicating frustration with conduct that "game[s] the system" in "mak[ing] it hard, or altogether impossible, for generic firms to get access to" samples needed to show equivalence); Transcript of Motions Hearing at 115–16, Actelion Pharms. Ltd. v. Apotex, Inc., 12-cv-05743-NLH (D.N.J. Oct. 17, 2013), ECF No. 96 (denying motion to dismiss on grounds that "[t]he FDA is not the FCC," "that there is no other potential remedy to a defendant suffering anticompetitive conduct," that "*Trinko* can't repeal Section 2," and that Section 2 "prevent[s] the improper maintenance and extension of a monopoly through improperly motivated conduct").

the FDA than FCC, false advertising regulation lacks the pervasive control and monitoring, including reporting requirements, of telecommunications law.[129]

False advertising litigation cannot effectively stand in for the antitrust function. False advertising, unlike the FCC's jurisdiction, is broad rather than deep: it covers a wide variety of competitive situations, from mouthwash to specialized airline components, but only by barring falsity and deception rather than by pervasively dictating market structure. Of critical significance, moreover, false advertising law is itself underenforced. The FTC has substantial resource constraints. And consumers themselves are rarely able to sue for the harms they suffer. Consumer contracts typically contain mandatory arbitration provisions, making schemes like AT&T's market-shaping deception harder to fight. As a result, there is no "false advertising regime" that effectively fosters competition and negates the need for antitrust enforcement.[130]

B. Framework for Monopolists

One concern courts have raised with making false advertising the basis for an antitrust violation is that much of this behavior does not affect the market as a whole. Courts are right that even if one company engages in this conduct, and even if an individual rival is harmed as a result, that does not mean that competition in the market as a whole is affected. But there is a simple solution to this concern: focus on the defendant's market power. Of all the actors employing false advertising, monopolists are the most likely to affect the market, with those attempting to monopolize making up the second-most-likely category. Targeting these two categories of actors recognizes that Section 2 of the Sherman Act provides the appropriate—and in fact only—framework for antitrust liability for unilateral conduct such as false advertising.

Focusing attention on only monopolists and attempted monopolists dramatically narrows the universe of false advertising/antitrust claims. Such an emphasis also is consistent with the approach taken in the Areeda/Hovenkamp treatise, which recognizes that antitrust may be appropriate when "the practice makes a durable contribution to the

129. *See Verizon*, 540 U.S. at 412.

130. Nor would antitrust courts be forced to conduct a completely foreign analysis in determining issues related to false advertising. To pick a contrary example, courts considering "reverse payment settlements," in which brand drug firms pay generics to settle patent litigation and delay entering the market, would be forced to engage in a different—and more complex—analysis if they were forced to determine the merits of the patent litigation to assess the antitrust claim. *See* FTC v. Watson Pharms., Inc., 677 F.3d 1298, 1315 (11th Cir. 2012) (recognizing difficulty of courts "deciding a patent case within an antitrust case about the settlement of the patent case," which it analogized to the southern dish of turkey, duck, and chicken known as "turducken"), *rev'd and remanded sub nom.*, FTC v. Actavis, Inc., 570 U.S. 136 (2013).

defendant's market power."[131] The treatise crafts a *de minimis* presumption because of the relative unlikelihood that any given false claim would "lead[] to or perpetuat[e] durable market power."[132] But the treatise also recognizes that "misrepresentations and organized deception by a dominant firm may have Section 2 implications when used against a nascent firm just as it is entering the market."[133] Once we understand that the treatise's concerns about overapplication of false advertising law are addressed by requiring monopoly (or, as discussed below, attempted monopoly) status, the treatise would lend support to liability when the defendant's monopoly power makes false advertising especially likely to affect the market as a whole and harm competition.

Our focus on monopolists and attempted monopolists also is consistent with antitrust injury doctrine. As the Supreme Court famously explained in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, plaintiffs must prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[134] In other words, plaintiffs must challenge a harm that affects the market as a whole. Limiting our scrutiny to monopolists and attempted monopolists helps effectuate *Brunswick*'s objectives.

We suggest a presumption that false advertising by monopolists constitutes monopolization. Crucially, the most fundamental critique against applying antitrust to false advertising—that "false advertising" does not require marketwide effects—are addressed by the defendant's control over the market.

To satisfy the first of the two elements of a monopolization case, a plaintiff must show that the defendant has monopoly power. As discussed above,[135] a plaintiff can do so indirectly by showing a market share of at least 75 percent (and more likely 90 percent) along with barriers to entry that could entrench that market position. A plaintiff also can prove market power directly, such as by showing the defendant's power to impose price increases or output reductions.

Second, the plaintiff must show that the defendant engaged in false advertising. As a matter of underlying substantive law, liability for false advertising already requires findings that the defendant's conduct was literally false or misleading, was material, actually deceived or was likely to deceive consumers, and caused or was likely to cause harm to the plaintiff.[136] These

131. 3B AREEDA & HOVENKAMP, *supra* note 6, ¶ 780, at 341.

132. *Id.* ¶ 782b, at 351.

133. *Id.* ¶ 782b, at 353.

134. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

135. *See supra* text accompanying notes 13–18.

136. The Lanham Act additionally requires that the statements be made "in commercial advertising or promotion" and occur in interstate commerce. 15 U.S.C. § 1125(a)(1)(B) (2018);

elements are logically and practically linked to each other; they constitute the *wrong* of false advertising, just as an agreement to set prices constitutes the wrong of price fixing.

In particular, deception is generally presumed from literal falsity, or is demonstrated by showing misleadingness—if consumers receive a false message from a facially ambiguous or even literally true claim, they have been deceived. Likewise, once both deception and materiality have been shown, courts generally find a likelihood of harm, as consumers have been misled about facts that are likely to affect their decisions.

The false advertising foundation provides a unique advantage for antitrust law, one not available in other settings. The reason is simple. False advertising's underlying requirements focus on the bad conduct, show its relevance, and demonstrate the harm. These elements offer on a silver platter what antitrust needs to prove monopolization. In addition, materially false advertising by a monopolist threatens multiple concerns: It makes it more difficult to compete on the merits, can easily be repurposed to harm any competitor, and is hard to credibly rebut without souring consumers on factual claims more generally. Because of these harms and the satisfaction of false advertising's elements, a monopolist's materially false advertising should be presumed to affect the market as a whole.

A presumption that a monopolist using false advertising has engaged in illegal monopolization also is appropriate given the near certainty of anticompetitive effects. Unlike other lawbreaking by a monopolist such as tax fraud, false advertising by definition harms at least one competitor, in what is a relatively small field. That is, by definition a monopolist controls most of the market, so there will be fewer competitors to harm. False advertising may even directly harm *all* the other competitors if the false claim is one of general superiority, or, as in the AT&T example, is directed at keeping existing customers from switching products. And by poisoning the informational environment, false advertising inherently threatens the key mechanism by which rivals can compete: by explaining to consumers what they can offer in a way that might persuade them. False advertising is also a technique that can easily be extended to the next competitor, further justifying a presumption that its use by a monopolist caused harm to competition.

Another way to frame the presumption of harm to competition centers on how we know that harm to actual entities has crossed into the legal category of "harm to competition." When an entity that meets the standards for monopoly power engages in materially false advertising that causes damage, we know that it is a monopolist and that it harmed identified victims

Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave., 284 F.3d 302, 310 (1st Cir. 2002). Neither requirement is particularly demanding in this context, nor relevant to the harm of false advertising.

(such as consumers or competitors) in a way likely to push the market as a whole toward an untrusting and untrustworthy market for lemons. When a monopolist introduces a valuable innovation to the market, in contrast, that can harm competitors, but it also produces social benefit, meaning that the harm should be tolerated. So too when a monopolist truthfully and non-misleadingly advertises a superior product. But when the ready-made template of false advertising law makes clear that a monopolist harms consumers' ability to trust information in the market and causes consumers to pay prices or buy products they otherwise wouldn't have chosen, at the very least the burden should be on the monopolist to show that it did no structural damage to the market.

The presumption we propose fits comfortably in antitrust analysis. Antitrust courts historically have applied two modes of analysis. The first, appropriate for conduct among competitors such as price fixing, agreements to limit output, and agreements to allocate markets, is viewed as *per se*, or automatically, illegal.[137] The second, the Rule of Reason, which is considerably more deferential and upholds nearly all agreements today,[138] considers an agreement's anticompetitive and procompetitive effects.[139] A third, intermediate, approach has more recently developed, called a "quick look" Rule of Reason or (as the FTC has applied it) "inherently suspect" analysis.

In these cases, the court presumes harm to competition even if a plaintiff does not show adverse effects or market power. For example, in *National Society of Professional Engineers v. United States*, the Supreme Court found that "an agreement among competitor[] [engineers] to refuse to discuss prices with potential customers until after" an engineer was selected may "not [be] price fixing as such," but "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement," which "operates as an absolute ban on competitive bidding . . . . and substantially deprives the customer of 'the ability to utilize and compare prices in selecting engineering

137. *E.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing); Hartford-Empire Co. v. United States, 323 U.S. 386 (1945) (output restrictions); Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990) (market allocation agreements).

138. *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009) ("Courts dispose of 97% of cases . . . on the grounds that there is no anticompetitive effect.").

139. Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1268–69 (explaining that courts apply a burden-shifting analysis in which: (1) "the plaintiff must show a significant anticompetitive effect," (2) "the defendant [must] demonstrate a legitimate procompetitive justification," (3) the plaintiff can "show either that the restraint is not reasonably necessary . . . or that the objectives could be achieved by" a less restrictive alternative, and (4) "the court balances the restraint's anticompetitive and procompetitive effects" (footnote omitted)).

services.'"[140] Similarly, in *NCAA v. Board of Regents of the University of Oklahoma*, the Court found that the NCAA's plan to limit the number of games that could be televised was a "naked restraint on price and output," which "requires some competitive justification even in the absence of a detailed market analysis."[141]

Similarly, as discussed above,[142] restrictions on truthful advertising harm competition by "mak[ing] it more difficult for consumers to discover information about the price and quality of goods or services, thereby reducing competitors' incentives to compete with each other with respect to such features."[143] In many cases, the FTC has relied on empirical studies finding that restrictions on truthful advertising "result in consumers' paying higher prices."[144] The agency thus treats restrictions on truthful advertising as inherently suspect, similar to a "quick look" analysis in presuming anticompetitive effects.[145] The Supreme Court's decision in *California Dental Ass'n v. FTC* also supports an abbreviated analysis. In that case, the Court found that an association's broad restrictions on discount and non-discount advertising were "designed to avoid false or deceptive advertising."[146] As a result, the restrictions had a procompetitive justification as well as a potentially anticompetitive effect, and the Court applied a more expansive analysis than the "quick look" scrutiny but one less than the "fullest market analysis" of the Rule of Reason.[147]

As these cases show, it is possible to calibrate antitrust scrutiny based on the likelihood that a particular type of conduct is anticompetitive. For "per se" offenses, courts require no additional proof beyond showing that the defendant's behavior falls into a class of activities that is inherently dangerous to competition. For conduct satisfying "quick look" scrutiny, the plaintiff is

140. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692–93 (1978) (quoting United States v. Nat'l Soc'y of Pro. Eng'rs, 404 F. Supp. 457, 460 (D.D.C. 1975)).

141. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 110 (1984); *see also* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 448, 461 (1986) (finding "that a conspiracy among dentists to refuse to submit x rays to dental insurers for use in benefits determinations" resulted in "actual, sustained adverse effects on competition in those areas where [the] dentists predominated" and was "legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis").

142. *See supra* text accompanying notes 8–10.

143. Polygram Holding, Inc., 136 F.T.C. 310, 355 (2003); *see also* Brief of the Federal Trade Commission at 1, 1-800 Contacts, Inc. v. FTC, No. 18-3848 (2d Cir. Oct. 7, 2019) ("Without timely information about competing products and sellers, . . . consumers cannot make informed choices and markets cannot function properly.").

144. *Polygram*, 136 F.T.C. at 355.

145. Brief of the Federal Trade Commission at 51, *1-800 Contacts*, No. 18-3848; *see also Polygram*, 136 F.T.C. at 354 (finding agreement among rivals not to advertise products was "presumptively anticompetitive").

146. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 (1999).

147. *Id.* at 779.

relieved of certain showings and the burden is more quickly shifted to the defendant to justify the conduct. In both sets of cases, the expense and risks of "false negative" errors that would be entailed by additional proof requirements are unjustified.

When a monopolist's false advertising has already been shown to be likely to have harmed at least one competitor, a presumption of anticompetitive conduct adapts this type of intermediate approach to the unilateral conduct situation. The setting is not precisely the same as a coordinated agreement to limit truthful advertising. But truthful advertising, which lies at the core of a competitive market, is threatened not only by coordinated restrictions but also by the unilateral dissemination of false advertising.[148]

It's conceivable, however, that a false statement could be material and still not affect the market as a whole. For that reason, we would allow the defendant to rebut the presumption by showing that the false or deceptive statement was ineffective. In other words, the monopolist could show that, despite a *likelihood* of deception from a literally false or misleading claim, harm from deception did not materialize—where, for example, sophisticated consumers did their own testing and relied on their results rather than on the defendant's claims. Our approach, however, would not support immunity for false advertising by entities with market power simply because it's difficult to tell exactly how much harm was done to each member of a small group of competitors.

One example of how our approach could change outcomes is the Fifth Circuit's ruling in *Retractable Technologies, Inc. v. Becton Dickinson & Co.*[149] In that case, the court erroneously rejected an antitrust verdict against an attempted monopolist because, even though it acknowledged that the plaintiff "may have lost some sales or market share" in the market for specialized medical syringes, the court adopted the blanket rule that false advertising can't violate the antitrust laws: The plaintiff lost its antitrust claim because the court said that false advertising harms only competitors, not competition.[150]

The court remanded on whether false advertising alone would permit a remedy. On remand, the district court ordered disgorgement of the defendant's profits under the Lanham Act, noting that at least some of the

148. *See* Stucke, *supra* note 91, at 841–44 (suggesting quick-look standard for deception); Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 990 (2005) ("[T]ortious conduct . . . can be a cheap form of exclusion.").

149. *See generally* Retractable Techs., Inc. v. Becton Dickinson & Co., 842 F.3d 883 (5th Cir. 2016) (holding that false advertising cannot violate antitrust laws).

150. *Id.* at 895. The court reasoned that, because the plaintiff had survived the false advertising without being driven out of the market, no competitive harm had occurred. *Id.* But this is illogical. In the absence of the false advertising the monopolist might have less of a monopoly—surviving as a competitor doesn't mean surviving with a fair competitive position.

defendant's sales were attributable to its false advertising. The court of appeals reversed again, reasoning that, although it was true that the defendant had been proved to have *gained* from its false advertising, there were other potential competitors, and so the plaintiff was not able to sufficiently prove that all of the defendant's sales came at the plaintiff's expense. In other words, the plaintiff then lost its Lanham Act claim because the false advertising harmed *competition* generally.[151]

Applying our approach, the key question would have been whether the defendant/false advertiser was in fact a monopolist; if so, a presumption of monopolization would have been appropriate. The false advertising factors (false/misleading, materiality, deception, and harm) appeared to be satisfied. Nor would the rebuttal be met as there was no showing that the false advertising was ineffective. The plaintiff could not quantify how much it lost versus how much other competitors lost because of the false advertising—but that was because the false advertising was apparently successful across the board. In fact, as this example shows, it will often be the case that false advertising—even to sophisticated consumers—is effective in sustaining a monopolist's market share: The monopolist by definition is big, is credible because of its experience, and has sustained reach in the relevant industry.

Our proposal might not change the number of entities exercising monopoly power. Truthful and non-misleading or neither-true-nor-false advertising can also support market power, though it seems unlikely that it can do so quite as effectively as materially false claims. If, as a result of our proposal, monopolists spend less on advertising that might later give rise to falsity-based antitrust claims, they will not necessarily decrease resources devoted to advertising in general. But because American antitrust policy accepts that some monopolies can persist legitimately, it is not a problem that nondeceptive advertising can be effective at maintaining monopoly power. Our proposal could allow more confidence that monopolists' advertising produces social benefits, and new entrants would have the same ability to use truthful and non-misleading or neither-true-nor-false claims.

C. Framework for Attempted Monopolists

While antitrust liability is most appropriate for monopolists engaging in false advertising, it also could apply to actors seeking to control the market. Section 2 of the Sherman Act applies not only to monopolists but also attempted monopolists, which have been defined as those that: (1) have a specific intent to achieve monopoly power, (2) have engaged in exclusionary conduct furthering its specific intent, and (3) have a dangerous probability of success.[152]

151. Retractable Techs., Inc. v. Becton Dickinson & Co., 919 F.3d 869, 877 (5th Cir. 2019).

152. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

The three elements don't provide much guidance. Regarding the first factor, because "the essence of competition is the intent to triumph over one's rivals[,] [o]ne of the most perplexing problems in antitrust policy is discerning between illegitimate and legitimate intent."[153] For the second element, the nature of exclusionary conduct is similar in attempted monopolization as monopolization cases. And third, a dangerous probability of success is designed to determine whether the conduct is conducive to monopoly.[154] Some courts have articulated market share requirements of at least 30 percent (and more likely 50 percent) in most cases, though a leading hornbook explains that "it is impossible to generalize[] [since] some attempts to monopolize require the defendant to have significant market power while others do not."[155]

Because attempted monopolists, unlike monopolists, do not control the market, a rebuttable presumption of an antitrust violation is not appropriate. But neither is the skepticism that courts have applied to false advertising claims. For that reason, in determining the second element, whether the defendant engaged in exclusionary conduct, we suggest several factors that direct the most robust scrutiny to the situations most likely to present marketwide harms: (1) targeting a new entrant; (2) actual harm from the false or misleading advertising; (3) degree of materiality; and (4) interactions with other anticompetitive conduct.[156]

The first factor analyzes whether the conduct is aimed at a new, rather than established, market entrant. New entrants are particularly susceptible to the effects of false advertising. A nascent firm just entering the market "has no established customer base and typically lacks the resources to answer the dominant firm's deception effectively."[157] A new entrant in a small field, such as the maker of a specialized blood collection device that only a few companies manufacture, likely would qualify as an appropriate plaintiff under our framework.[158] In contrast, Anheuser Busch's false advertising in the highly concentrated light-beer market that targets the other major competitor in that market would not.

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153. HOVENKAMP, *supra* note 11, § 6.5a, at 371.

154. *Id.* § 6.5b, at 374–75.

155. *Id.* § 6.5b2, at 376–77.

156. False advertising liability always requires falsity or misleadingness and, relatedly, likely or actual deception. Our framework is designed to draw courts' attention to the types of false advertising that are particularly likely to harm overall competition, leaving some false advertising that will be actionable as such, but not as an antitrust violation, where it harms competitors or consumers.

157. 3B AREEDA & HOVENKAMP, *supra* note 6, ¶ 782b, at 353.

158. *See* Kurin, Inc. v. Magnolia Med. Techs., Inc., No. 3:18-cv-1060-L-LL, 2019 WL 5422931, at *1 (S.D. Cal. Oct. 23, 2019) (exemplifying Lanham Act false advertising case brought by new entrant against earlier entrant).

The second factor examines whether the statements impose harm on the rival. The clearest case of harm will occur when the rival is prevented from entering the market. But it could also be satisfied when the rival is not able to expand its market share. In false advertising cases, courts often decline to award monetary damages (even when they enjoin future false advertising) unless the plaintiff shows not just that the false advertising is likely to deceive, but also that the deception has materialized in the form of diverted sales, which also proves materiality and harm.[159] Because attempted monopolists lack the control over the market that monopolists have, a similar requirement would be appropriate here.

The third factor focuses on whether the statements center on facts likely to be material to most of the relevant consumers. The usual standard of materiality asks "whether reasonable consumers would have a tendency to rely on th[e] misleading statement of fact in making their purchasing decisions."[160] Courts in false advertising cases have not generally distinguished between the materiality of the general topic to which the claim relates and the materiality of the difference between the claim and the truth. For example, where a company falsely claimed that its razor extended hair, creating a smoother shave, the court reasoned that, because the extension claim was material, misrepresentations as to the "magnitude and frequency of that effect" were necessarily also material.[161] This distinction, however, is usually

159. *See, e.g.*, Pizza Hut, Inc. v. Papa John's Int'l, Inc., 227 F.3d 489, 497 (5th Cir. 2000); Balance Dynamics Corp. v. Schmitt Indus., Inc., 204 F.3d 683, 690 (6th Cir. 2000); U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 922 (3d Cir. 1990). Intentional deception can also justify a presumption of harm for purposes of receiving monetary damages. *See, e.g.*, Porous Media Corp. v. Pall Corp., 110 F.3d 1329, 1333 (8th Cir. 1997) (intentional deception), *superseded by statute on other grounds*, Trademark Amendments Act of 1999, Pub. L. No. 106–43, 113 Stat. 219; Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1146 (9th Cir. 1997) (holding that deliberate false advertising "gives rise to a presumption of actual deception and reliance" and "allow[s] monetary damages even without a showing of actual consumer confusion" (quoting U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1040–41 (9th Cir. 1986))); George Basch Co. v. Blue Coral, Inc., 968 F.2d 1532, 1537 (2d Cir. 1992), *superseded by statute on other grounds*, Trademark Amendments Act of 1999, Pub. L. No. 106–43, 113 Stat. 219, *as recognized in* Cartier v. Aaron Faber, Inc., 512 F. Supp. 2d 165 (S.D.N.Y. 2007); *Balance Dynamics*, 204 F.3d at 694). And courts have generally held that in two-player markets, false comparative advertising also leads to a presumption of harm. *See, e.g.*, Dependable Sales & Serv., Inc. v. TrueCar, Inc., 377 F. Supp. 3d 337, 342 (S.D.N.Y.), *on reconsideration*, 394 F. Supp. 3d 368 (S.D.N.Y. 2019).

160. *Pizza Hut*, 227 F.3d at 502.

161. Schick Mfg., Inc. v. Gillette Co., 372 F. Supp. 2d 273, 287 (D. Conn.) (denying preliminary injunction in part and granting in part), *modified*, No. 3-05-cv-174 (JCH), 2005 WL 8168764 (D. Conn. June 20, 2005); *see also* Kraft, Inc. v. FTC, 970 F.2d 311, 327 (7th Cir. 1992) (applying similar reasoning to misleading calcium content claims for processed cheese slices). *But see* Danone, US, LLC v. Chobani, LLC, 362 F. Supp. 3d 109, 118–19 (S.D.N.Y. 2019) (denying preliminary injunction and distinguishing between materiality of a general claim and materiality of the difference between the truth and the advertising, where the advertiser had overclaimed an actual superiority in sugar content of yogurt).

not even raised in false advertising cases, as the materiality of the claim's general subject matter (e.g., safety, price, durability) typically suffices.

The specificity with which materiality must be proved can, however, be calibrated to ensure that only the most market-threatening false advertising can support an attempted monopolization claim. For example, for monopolists, who by definition control the market, a five percent misrepresentation about price deserves no more legal protection from antitrust liability than a 50 percent misrepresentation. False advertising inherently threatens competition, price is generally material to consumers, and if consumers are likely to act on the misrepresentation, then harm should be presumed.

In contrast, for attempted monopolists, who by definition have not yet achieved monopoly power, courts could reasonably demand more specificity about materiality. If price is misrepresented by five percent, an antitrust plaintiff should be required to show that a substantial number of consumers would be affected (which certainly might be the case, as some groups of consumers are extremely price sensitive). Common sense also has a role to play in the amount of additional specificity courts should demand. Because price is a central product characteristic and the magnitude of the difference between the advertising and the truth is so much greater, a 50 percent misrepresentation needs less, if any, extrinsic evidence of materiality. But not all material claims will rise to that magnitude qualitatively or quantitatively. A searching materiality inquiry—which has resonance with the "clearly material" requirement from the multifactor test discussed above[162]—thus appropriately constrains antitrust law.

This inquiry should recognize that statements about risk are particularly important and likely to have a broad impact. For example, a safety claim may almost always be material—consumers predictably and reasonably value even a one percent lower chance of death quite highly.[163] Alternatively, companies could falsely claim that there are capacity issues preventing a rival from meeting customers' supply needs—a different risk, but one that is highly salient.

Materiality interacts with the other factors. Where the plaintiff is a new market entrant, claims about risk may be particularly persuasive in deterring customers from switching to the competition.[164] And where the plaintiff can show that it suffered substantial harm as a result of the misrepresentation, that is itself strong evidence of a high degree of materiality.

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162. *See supra* notes 77–82 and accompanying text.

163. *See In re* Figgie Int'l, Inc., 107 F.T.C. 313, 389 (1986) ("Even a very small amount of additional protection from death or serious injury caused by fire would no doubt be considered significant by some consumers.").

164. In this setting, it may be harder to prove that the defendant made a falsifiable statement given that predictions about the future are often held to be nonactionable opinion.

Finally, courts should consider whether false advertising in a near-monopoly situation is accompanied by other types of exclusionary conduct, which can amplify or reinforce the effects of false advertising.[165]

In any given case, courts should balance these factors to see if there is a reason to treat the false advertising at issue as exclusionary. Consider, for example, *Insignia Systems* v. *News America Marketing In-Store, Inc.*[166] This long-running case involved the in-store promotions and advertising business. The parties contracted with product manufacturers to sell them promotional materials like end-cap displays, inserts in grocery carts, and floor stickers, and they also contracted with retailers like grocery stores for the right to place those materials in their stores. Defendant NAMI told manufacturers that the plaintiff successfully placed materials in less than 20 percent of the retail stores with which it had contracts, while claiming for itself "compliance rates of 90-95%."[167] The court reasoned that, if NAMI deliberately deceived customers with the intent to enforce a monopoly, it could be liable for attempted monopolization.[168]

We agree with the court's outcome, but our framework more readily explains what made this particular false advertising actionable in antitrust. In our framework for attempted monopolization, the court could have pointed to the evidence that NAMI's allegedly false advertising caused actual harm to two competitors—apparently the only two competitors in that space—as well as to the overriding materiality of NAMI's compliance claim to manufacturers. As NAMI itself asked, "how effective can an in-store program be if it's not actually seen in-store?"[169] In addition, although the plaintiff apparently wasn't a new entrant, NAMI combined its allegedly false advertising with other exclusionary conduct such as exclusive contracts with retailers.[170] This constellation of facts supports allowing an antitrust claim to proceed.

In short, our suggested factors apply a competition lens to false advertising. If the activity targets nascent rivals or imposes barriers to entry, it reveals competitive harm. And if it targets claims that are nearly universally material, it can readily harm the market as a whole.

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165. *See, e.g.*, Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342, 1356 (5th Cir. 1980) ("Probably no one of the instances of improper conduct [including bribery and contracts resulting from improper influence], standing alone, would lead to Section 2 liability. Taken together, however, they show a pattern of exclusionary behavior sufficient to support the jury's verdict." (footnote omitted)); *infra* text accompanying note 188.

166. Insignia Sys., Inc. v. News Am. Mktg. In-Store, Inc., 661 F. Supp. 2d 1039 (D. Minn. 2009).

167. *Id.* at 1050.

168. *Id.* at 1062. The court also denied the defendant's motion to dismiss the monopolization claim on similar grounds. *Id.* at 1061.

169. *Id.* at 1050. The plaintiff, meanwhile, alleged "that its [actual] compliance rate was 75% or higher." *Id.* at 1049.

170. *Id.* at 1051.

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Our restriction of antitrust claims for false advertising to defendants that are monopolists or attempted monopolists is consistent with Section 2 of the Sherman Act. Our approach cabins the reach of antitrust liability for false advertising in a manner that addresses overreach concerns, recognizing that most false advertising will not violate the antitrust laws. At the same time, a rebuttable presumption against monopolists engaging in false advertising captures the general anticompetitive market harm from the behavior while still giving the monopolist a chance to show that the statement was ineffective. And focusing on the most relevant factors presented by false advertising and marketwide harm addresses the ways in which attempted monopolists can harm competition through false advertising.

D. An Example: Biosimilars

An example illustrates our framework. The pharmaceutical industry is marked by high barriers to entry. It is expensive to enter the market, and there are significant hurdles such as receiving approval from the FDA. These barriers are even higher in the biologics setting. Compared to the "small molecule" drugs that have made up the pharmaceutical market for the past several decades, biologic products are more complex and less predictable. As a result, unlike the near-identical relationship between brand and generic drugs, the connection between biologics and "follow-on biosimilars" is not as direct.[171]

The relevant statute, the Biologics Price Competition and Innovation Act ("BPCIA"),[172] requires a biosimilar to be "highly similar to" the biologic and have "no clinically meaningful differences" in relation to "safety, purity, and potency."[173] But the uncertainty surrounding the products has resulted in biologic manufacturers stating or implying that biosimilars are unsafe, sometimes by omitting relevant information about their functional equivalence with the reference biologics.[174] In a setting in which even the most minute differences between products could be enough to dissuade patients from trying new medications, the assertions at least implied dissimilarities that could have significant safety effects.

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171. Michael A. Carrier & Carl J. Minniti III, *Biologics: The New Antitrust Frontier*, 2018 U. ILL. L. REV. 1, 8.

172. Biologics Price Competition and Innovation Act of 2009, Pub. L. No. 111-148, 124 Stat. 804 (2010).

173. 42 U.S.C. § 262(i)(2) (2018).

174. *See generally* Citizen Petition from Pfizer Inc. to the Food & Drug Admin. (Aug. 22, 2018), https://www.bigmoleculewatch.com/wpcontent/uploads/sites/2/2018/08/Citizen_Petition_from_Pfizer.pdf (demonstrating how Pfizer, a manufacturer of biosimilars, filed a citizen petition with the FDA that referenced many of these statements.) [https://perma.cc/9849-SRT6].

For example, Genentech noted on its "Examine Biosimilars" website that "FDA requires a biosimilar to be highly similar, but not identical to the [reference product]."[175] More explicitly, Amgen tweeted: "Biologics or biosimilars? It's not just apples to apples. While #biosimilars may be highly similar to their #biologic reference products, there's still a chance that patients may react differently."[176]

Given the context of life-saving medications, it's easy to imply dire consequences. For example, Amgen created a YouTube video asserting that a switch "carries risks, given that no two biologic medicines are identical," which suggests that they "can behave differently in the body."[177] Amgen also cautioned that "[s]witching drugs is not a good idea if your medicine is working for you" and that "an inadvertent substitution . . . is not appropriate care."[178] Finally, some biologic manufacturers have warned that patients could face "additional risks" by taking biosimilars or even "could end up in the emergency room."[179]

These claims raise several concerns. Most significant, the statements at issue imply that biosimilars create serious risks, failing to disclose that the FDA approves a biosimilar only when "there are no clinically meaningful differences [from] the biologic product."[180] To the contrary, biologic and biosimilar products are required to have the same safety and effectiveness profile.[181] Evidence from Europe, which has witnessed robust biosimilar entry, has confirmed that "over 700 million patient days of treatment" demonstrated "that clinical outcomes with biosimilars match the outcomes of the reference

175. *Id.* at 7 (alteration in original) (quoting Genentech, *Examine Biosimilars – Biosimilars vs. Generics*).

176. Ned Pagliarulo, *Pfizer Calls Out Pharma Peers for 'Scare Tactics' on Biosimilars*, BIOPHARMA DIVE (Aug. 29, 2018, 11:48 AM), https://www.biopharmadive.com/news/pfizer-calls-out-pharma-peers-biosimilar-scare-tactics-fda-guidance/531214 [https://perma.cc/5E4J-BMQ6] (quoting @AmgenBiosim, TWITTER (Apr. 13, 2018)).

177. Pfizer Citizen Petition, *supra* note 174, at 8 (quoting Amgen, *The Arrival of Biosimilars – What's in a Name*, YOUTUBE).

178. *Id.*

179. Hillel P. Cohen & Dorothy McCabe, *Combatting Misinformation on Biosimilars and Preparing the Market for Them Can Save the U.S. Billions*, STAT (June 19, 2019), https://www.statnews.com/2019/06/19/misinformation-biosimilars-market-preparation [https://perma.cc/AJE2-7Z7S] (quoting Christopher Rowland, *'Marketers Are Having a Field Day': Patients Stuck in Corporate Fight Against Generic Drugs*, WASH. POST (Jan. 9, 2019, 8:00 PM), https://www.washingtonpost.com/business/economy/drugmakers-alleged-scare-tactics-may-hold-back-competition/2019/01/09/612ac994-046d-11e9-9122-82e98f91ee6f_story.html [https://perma.cc/D2DL-H7ER]).

180. 42 U.S.C. § 262(i)(2)(B) (2018).

181. *Patient Materials*, FOOD & DRUG ADMIN., https://www.fda.gov/drugs/biosimilars/patient-materials [https://perma.cc/VDE3-XS95] (last updated Oct. 7, 2020).

biologics."[182] This evidence also has revealed that "patient switching from the reference biologic to the biosimilar . . . is not of concern" since the more than 14,000 switches from biologic to biosimilar resulted in "[n]o change in clinical outcomes."[183]

Given significant development costs, regulatory barriers, thickets of dozens of (or even more than 100) patents,[184] and exclusive contractual arrangements,[185] biologic manufacturers are likely to have monopoly power.[186] Taking the absence of clinically meaningful differences in FDA-approved biosimilars as a given, plaintiffs challenging false statements are likely to satisfy our presumption if they can show that, under false advertising law, the statements (or omissions) are false and material, and therefore are likely to deceive consumers and cause harm. False advertising principles establish that biologic manufacturers will not be liable unless their statements are false or mislead substantial numbers of relevant consumers. But, if falsity or misleadingness are established, they are not likely to be able to rebut the presumption of anticompetitive conduct given the significance of health risk claims to consumers.

Even for attempted monopolists, as long as a plaintiff establishes falsity or misleadingness, the factors would seem to favor liability. Given the lack of biosimilar entry to date, in many cases biosimilars will be seeking to enter the market. The statements, which focus directly on risk, pose significant barriers to entry, as doctors and consumers are not likely to take a chance on drugs that have even the possibility of safety concerns. It is hard to think of examples that would more concretely affect consumers than warnings that drug products are potentially unsafe. In fact, the FTC recently issued warning letters to a number of plaintiff-side law firms for advertising that linked FDA-approved drugs with serious side effects, potentially frightening patients away from useful medications.[187] In addition, a biologic manufacturer's disparagement of a biosimilar rival may be part of a broader range of anticompetitive conduct. For example, disparagement could entrench barriers to entry that convince insurance companies to favor biologics

182. BIOSIMILARS F., STRUCTURAL MARKET CHANGES NEEDED IN U.S. TO ACHIEVE COST-SAVINGS FROM BIOSIMILARS 8 (2019), https://biosimilarsforum.org/PDF/BIosimilars_WhitePaper-final.pdf [https://perma.cc/U5SE-2X2A].

183. *Id.*

184. *Humira Patent Fortress at Center Stage During Pharma Execs' D.C. Showdown*, CRAIN'S CHI. BUS. (Feb. 26, 2019, 2:28 PM), https://www.chicagobusiness.com/health-care/humira-patent-fortress-center-stage-during-pharma-execs-dc-showdown [https://perma.cc/GL3Y-3EX9] (noting that AbbVie has 136 patents on arthritis- and Crohn's-treating Humira).

185. *See infra* text accompanying note 188.

186. *E.g.*, Carrier & Minniti, *supra* note 171, at 3.

187. *FTC Flags Potentially Unlawful TV Ads for Prescription Drug Lawsuits*, FED. TRADE COMM'N (Sept. 24, 2019), https://www.ftc.gov/news-events/press-releases/2019/09/ftc-flags-potentially-unlawful-tv-ads-prescription-drug-lawsuits [https://perma.cc/PTV5-QJ4H].

through potentially anticompetitive exclusive dealing, bundling, and rebates.[188]

In short, false advertising law provides useful tools for determining if substantial numbers of relevant consumers are being misled to their detriment. And our framework would likely find that a biologic manufacturer's proven false advertising that raises safety concerns against a biosimilar constitutes monopolization.

V. Conclusion

In their fear of being overrun by false advertising claims, antitrust courts have veered in the opposite direction, essentially making it impossible to bring these actions. But they have overshot the mark. To say that most false advertising claims don't constitute antitrust violations is not to say that antitrust law should reject false advertising claims brought against monopolists or attempted monopolists. Most bribery doesn't violate the antitrust laws either, but antitrust courts still understand that bribery is relevant when it's used to sustain or approach monopoly.

Underlying courts' hesitancy to use antitrust law is likely a sense that false advertising may not be all that bad. Courts may also think that it is difficult enough to identify truly false advertising that they risk accidentally suppressing truthful advertising. In other words, the risk of overenforcement reaching truthful advertising justifies allowing a certain amount of false advertising to go unscathed. But false advertising is already defined by a robust body of case law. And when a monopolist or attempted monopolist is engaging in the behavior, we believe underdeterrence is much more dangerous to consumers and markets, especially given the significant burdens on plaintiffs bringing antitrust claims to show monopoly power or a realistic threat of monopoly power. In this Essay, we have argued for a revival of antitrust's deterrent role in policing anticompetitive false advertising that harms marketwide competition.

The frameworks we construct for monopolists and attempted monopolists promise to employ the learning of false advertising law in a conservative manner in the antitrust realm. Such an approach would benefit false advertising law by removing contradictory assumptions about the effects of false advertising now prevalent in antitrust cases. It would benefit antitrust law by removing its blind spots about how false advertising harms markets. Most important, it would benefit consumers, who would be subject to less false advertising and who would gain more competitive markets.

188. *See, e.g.*, Michael S. Sinha, Gregory D. Curfman & Michael A. Carrier, *Antitrust, Market Exclusivity, and Transparency in the Pharmaceutical Industry*, 319 JAMA 2271, 2271–72 (2018).