And Should I Then Presume?: A Response to Carrier and Tushnet's *An Antitrust Framework for False Advertising*

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ABSTRACT: Michael Carrier and Rebecca Tushnet's Article An Antitrust Framework for False Advertising, *makes a convincing case that a "categorical immunity" approach, under which false advertising can never serve as the basis for a monopolization or attempted monopolization claim under § 2 of the Sherman Act, is unwarranted; and that an alternative approach, under which courts apply a rebuttable presumption that false advertising is insufficiently exclusionary to contribute to the willful acquisition or maintenance of monopoly power, is similarly unsound.*[1] *Carrier and Tushnet's further argument that rather than simply applying a case-by-case approach, courts should adopt a rebuttable presumption of antitrust liability whenever a monopolist engages in false advertising,*[2] *is somewhat less convincing, though I suspect that in practice such a presumption would only rarely be outcome-determinative.*

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1. *See* Michael A. Carrier & Rebecca Tushnet, *An Antitrust Framework for False Advertising*, 106 IOWA L. REV. 1841, 1850–62 (2021).

2. *See id.* at 1871–72.

INTRODUCTION

Michael A. Carrier and Rebecca Tushnet's thought-provoking Article *An Antitrust Framework for False Advertising*[3] sets out three principal theses. The first is that courts should reject the rule, which Carrier and Tushnet attribute to the Fifth and Seventh Circuits, that false advertising can never serve as the basis for a monopolization or attempted monopolization claim under § 2 of the Sherman Act.[4] The second is that courts should also reject what the authors refer to as the "*de minimis*" approach, under which courts presume that false advertising is insufficiently exclusionary to serve as the predicate for a § 2 claim, but permit plaintiffs to rebut this presumption with evidence of six additional factors.[5] The third thesis—which is consistent with but not necessarily entailed by the first two—is that, rather than considering on a case-by-case basis whether a given instance of false advertising constitutes exclusionary conduct for purposes of § 2,[6] courts *should* employ a rebuttable "presumption that false advertising by monopolists constitutes monopolization."[7]

As discussed below, the first thesis—that false advertising should not be categorically immune from serving as a predicate for a § 2 claim[8]—seems eminently sound. I also generally agree with Carrier and Tushnet's second thesis, subject to the understanding that "false advertising" in the present context means conduct that would qualify as actionable false advertising under the Lanham Act. I am less persuaded by the third thesis, which I understand to mean that courts should rebuttably presume that false advertising enables a monopolist to acquire or maintain its monopoly power by causing the plaintiff to suffer antitrust injury. On balance, I am inclined to think that such a presumption would do little harm, though I also doubt that it would accomplish more than the occasional good.

I. CATEGORICAL IMMUNITY

Carrier and Tushnet argue that the approach they attribute to the Fifth and Seventh Circuits, that false advertising is categorically immune from serving as the basis for a § 2 claim,[9] is insupportable for several reasons.[10] First,

3. *See generally id.*

4. *See id.* at 1850–53. In relevant part, § 2 of the Sherman Act makes it unlawful to "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, or with foreign nations." 15 U.S.C. § 2 (2020).

5. *See* Carrier & Tushnet, *supra* note 1, at 1854–62.

6. Carrier and Tushnet attribute a case-by-case approach to the Third, Eighth, and D.C. Circuits. *See id.* at 1862–63.

7. *Id.* at 1871.

8. *Id.* at 1850–53.

9. *Id.*

10. The principal cases they cite in support of this approach are *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 624 (7th Cir. 2005) and *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 895 (5th Cir. 2016). *See* Carrier & Tushnet, *supra* note 1, at 1850–53.

they argue, "[t]he fact that most acts of false advertising," like most acts of "arson or bribery[,] don't violate the antitrust laws says nothing about how to identify the subset that could."[11] Second, they argue that there is no "'rigid distinction' 'between business torts, which harm competitors, and truly anticompetitive activities, which harm the market,' since competitors make a market."[12] Third, they dispute the premise (articulated in the Fifth Circuit's *Retractable Technologies* opinion) "that misleading advertising 'generally sets competition into motion'" and is "indicative of competition on the merits," because "false advertising is *not* competition 'on the merits.'"[13] Fourth, they argue that the concerns over what I will refer to below as "false positives" or "chilling effects"[14] are not a sufficient basis for immunity, but rather that the solution to the risk that courts might confuse "procompetitive truthful advertising" with false advertising "is to work on minimizing that confusion, not to abandon the field."[15] I generally agree with these observations, and would note a couple of additional points that further counsel against the categorical immunity approach.[16]

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11. Carrier & Tushnet, *supra* note 1, at 1851.

12. *Id.* (quoting Shubha Ghosh, *The Antitrust Logic of Biologics*, 2018 U. ILL. L. REV. ONLINE 46, 53 (2018) (internal citation omitted)).

13. *Id.* at 1852–53 (quoting *Retractable Techs.*, 842 F.3d at 894–95 (internal citation omitted)).

14. *See id.* at 1853 ("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.").

15. *Id.*

16. I would note, however, that it is not entirely clear to me that the Fifth Circuit embraces the categorical approach *tout court*. To be sure, the *Rectractable Technologies* opinion quotes with apparent favor the Seventh Circuit's endorsement of such an approach in *Sanderson*, and includes the language quoted by Carrier and Tushnet equating false advertising with competition on the merits. *See Retractable Techs.*, 842 F.3d at 894–95. Other portions of the opinion, however, which Carrier and Tushnet also quote, seem more equivocal. *See id.* at 894 (stating that an earlier decision, *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999), "sets an extremely high bar for a claim that false advertising, *without more*, can support an antitrust claim") (emphasis added); *see also Retractable Techs.*, 894 F.3d at 895 ("*[A]bsent a demonstration* that a competitor's false advertisements had the potential to eliminate, or did in fact eliminate, competition, an antitrust lawsuit will not lie. . . . [F]alse advertising alone *hardly ever* operates in practice to threaten competition . . . .") (emphasis added) (footnote and citations omitted); *id.* at 896 ("Even if we were to apply the *de minimis* presumption here, [plaintiff] RTI could not uphold a § 2 verdict for [defendant] BD's false advertising under the six-part test" because, *inter alia*, "no facts adduced at trial indicated that BD's advertising in fact harmed competition." (footnotes omitted)). For that matter, even the Seventh Circuit's case law on the issue is, arguably, ambiguous. The principal Seventh Circuit decision, *Sanderson v. Culligan Int'l Co.*, does indeed state that "[f]alse statements about a rival's goods do not curtail output in either the short or the long run" and therefore cannot violate the antitrust laws. Sanderson v. Culligan Int'l Co., 415 F.3d 620, 623 (7th Cir. 2005). That statement nevertheless is arguably dictum in an intemperate opinion that drips with contempt for the plaintiff's entire case. *See id.* at 622 (noting that plaintiff's antitrust claim, premised on § 1 of the Sherman Act, failed at the outset because it did not allege any sort of conspiracy; and that, even if "[r]ecast under § 2 it would fare no better, because Sanderson does not contend that Culligan possesses monopoly power or that bad-mouthing Magnatech's products creates a dangerous probability of monopolization"); *see also id.* at 621 (noting that neither party caught the error of naming the sole shareholder of a corporation that sold "magnetic water conditioners," rather than the corporation itself, as the

The first is that mainstream antitrust case law firmly establishes that *some* forms of deceptive conduct can be exclusionary, and therefore can form the basis for an antitrust claim. These would include, for example, claims for monopolization or attempted monopolization premised on a defendant's fraudulent procurement of a patent[17] or the pursuit of sham litigation.[18] Other prominent examples of deceptive practices potentially giving rise to § 2 violations include Microsoft's misrepresentations to software developers that the tools it created to assist in the development of Java applications were

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plaintiff); *id.* at 624 ("[Plaintiff] should be thankful that Culligan has not filed a cross-appeal from the district court's order denying its motion for sanctions."). Moreover, while both an earlier Seventh Circuit decision, *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 400 (7th Cir. 1989), as well as a later one, *Mercatus Grp. v. Lake Forest Hosp.*, 641 F.3d 834, 851 (7th Cir. 2011) (cited in *Rectractable Techs.*, 842 F.3d at 894), can be read as supporting the categorical immunity position, they too are arguably distinguishable. *Schachar*'s principal holding is that the defendant organization could not be liable under Sherman Act § 1 absent evidence that it imposed any sort of restraint on its members. *See Schachar*, 870 F.2d at 397–99. *Mercatus*, by contrast, was a § 2 case. *See Mercatus*, 641 F.3d at 838. *Mercatus* (citing *Schachar* and *Sanderson*) expressed the view that false "statements are outside the reach of the antitrust laws" unless they are accompanied by a "coercive enforcement mechanism." *Id.* at 851–52. "Coercive enforcement mechanisms," however, which I would take to mean policies intended to induce conspirators from defecting, would seem to be relevant only for the purpose of showing that there was, in fact, a conspiracy—an essential element of a § 1 but not a § 2 case.

17. *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174 (1965) (cited in Carrier & Tushnet, *supra* note 3, at 1868) (holding that the enforcement of a patent obtained by knowingly and willfully making material misrepresentations to United States Patent and Trademark Office can violate Sherman Act § 2); *see also* Carrier & Tushnet, *supra* note 1, at 1868–69, 1868–69 n.124–25 (noting potential antitrust liability arising from the submission of false information to the Food and Drug Administration).

18. *See* Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 51 (1993) (holding that "sham" litigation can violate the antitrust laws, where *inter alia* the litigation is both objectively and subjectively baseless). Carrier and Tushnet do not mention sham litigation claims as an example of actionable deceptive conduct, though they do cite two early cases, *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493 (1922), and *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 313 (1934), as examples of "precedent for considering deception to be anticompetitive in the antitrust sense." Carrier & Tushnet, *supra* note 1, at 1867. I would hesitate to cite either of these cases, however, as contemporary *antitrust* precedent, given that they were decided prior to a 1938 amendment to the Federal Trade Commission ("FTC") Act that differentiated between "unfair methods of competition" and "unfair or deceptive acts or practices." Federal Trade Commission Act Amendments, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111 (1938). As used today, the term "unfair methods of competition" usually designates conduct in violation of antitrust law—though it may sometimes be deployed more broadly—whereas "unfair or deceptive acts or practices" includes false advertising and other consumer-protection harms. *See, e.g.*, BARTON BEEBE, THOMAS F. COTTER, MARK A. LEMLEY, PETER S. MENELL & ROBERT P. MERGES, TRADEMARKS, UNFAIR COMPETITION, AND BUSINESS TORTS 468–70 (2d ed. 2016). Given the underlying facts of *Winsted Hosiery* and *Keppel*, I suspect that the FTC today might characterize cases like these as primarily involving "unfair or deceptive acts or practices" rather than "unfair methods of competition." *But see* Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Commission File No. P221202, 1, 2 n.3, 15 n.88 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf (asserting the FTC's authority to construe the term "unfair methods of competition" as encompassing conduct beyond the reach of the Sherman and Clayton Acts, citing *Keppel* with approval, and stating that "false or deceptive advertising or marketing which tends to create or maintain market power" can be an unfair method of competition under § 5).

Windows-specific,[19] and at least some misrepresentations made to standard-setting organizations.[20] The existence of cases like these makes it hard to understand why anyone would single out one specific type of deception—false advertising—for blanket immunity. The Seventh Circuit's stated rationale is that false advertising never reduces output[21]—which suggests that the court envisions false advertising as having, at most, only the zero-sum effect of diverting sales from the victim to the advertiser—but there is no reason to think this is universally true, much less that it distinguishes false advertising from other deceptive conduct. As Carrier and Tushnet point out, in theory "monopolists controlling the market [can] entrench their power by engaging in false advertising"[22]—and it is standard economic theory that a monopolist maximizes profit by increasing price and *reducing output* in comparison with competitive levels.[23] Nor is it a meaningful point of distinction that false advertising qualifies as commercial speech,[24] whereas some of these other forms of deception may not.[25] The First Amendment permits the government to ban false commercial speech, after all:[26] If it did not, there would not be any law of false advertising to begin with.

A second point I would note relates to the (by now commonplace) incorporation into antitrust of a decision-theoretical approach under which courts craft antitrust liability standards to minimize the sum of error and

19. *See* United States v. Microsoft Corp., 253 F.3d 34, 76–77 (D.C. Cir. 2001) (cited in Carrier & Tushnet, *supra* note 1, at 1863) (affirming a § 2 judgment against Microsoft, in part based on software developers' "reli[ance] upon Microsoft's public commitment to cooperate with Sun" and their use of "tools to develop what Microsoft led them to believe were cross-platform applications," but which "ended up producing applications that would run only on the Windows operating system").

20. *See* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007) ("We hold that (1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an SDO's reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct.").

21. *See Sanderson*, 415 F.3d at 623.

22. Carrier & Tushnet, *supra* note 1, at 1850.

23. *See, e.g.*, THOMAS F. COTTER & JEFFREY L. HARRISON, LAW AND ECONOMICS: POSITIVE, NORMATIVE AND BEHAVIORAL PERSPECTIVES 700 (3d ed. 2014).

24. One of the elements of a Lanham Act false advertising claim is that the alleged misrepresentation occurs "in commercial advertising or promotion." *See* 15 U.S.C. § 1125(a)(1)(B). To qualify as "commercial advertising or promotion," the statement must be, at a minimum, commercial speech, intended to influence consumers to buy the defendant's products, and disseminated sufficiently to the relevant public. *See* Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 56–58 (2d Cir. 2002).

25. Although the Supreme Court has yet to provide a comprehensive definition of commercial speech, three factors that weigh in favor of speech being classified as commercial—and therefore subject to regulations that are themselves subject only to a form of intermediate First Amendment scrutiny—are that it is made in advertising, pursuant to an economic motivation, and refers to a specific product. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–68 (1983).

26. *See* In re R.M.J., 455 U.S. 191, 203 (1982) ("Misleading advertising may be prohibited entirely.").

administrative costs, with error costs comprising the cost of both "false positives" (wrongly condemning procompetitive conduct) and "false negatives" (wrongly exonerating anticompetitive conduct).[27] In accordance with this framework, one could perhaps argue that immunizing false advertising from antitrust liability would generate few—if any—costs attributable to false negatives, since the misconduct is already subject to other legal penalties, and would reduce the cost of both false positives and adjudication attendant to the recognition of such claims. In the present context, those false positives would include the "chilling effects" I noted above resulting, as Carrier and Tushnet put it, from factfinders wrongly concluding that false advertising occurred and, therefore, "block[ing] truthful advertising, which is good for competition."[28] As I also noted above, however, Carrier and Tushnet's response to this concern is that courts should work to minimize that risk, rather than "abandon[ing] the field."[29] I think that response is generally right, albeit subject to a couple of caveats I address in Part III below.

I also am inclined to agree with Carrier and Tushnet that the risk of false negatives in the present context is substantial for a variety of reasons, among them: the Federal Trade Commission's ("FTC") limited resources to prosecute deceptive advertising; the fact that consumers lack standing to assert claims under both the Lanham Act and the FTC Act, and face the standard generally-applicable constraints to aggregating claims in class actions; and, most importantly, that false advertising threatens harm not only to the defendant's competitors but to the market generally (the authors' "market for lemons" point).[30] To be sure, these harms do not always result in *antitrust* injury, that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[31] False advertising often may have little effect on the market as a whole, even if one or more individual competitors feels its brunt.[32] Nonetheless, it is important to keep in mind that the focus of Carrier and Tushnet's analysis is "false advertising by firms *with monopoly power*"; and, as they note, it stands to reason that anticompetitive effects are likely to be amplified in markets that are already anticompetitive.[33]

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27. *See, e.g.*, Alden F. Abbott & D. Bruce Hoffman, Ohio v. American Express *and the Continued Evolution of Economic Reasoning in Supreme Court Jurisprudence*, 33 ANTITRUST 37, 37 (2018) ("[T]he [Supreme] Court has adopted principled screening rules designed to minimize the sum of antitrust error costs (false positives plus false negatives) and administrative costs in antitrust enforcement.").

28. *See supra* note 14 and accompanying text (quoting Carrier & Tushnet, *supra* note 1, at 1853).

29. *See* Carrier & Tushnet, *supra* note 1, at 1853.

30. *See id.* at 1847–49, 1864–66.

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

32. *See* Susannah Gagnon & Herbert Hovenkamp, *Antitrust Liability for False Advertising: A Response to Carrier & Tushnet*, 107 IOWA L. REV. ONLINE 82, 85–86, 89–90 (2022).

33. *See* Carrier & Tushnet, *supra* note 1, at 1856, 1872 (emphasis added).

Finally, any argument that defendants should be immune from antitrust liability because they are also liable under some other body of law would probably strike most observers as bizarre: The fact that one's conduct simultaneously violates two or more bodies of law hardly means that the offender can be prosecuted for violation of only one.[34] That said, as applied to antitrust, the argument is not *quite* as crazy as it sounds. In deciding whether to apply or extend antitrust into gray areas—for example, whether to impose § 2 liability for unilateral refusals to deal, or to condemn vertical concerted refusals to deal as per se illegal—the Supreme Court does indeed consider whether the risk of antitrust intervention is worthwhile, given the existence of other potential causes of action that can reduce the cost of false negatives.[35] It is quite another matter, however, to say that a type of conduct simply should evade liability for the violation of a generally-applicable legal standard just because some other body of law may penalize the conduct as well.[36] As Carrier and Tushnet suggest, we would not exempt from § 2 liability a monopolist who burns down his competitor's factory just because he is also criminally and civilly liable for committing arson.[37]

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34. *See id.* at 1850 ("[A]s a baseline principle, the presence of one set of remedies is not preclusive of another set when the facts implicate both bodies of law.") (internal citation omitted).

35. *See* Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 399 (2004) ("When there exists a regulatory structure designed to deter and remedy anticompetitive harm, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny."); *see also* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 137 (1998) (quoting 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 651d, at 78 (3d ed. 1996)) ("[O]ther laws, for example, 'unfair competition' laws, business tort laws, or regulatory laws, provide remedies for various 'competitive practices thought to be offensive to proper standards of business morality.' . . . [T]his Court has refused to apply *per se* reasoning in cases involving that kind of activity."). In this regard, Carrier and Tushnet cite *Trinko* for the proposition that "one could conceivably argue that antitrust should not apply to actions that are also governed by a separate regulatory regime." *See* Carrier & Tushnet, *supra* note 1, at 1869. But they reject the application of that principle in the false advertising context on the ground that other regulatory regimes (e.g., FDA regulation of drugs) "do[] not pervasively regulate industry structure in the way that the FCC does." *See id.* The FCC was the relevant agency in *Trinko*. *Id.*

36. I will note in passing that another wrongheaded version of the "other bodies of law suffice" argument sometimes arises in connection with the question of whether the breach of a commitment to license a standard-essential patent on fair, reasonable, and nondiscriminatory ("FRAND") terms, as alleged in (among other cases) *Broadcom*, should ever be an antitrust violation, given the possibility that third-party beneficiaries of FRAND commitments could prosecute breach-of-contract claims. In other work, I argue that the possible existence of such alternative claims should not deprive the courts of the ability to adjudicate FRAND breaches as antitrust violations if antitrust liability is otherwise well-founded. *See* Thomas Cotter, *Delrahim's Antitrust Approach to FRAND Still Problematic*, LAW360 (June 7, 2019, 6:34 PM), https://www.law360.com/articles/1167262 [https://perma.cc/HNX7-ZLR7].

37. *See* Carrier & Tushnet, *supra* note 1, at 1851 ("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."). *NYNEX* itself is not to the contrary. *See NYNEX*, 525 U.S. at 137 ("[I]n the presence of substantial market power, some kinds of tortious behavior could anticompetitively create or sustain a monopoly, [but] it is wrong categorically to condemn such

II. PRESUMPTIVE IMMUNITY

What Carrier and Tushnet refer to as "the *de minimis* approach," followed by the Second, Sixth, Ninth, Tenth, and Eleventh Circuits, was first proposed in the 1978 version of what was then the Areeda and Turner antitrust treatise, and continues to be included in the current—Areeda and Hovenkamp—edition of the treatise.[38] This approach recommends that courts "regard misrepresentations as presumptively de minimis" but that plaintiffs should be able to rebut the "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."[39] As Carrier and Tushnet point out, however, most of these factors overlap with what contemporary courts require to prove a false advertising claim.[40] More specifically, under current law courts require proof of—depending on how one divides them up—nine elements to prove a Lanham Act false advertising claim:

> (1) a false or misleading (2) description or representation of fact (3) regarding the nature, characteristics, qualities, or geographic origin (4) of the plaintiff's or defendant's goods, services, or commercial activities (5) in commercial advertising or promotion, which (6) either actually deceives or has a tendency to deceive a substantial segment of the intended audience, (7) is material, and (8) is used in interstate commerce, such that (9) the plaintiff has been or likely to be injured as a result.[41]

Element (1) (falsity) corresponds with the first Areeda and Hovenkamp factor ("clearly false"), as well as the fourth ("made to buyers without knowledge of the subject matter")[42] and the sixth ("not readily susceptible of neutralization

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practices . . . *or categorically to excuse them.*") (alterations in original) (emphasis added) (quoting 3 AREEDA & HOVENKAMP, *supra* note 35, ¶ 651d, at 80).

38. *See* Carrier & Tushnet, *supra* note 1, at 1854 (citing 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶¶ 738c, 739 (1978); and then citing 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 782b, at 351 (4th ed. 2013)).

39. *Id.* at 1855 (quoting 3B AREEDA & HOVENKAMP, *supra* note 38, ¶ 782b, at 351) (citing Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 371 (6th Cir. 2003)). The authors note that "[c]ourts are not consistent on whether a plaintiff must show each of the six factors." *Id.* at 1855 n.65; *see also* Maurice E. Stucke, *When a Monopolist Deceives*, 76 ANTITRUST L.J. 823, 827–28 (2010) (making this same point).

40. *See* Carrier & Tushnet, *supra* note 1, at 1857–61.

41. *See* BEEBE ET AL., *supra* note 18, at 441. Where the misrepresentation relates to the defendant's own goods, services, or commercial activities, the claim is, literally, for false advertising. When it relates to the plaintiff's goods, services, or commercial activities, it is a type of product disparagement. *See id.* at 441–42.

42. *See* Carrier & Tushnet, *supra* note 1, at 1855, 1860 ("If a statement is false or misleading, material, and actually deceived consumers, their [buyers'] knowledge of the subject matter demonstrably was not enough to protect them from deception.").

or other offsets by rivals").[43] Element (7) (materiality) corresponds to the second ("clearly material")—and also with the third ("likely to induce reasonable reliance"), inasmuch as "likely to induce reasonable reliance" is more or less what "materiality" *means* in false advertising law.[44] Carrier and Tushnet note these overlaps,[45] and infer that Areeda and Hovenkamp's wording therefore either envisions some higher burden of proof[46] or is intended to preclude all but "literally false" statements from the scope of potential antitrust liability.[47] They perceive no clear rationale for such additional requirements, however,[48] and argue further that Areeda and

43. *See id.* at 1855, 1861 ("If the false advertising worked, then it damaged the fair functioning of the marketplace, regardless of what theoretically could have happened."). Perhaps, though, the underlying idea is that deception is less likely to occur, all other things being equal, in markets for so-called "search" goods (goods that can be sampled prior to purchase) or even for low-cost, frequently-purchased "experience" goods (goods whose attributes consumers can discover after purchase). For discussion, *see* BEEBE ET AL., *supra* note 18, at 406, 410; *see also* FTC Policy Statement on Deception, *appended to* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174, 181 (1984) ("[W]hen consumers can easily evaluate the product or service, it is inexpensive, and it is frequently purchased . . . market incentives place strong constraints on the likelihood of deception" because sellers "normally would seek to encourage repeat purchases.").

44. *See* Carrier & Tushnet, *supra* note 1, at 1855, 1860; *see also* BEEBE ET AL., *supra* note 18, at 453–55 and sources cited therein.

45. *See* Carrier & Tushnet, *supra* note 1, at 1857–61.

46. *See id.* at 1857 n.71 (stating that "clearly false" may "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"); *id.* at 1860 n.82 ("[I]f 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.").

47. *See id.* at 1857–58 (stating that "clearly false" could mean "something like 'not capable of some innocent interpretation,'" but that misleading claims "can cause the same kinds of harm as literally false statements"). In false advertising law, "falsity" may rest on evidence that the statement at issue is either literally false (false on its face) or, alternatively, literally true, or ambiguous but misleading. *See id.* at 1848, 1857–58. To sustain a finding that a literally true or ambiguous statement is misleading normally requires extrinsic evidence that a substantial portion of the relevant class of consumers understand the statement to mean something that is untrue. *See id.* at 1859, 1859 n.80. According to most courts, a finding of literal falsity creates a rebuttable presumption that the statement is likely to cause deception. *See* BEEBE ET AL., *supra* note 18, at 451. A few courts also permit a presumption of materiality, though this appears to be a minority view (and more difficult to justify, as a policy matter). *See id.* at 453.

Further to the above points, in their Response to Carrier and Tushnet, Gagnon and Hovenkamp argue that the six factors are responsive to, among other things, the risk that courts otherwise might impose antitrust liability for "puffery," that is "ordinary exaggerations in advertising." *See* Gagnon & Hovenkamp, *supra* note 32, at 90–91. But puffery is not actionable under false advertising law anyway, both because—as Carrier and Tushnet note—it isn't "falsifiable," *see* Carrier & Tushnet, *supra* note 1, at 1853 n.51, 1858, and because it is immaterial to consumer purchasing decisions, *see* Martin v. Wendy's Int'l, Inc., 714 F. App'x 590, 592 (7th Cir. 2018) ("[S]tatements that 'no one is or could be fooled' by . . . [are] not actionable.") (quoting Schering-Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc. 586 F.3d 500, 512 (7th Cir. 2009)).

48. *See* Carrier & Tushnet, *supra* note 1, at 1857–61.

Hovenkamp's fifth factor (duration) is more relevant to assessing the impact of the offense rather than its commission.[49]

I am inclined to agree with Carrier and Tushnet's critiques of the *de minimis* approach, despite some lingering concerns that extending antitrust's reach into the types of cases under consideration could over-deter some lawful, procompetitive advertising.[50] On balance, I think this risk is manageable, given that Carrier and Tushnet's proposals are limited to the subset of antitrust claims against alleged monopolists or those attempting to monopolize, as well as the difficulty I perceive in formulating any defensible alternative limiting principles. Restricting the universe of false advertising claims that can serve as a predicate to § 2 liability to those involving literal falsity, or in which (to pluck a number from the air) thirty percent as opposed to fifteen percent of the relevant class of consumers are likely to be misled, seems arbitrary; and in any event, the weaker the case for deception, the weaker the case will be that it has enabled the acquisition or maintenance of monopoly power. Thus, even if factors such as duration are not—as Areeda and Hovenkamp suggest—a *sine qua non* of liability, proof that a false advertising campaign lasted for just a few days should reduce the likelihood that it was a substantial factor contributing to the defendant's acquisition or maintenance of monopoly power; the same might be said of false advertising that affected the purchasing decisions of only fifteen percent of the relevant class of consumers. Courts should view such facts as relevant to the strength of a monopolization claim, but not as quasi-elements of such a claim.

Carrier and Tushnet nevertheless could make it a bit more clear that their proposal for evaluating false advertising as § 2 violations depends on courts applying contemporary Lanham Act standards—if, in fact, that is the case.[51] This point is potentially important since, as they do note, there are other bodies of law besides the Lanham Act that regulate false advertising and other types of deceptive conduct.[52] As noted above,[53] for example, § 5 of the

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49. *See id.* at 1861 (arguing that the fifth factor is "a rough proxy for likelihood and amount of harm" but should not be "an independent requirement," and that the sixth "duplicates deceptiveness and harm").

50. Critics of contemporary false advertising have expressed concern, for example, that this body of law sometimes enables incumbents to fend off new entrants, or to chill truthful speech. *See, e.g.*, 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, 2–5 (1992); Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 47–51; Ellen R. Jordan & Paul H. Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527, 532 (1979). Whether the questionable cases these critics identify are representative of the whole, however, or constitute a larger proportion of cases than one would find in other bodies of law, is unclear—and in any event may be of less relevance to the situations addressed by Carrier and Tushnet, which involve claims against, rather than by, dominant incumbent firms.

51. This seems to be what they are advocating, since their discussion of how to implement their proposal specifically references Lanham Act standards, *see* Carrier & Tushnet, *supra* note 1, at 1871–72 n.136, but given the other bodies of law that regulate false advertising the authors perhaps should have made this more apparent.

52. *See id.* at 1847 (noting the FTC Act and corresponding state laws).

53. *See supra* note 30 and accompanying text.

Federal Trade Commission Act ("FTC Act") authorizes the Commission to prosecute "unfair or deceptive acts or practices in or affecting commerce,"[54] but unlike § 43(a) of the Lanham Act, the FTC Act does not set forth any specific, relevant criteria for determining what is "deceptive." To be sure, the standards applied in the Lanham Act and FTC false advertising cases today are similar—but this has not necessarily always been the case,[55] and some differences remain, including those relating to matters such as materiality,[56] the use of extrinsic evidence to prove that a representation is misleading,[57] and advertising substantiation.[58] Similarly, the common law of product disparagement does not require—as does the Lanham Act—proof that a disparaging statement about a competitor's product was made "in commercial

54. 15 U.S.C. § 45(a)(2).

55. Some early cases endorsed a very expansive approach to liability by condemning what was almost surely harmless puffery. *See, e.g.*, Charles of the Ritz Distribs. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944) (affirming an order prohibiting the use of "Rejuvenescence" for a cosmetic, on the theory that the FTC Act "was not 'made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking and the credulous'") (citing Florence Mfg. Co. v. J.C. Dowd & Co, 178 F.3d 73, 75 (2d Cir. 1910)). By the early 1980s, the Commission had come around to an analytical framework more similar to the one that courts apply in Lanham Act cases, *see* FTC Policy Statement on Deception, *supra* note 43, at 175–76, which the Commission (and federal courts reviewing Commission decisions) have followed ever since. *See, e.g.*, Tomasella v. Nestlé USA, Inc., 962 F.3d 60, 72–74 (1st Cir. 2020); ECM BioFilms, Inc. v. FTC, 851 F.3d 599, 609–11 (6th Cir. 2017); Novartis Corp. v. FTC, 223 F.3d 783, 786–87 (D.C. Cir. 2000); Kraft, Inc. v. FTC, 970 F.2d 311, 314 (7th Cir. 1992).

56. *See* FTC Policy Statement on Deception, *supra* note 43, at 5 (stating that the Commission will presume that a representation is material if it is express, or (if it is an implied misrepresentation or an omission) it is intentionally deceptive, or if it "significantly involve[s]health, safety, or other areas with which the reasonable consumer would be concerned").

57. *See id.* at 2 (stating that "[i]n cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transaction[,]" without resorting to extrinsic evidence (footnote omitted)).

58. With regard to substantiation, an "establishment" claim is one that represents that some test or study substantiates it (e.g., "Tests prove that COTTER motor oil provides longer engine life"), whereas a "nonestablishment" claim merely makes a statement about a product (e.g., COTTER motor oil provides longer engine life). *See* BEEBE ET AL., *supra* note 18, at 455–56. Establishment claims that lack their purported substantiation, or that are based on unreliable tests, are literally false. *See, e.g.*, United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1181–82 (8th Cir. 1998); Castrol, Inc. v. Quaker State Corp., 977 F.2d 57, 63 (2d Cir. 1992). According to some authorities, however, proof that a firm lacked support for a nonestablishment claim does not necessarily prove that the claim is false for Lanham Act purposes. *See United Indus.*, 140 F.3d at 1182; BASF Corp. v. Old World Trading Co., 41 F.3d 1081, 1090–91 (7th Cir. 1994); 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 27:61 (5th ed. 2022). Other authorities, however, have held that nonestablishment claims lacking any substantiation whatsoever are literally "false without additional evidence from the plaintiff to that effect." Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co., 290 F.3d 578, 590 (3d Cir. 2002). In the FTC context, by contrast, both establishment and nonestablishment claims are considered deceptive if they lack substantiation. *See* FTC Policy Statement Regarding Advertising Substantiation, *appended to* Thompson Med. Co., 104 F.T.C. 648, 839 (1984), *aff'd* 791 F.2d 189 (D.C. Cir. 1986) (requiring that advertisers "have a reasonable basis for advertising claims before they are disseminated").

advertising or promotion."[59] To be sure—as I noted in Part II above—false, deceptive, or fraudulent statements that do not implicate the Lanham Act may sometimes enable a firm to acquire or maintain monopoly power. To ensure that courts are not overextending the reach of the Sherman Act (and thus generating false positives), however, it may be wise to require them to consider—in cases involving deceptive conduct that would not qualify as false advertising under the Lanham Act—precisely how that conduct differs from the type of conduct that would be actionable under the Lanham Act. The less likely it would be considered actionably false, material, or sufficiently disseminated to qualify as "commercial advertising or promotion,"[60] the less likely it is, all things considered, to contribute to the acquisition or maintenance of monopoly power.

III. PRESUMPTIVE LIABILITY

The third principal thesis of the Carrier-Tushnet Article is that, rather than simply considering on a case-by-case basis whether a given act of false advertising enabled a monopolist to acquire or maintain market dominance, courts should employ a rebuttable "presumption that false advertising by monopolists constitutes monopolization."[61] Doctrinally, I understand this to mean that proof of actionable false advertising should give rise to a rebuttable presumption that the false advertising *caused* the plaintiff to suffer *antitrust*

59. As I have noted elsewhere, "subject to some variations among jurisdictions, the claimant [in a product disparagement case] must prove that the defendant intentionally made a false and disparaging statement, of and concerning the plaintiff's goods, services, or property, thus causing the plaintiff to suffer special harm . . . ." Thomas F. Cotter, *Damages for Noneconomic Harm in Intellectual Property Law*, 72 HASTINGS L.J. 1055, 1068 (2021). Thus, individualized disinformation spread by a defendant may be actionable as common-law product disparagement but not as a violation of the Lanham Act. *See* Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 56–60 (2d Cir. 2002) ("[T]he touchstone of whether a defendant's actions may be considered 'commercial advertising or promotion' under the Lanham Act is that the contested representations are part of an organized campaign to penetrate the relevant market. Proof of widespread dissemination within the relevant industry is a normal concomitant of meeting this requirement."); *see also* Grubbs v. Sheakley Grp., Inc., 807 F.3d 785, 801 (6th Cir. 2015) ("defin[ing] 'commercial advertising or promotion' as: (1) commercial speech; (2) for the purpose of influencing customers to buy the defendant's goods or services; (3) that is disseminated either widely enough to the relevant purchasing public to constitute advertising or promotion within that industry or to a substantial portion of the plaintiff's or defendant's existing customer or client base").

60. In this regard, I disagree with Carrier and Tushnet, who write that satisfaction of the "commercial advertising or promotion" requirement is not "relevant to the harm of false advertising." *See* Carrier & Tushnet, *supra* note 1, at 1871–72 n.136. Because this element effectively requires proof that the statement was widely disseminated within the relevant industry, *see supra* note 59, it arguably does shed some light on whether the statement is likely to contribute to the acquisition or maintenance of monopoly power. On the other hand, I agree that false advertising law's limitations on *who* can assert a false advertising claim are in some respects narrower than the standing requirements imposed by antitrust law, *see* Carrier & Tushnet, *supra* note 1, at 1865–66, and I am not suggesting that the antitrust requirements should be any different in a monopolization case premised on false advertising.

61. *Id.* at 1871.

injury.[62] In support of this proposal, Carrier and Tushnet assert "the near certainty of anticompetitive effects," given that "false advertising by definition harms at least one competitor, in what is a relatively small field."[63] The inference that such a presumption would serve the public interest nevertheless is, in my view, not overly compelling, though perhaps a presumption would not do much harm either.[64]

As the authors note, antitrust is certainly no stranger to the use of presumptions,[65] which fit naturally within the decision-theoretical framework, noted above,[66] that has become a standard part of contemporary antitrust law. More generally, it can be useful to think of presumptions as a type of "heuristic" (shortcut) that may be warranted when there is reason to believe that the reduction in the cost of making a decision resulting from the use of the heuristic outweighs the benefits of a more searching inquiry.[67] In the present context, a presumption that false advertising enables a monopolist to acquire or maintain monopoly power reduces the plaintiff's burden of having to come forward with evidence of causation and harm, and therefore might not only reduce costs but also generate more plaintiff victories. (Of course, if the defendant comes forward with counterevidence on either harm or injury, the plaintiff will have to respond, which reduces some of the cost-saving benefit.) This is all to the good if those victories are justified; and the fact that the defendant dominates the market may well suggest—as Carrier and Tushnet argue—that most of them would be. At the very least, monopolists would be on notice to think twice before engaging in deceptive conduct because they would be at least somewhat less likely to evade liability. Whether a presumption would matter very much, however, depends on how many cases would turn on the shifting of the burden to the defendant, as well as the risk of error. Again, we come back to the question of whether courts applying Lanham Act false advertising standards do so in a manner that, on balance,

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62. *See id.* at 1872–73 ("When an entity that meets the standards for monopoly power engages in materially false advertising that causes damage, we know that . . . it harmed identified victims (such as consumers or competitors) in a way likely to push the market as a whole toward an untrusting and untrustworthy market for lemons."); *see also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (defining antitrust injury).

63. Carrier & Tushnet, *supra* note 1, at 1872 (noting further that, because "a monopolist controls most of the market . . . there will be fewer competitors to harm").

64. The authors concede that a presumption is not appropriate for attempted monopolization claims, "[b]ecause attempted monopolists, unlike monopolists, do not control the market." *Id.* at 1877. They argue that for cases of attempted monopolization, courts should apply "the most robust scrutiny" to situations involving "(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." *Id.*

65. *See id.* at 1873–75 (discussing *per se* illegality and the quick-look approach, both of which involve presumptions—the first irrebuttable and the second rebuttable—of competitive harm).

66. *See* Abbott & Hoffman, *supra* note 27 and accompanying text.

67. For elaboration on this point and citation to sources, *see* Thomas F. Cotter, *Patent Damages Heuristics*, 25 TEX. INTELL. PROP. L.J. 159, 160–71 (2018). A heuristic may generate more false positive errors, though in some cases it could result in a net increase in accurate outcomes if, for example, it manages to reduce the number of false negatives without causing a corresponding increase in the number of false positives. *See id.* at 169.

serves the public interest; how much harm actionable false advertising actually causes when it occurs; and whether, in the present context, the risk of error will unduly chill vigorous competition.[68] The most I can say is that if we are reasonably confident that Lanham Act false advertising jurisprudence is largely sound and capable of being correctly applied, a presumption would marginally reduce adjudication and error costs and therefore might be worthwhile. Moreover, given that the presumption would arise only in the subset of antitrust cases in which the defendant is a monopolist, the risk of false positives should be relatively small, for the reasons suggested by Carrier and Tushnet.[69] All of which leads to the perhaps not very satisfying conclusion, nevertheless, which is that here, as elsewhere, the optimal rule or standard often depends on information that remains just outside our grasp. So, should we then presume?

CONCLUSION

Carrier and Tushnet have made a convincing case against both the categorical and presumptive immunity approaches to the antitrust/false advertising interface. As they demonstrate, false advertising can be one means by which a monopolist expands or maintains its market power. As long as courts properly apply the standard Lanham Act framework for determining what counts as actionable false advertising—or, in appropriate cases, for example those involving common-law product disparagement, justify departures from that framework—there is no particular reason to impose additional burdens of pleading or proof of falsity and materiality. Whether it would make sense to adopt a rebuttable presumption *of* liability when a monopolist engages in false advertising is, however, less clear, though I suspect that any such presumption would only rarely be outcome-determinative.

68. *See supra* note 50.

69. *See* Carrier & Tushnet, *supra* note 1, at 1872.