FALSE ADVERTISING, ANIMALS, AND ETHICAL CONSUMPTION

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In light of the fact that today's consumers often want their products to be created in the most environmentally-, globally-, and animal-friendly ways possible, unethical sellers sometimes succumb to the incentive to persuade consumers that goods were created more ethically than they actually were. False advertising law represents a rare, albeit roundabout, legal opening for animal advocates to deal with issues of animal mistreatment, regardless of legislative and executive branch disregard of the importance of animal protection. Whether there is a beneficial change in the law or not, current opportunities in the market for these cases should be sought out and exploited, if only to protect the ground animal advocates have gained in the battle for consumer opinion. This article investigates the ways that consumers can protect themselves from false advertising through the use of federal and state agencies, independent review, federal and state courts, and private attorneys general actions.

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I. INTRODUCTION

While the animal advocacy movement has historically focused on legislation, advocates nationwide are aware that changing the way consumers think may carry the day in the end. As animal advocacy groups succeed in convincing consumers to make ethical choices when buying, sellers who stand to lose market share as a result may use advertising that can be deceptive.[1] Because consumers will often pay more for humanely produced goods, and because those goods often cost more to produce, there is an incentive to convince buyers at the point of purchase that goods are created under more animal-friendly conditions than they in fact are.[2] Sellers who cave to this incentive interfere

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[1] There is little or no authority specific to this type of false advertising, but the field is quickly developing. For example, in 2002 People for the Ethical Treatment of Animals, Inc. (PETA) filed suit against the California Milk Advisory Board alleging false advertising by the Board in connection with its "Happy Cows" campaign. George Raine, *'Happy Cows' Cheese Ads Called a Sad Tale: Idyllic Depiction is False Advertising, Animal Rights Group Says*, S.F. Chron. B1 (April 30, 2002); PETA, *Pls.' Memo. of Points & Authorities in Opposition to Def.'s Demr., People for the Ethical Treatment of Animals v. Cal. Milk Advisory Bd.*, http://www.unhappycows.com/703.html (accessed Feb. 20, 2004) [hereinafter *PETA Memo*]; *Court Throws Out 'Happy Cows' Lawsuit*, San Diego Union Trib. A10 (Mar. 27, 2003). While the case was dismissed on other grounds, PETA has appealed and alleges that the Board is responsible for a media campaign designed to convince consumers that California dairy farms are unusually humane, and that in light of actual conditions, this constitutes false advertising. *Id.* PETA also filed suit in the same court in 2003 against the Kentucky Fried Chicken Corporation and its parent company alleging that the defendants were making grossly false representations regarding the treatment of their chickens. Elizabeth Becker, *Animal Rights Group to Sue Fast-Food Chain*, N.Y. Times A11 (July 7, 2003). In November 2003, the National Advertising Division of the Council of Better Business Bureaus, Inc. recommended that the United Egg Producers, Inc. (UEP), a trade association for the egg producing industry, discontinue the use of its misleading "Animal Care Certified" claim and logo appearing on egg carton packaging after it was challenged by Compassion Over Killing, Inc. (COK), an animal advocacy organization. It was determined that consumers could reasonably take away the message that laying hens are treated to a more humane level of care than required by the UEP program. *United Egg Producers, Inc.*, NAD Case Rpts. 636, 636 (Dec. 2003), *appeal filed*. The national advertising review board subsequently upheld this decision. Referring to survey evidence about acceptable practices the board stated "it is unimaginable that consumers would consider treatment they find 'unacceptable' to be humane treatment." The NARB has not print-pubished its decision at this time, but see Patrick Condon, *Associated Press, Better Business Bureau Nixes Egg Ads*, http://www.spokane.bbb.org/alerts/alerts.html?newsid=381&newstype=1 (May 11, 2004).

[2] *See* 67 Fed. Reg. 79552-02, 79554 (Dec. 30, 2002) ("Since some consumers prefer products from animals that have been raised using these production practices [free range claims], producers may seek to improve their returns by appealing to such market niches."); Fran Henry, *The Squawk Over Ohio's Eggs*, Cleveland Plain Dealer, A1 (June 1, 2000) (citing a 1999 study by the American Humane Association that found that 44% of consumers would pay 5% more for food labeled "humanely raised"). In 2001, the USDA in its "International Egg and Poultry Review," discussed the impact of consumers' animal welfare concerns on the industry:

> Another key issue increasingly affecting egg production worldwide concerns animal welfare and the ethical treatment of animals. In the EU, The Council Di-

with the free market.[3] More importantly, if sellers of traditionally produced products succeed in deceiving consumers, the ground animal advocates have gained in the battle for consumers' opinion and their market choices will be fruitless.

False advertising laws exist to ensure that consumers receive the information they need to make the market choices they want. Ethical choices regarding how goods are produced are no less protected under the law than choices based on how a good functions or how long it will last, and are perhaps more important. In a world of expanding free markets, ethical consumption may be the most effective means for social change, but it is not possible if sellers get the benefit of being able to dupe the consumer.[4]

While it prevents deception, false advertising law is also one of the few avenues that animal advocates can use to have courts and public agencies review the actual treatment of animals as well as consumers' perception of that treatment. The law indirectly creates public forums where these issues must be dealt with dispositively. Parts I, II, and III

> rective on minimum standards for the protection of laying hens requires a decrease in bird stocking density and a ban on the use of conventional laying cages by the year 2012 (Germany is proposing that requirements on cages be in effect by 2007). The concern among egg producers is that this directive will increase the price of eggs and reduce consumption. McDonald's Corp. (which uses about 2.5% of total U.S. egg production) recently announced that it would purchase eggs only from free-range hens. Industry estimates costs of production will increase between 11 cents/dozen and 24 cents/dozen.

4 Intl. Egg & Poultry Rev. 46, 1 (2001); *see also* 6 Intl. Egg & Poultry Rev. 45, 1 (2003) (noting that animal welfare regulations increase the difficulty and cost of producing eggs).

[3] *See* Federal Trade Comm. Mary L. Azcuenaga, Address before the Int. Cong. of Advert. & Free Mkt., http://www.fts.gov/speeches.az1.htm (accessed Feb. 20, 2004):

> One of the fundamentals of a market economy is the free flow of information about goods and services offered for sale. The underlying theory is that the more fully consumers are informed, the better equipped they will be to make purchase decisions. Unwanted goods and services eventually will disappear from the market, and prices that are too high to induce purchase ultimately will be lowered as firms seek to attract buyers. Most of the time, advertising enhances market performance by transferring useful information to consumers and by enabling firms to promote the attributes of their products and services and, thereby, to compete better with each other. On the other hand, advertising may adversely affect market performance when firms use it to transmit deceptive or fraudulent messages on which reasonable consumers are induced to rely to their detriment. When this happens, we tend to refer to the result as "market failure."

Id. See also Jean Wegman Burns, *The Paradox of Antitrust and Lanham Act Standing*, 42 UCLA L. Rev. 47, 54 (1994) ("Deceptive advertising . . . ultimately leads to a misallocation of societal resources by causing consumers to make 'mistaken' purchases.").

[4] The importance of ethical market choice goes beyond its impact on animals. *See generally Enforcement Policy Statement on U.S. Origin Claims*, 62 Fed. Reg. 63770 (Jan. 2, 1997) (regarding the Federal Trade Commissions' enforcement policy with respect to the use of "Made in USA" and other U.S. origin claims in advertising and labeling); *see generally Nike v. Kasky*, 123 S. Ct. 2554 (2003) (regarding representations about labor conditions at foreign facilities where Nike produces consumer goods).

of this article serve as a very basic introduction to the procedure, substance, and evidence of false advertising law in the context of animal advocacy, so that advocates can identify abuses in the current market and take action. Part IV argues that the need to protect consumer choice about animal mistreatment demands changes where the law currently fails consumers.

II. FORUMS AND BASIC PROCEDURE

Animal advocates have many options to target false advertisers, each with significant pros and cons. While solutions have been attempted in the market itself, they have not solved the problem.[5] The following discussion is not exhaustive, but may represent some of the more common forums available and should allow advocates to plan strategies when they identify causes of action in the current market. The forums may generally be divided into: 1) federal and state executive (and in some cases independent) agencies, and 2) federal and state courts.

A. Federal Agencies

Perhaps the most effective method of dealing with the false advertising of animal related products (or a service, such as a circus or a zoo) is to begin advocating before the ads are even released by lobbying the various federal agencies that control the language of advertising. The Federal Trade Commission (FTC), Food and Drug Administration (FDA), and United States Department of Agriculture (USDA) all have authority, to various degrees, to control how products are advertised and promulgate regulations to this effect.[6] By taking advantage of op-

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[5] Various organizations have created labels, symbols, and logos that identify products as "Cruelty Free," "Certified Humane Raised and Handled," and "Free Farmed," (phrases all unregulated by the Federal Government) which may be used by sellers certified in accordance with the particular organization's program. *See* Kim Severson, *Humane Handling Taking Hold on Animal Farms*, S.F. Chron. A4 (Sept. 7, 2003); Andrea Mather, *Beauty with Compassion*, Vegetarian Times 60, 60 (Dec. 1999). These programs range from attempts at self-regulation to promotions of a particular product line. *Id.* However, such programs are not currently in widespread use and without any general consensus on the meaning of the subject terms there is no guarantee that independent certification programs will not themselves mislead some consumers. Absent government regulation, false advertising law remains today's most effective means of protecting consumers' choice about products that affect animals. In fact, industry "up front" self-regulation can lead to significant consumer deception about the products they buy, as in the case of the "sweat free label." Maria Gillen, *The Apparel Industry Partnership's Free Labor Association: A Solution to the Overseas Sweatshop Problem or the Emperor's New Clothes?*, 32 N.Y.U. J. Intl. L. & Pol. 1059, 1064 (2000).

[6] *Fed. Trade Commn. Act of 1914*, 15 U.S.C. §§ 45, 52, 55 (2000); *Fed. Food Drug & Cosmetics Act*, 21 U.S.C. §§ 321(n), 331, 343(a) (2000); *Agric. Mktg. Act of 1946*, 7 U.S.C. 1622(c) (2000); *FTC Enforcement Policy State on Food Advert.*, 59 Fed. Reg. 28388-01, 28388 (1994) ("The FTC, FDA, and USDA share jurisdiction over claims made by manufactures of food products pursuant to a regulatory scheme established by Congress through complementary statutes."); *see also* 7 U.S.C. § 6509 (2000); 21 U.S.C. §§ 453(h)(1), 601(n)(1), 1036(b) (2000); 7 C.F.R. §§ 56.35(b), 58.50 (2003). The Federal

portunities for public input (usually through public "notice and comment" procedures) on how advertising claims of specific products will be regulated, animal advocates can narrow the claims made by companies and affect what those companies must do in order to substantiate the claims they make.[7]

For example, in 1998 the USDA sought comments on its proposed National Organic Program (NOP).[8] The proposal, though not primarily concerned with the treatment of animals, contained provisions for how subject animals would be confined.[9] Furthermore, it included a certification process for sellers to label their products as "organic" when displayed to consumers. The USDA received several comments regarding animal welfare,[10] and considered adding space requirements (possibly in reaction to animal welfare comments) but chose not to.[11] Instead, producers who wish to make claims to consumers that their products are "organic" must now adhere to qualitative standards that can be used by auditors to determine whether confinement is appropriate under the program, and whether the seller can thus advertise their products as "organic."[12] Regardless of whether quantitative or qualita-

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Communications Commission (FCC) also has jurisdiction over false advertising, but has agreed to allow the FTC to handle most cases, with the exception of egregious false advertising by broadcast stations and cases involving common carriers. *Liaison Agreement Between Fed. Commun. Commn. & Fed. Trade Commn.*, 3 Trade Reg. Rep. (CCH) ¶ 9,852 (1988); *In re Bus. Discount Plan, Inc., Notice of Apparent Liab. for Forfeiture*, 14 FCC Rcd. 340, 355–58 (1998).

7 *See Administrative Procedure Act*, 5 U.S.C. §§ 553(b)(3), (c) (2000) (requiring that this be done pursuant to the notice and comment procedures). For arguments against up-front government regulation of false advertising in the context of environmental claims and the green market, *see* John M. Church, *A Market Solution to Green Marketing: Some Lessons from the Economics of Information*, 79 Minn. L. Rev. 245, 254 (1994).

8 63 Fed. Reg. 57624, 57624 (Oct. 28, 1998).

9 *Id.*

10 *Id.* at 57625 ("Many commenters indicated opposition to factory farming of livestock. It is unclear how these commenters would define the term factory farming and whether those who oppose factory farming are concerned about animal space requirements, environmental issues, or a particular business structure. Like NOSB and USDA, they believe that routine, continuous confinement of livestock must be prohibited, but some commenters stated that the proposed livestock requirements, which required access to outdoors and space for movement, fall short of consumer expectations for the production of organically grown livestock. Therefore, a more detailed delineation of the criteria for appropriate confinement may be necessary to satisfy the concerns of these commenters.").

11 65 Fed. Reg. 80548, 80573 (Dec. 21, 2000).

12 7 C.F.R. § 205.239 (2003) (these are "conditions which accommodate the health and natural behavior of animals, including: (1) Access to the outdoors, shade, shelter, exercise areas, fresh air, and direct sunlight suitable to the species, its stage of production, the climate, and the environment; (2) Access to pasture for ruminants; (3) Appropriate clean, dry bedding. If the bedding is typically consumed by the animal species, it must comply with the feed requirements of § 205.237; (4) Shelter designed to allow for: (i) Natural maintenance, comfort behaviors, and opportunity to exercise; (ii) Temperature level, ventilation, and air circulation suitable to the species; and (iii) Reduction of potential for livestock injury; (b) The producer of an organic livestock operation may provide temporary confinement for an animal because of: (1) Inclement weather; (2) The

tive standards are preferred, use of the term and any implications it may have for the consumer regarding how these animals are kept is now regulated. To the extent consumers educate themselves about the program, they can be aware of how these animals are treated, and industry cannot benefit from the sale-inducing but untrue conditions the terms might have previously implied.

The USDA is now dealing with these issues again, in the context of a voluntary certification program. On December 30, 2002, the Agricultural Marketing Service of the USDA issued public notice and request for comments on proposed minimum requirements for livestock and meat industry production/marketing claims.[13] The program created minimum standards by which certain claims, free-standing and in conjunction with the terms "USDA Certified" and "USDA Verified," could be judged. While the certification program is voluntary, the standards could ostensibly be used by the agency to deny non-compliant claims made by sellers when they seek agency approval of their labeling.[14] Some of the claims covered are "[f]ree range, [f]ree roaming, or [p]asture [r]aised" and producers would be expected to verify how livestock are cared for during normal and inclement weather conditions, birthing, and other conditions that would merit special attention.[15]

Public notice and comment procedures give animal advocates some ability to influence the regulation of false advertising. It is questionable to what extent agencies actually react to such comments, but those comments do still "seed the record" for future administrative suits. However, current governmental regulation in this area is virtually non-existent. Furthermore, the variety of ways sellers can imply things to consumers makes comprehensive regulation of false advertising almost impossible. Animal advocates must then deal with false ads as they find them, ad-hoc, and seek redress from the various agencies in their law enforcement capacities by filing complaints.[16]

The FDA, FTC, and USDA are all empowered to remedy false advertising. The FTC may bring an action pursuant to section 13 of the Federal Trade Commission Act (FTCA) to enjoin further distribution of the advertising and enforce such an injunction in district court, until it files a formal complaint under section 5 of the FTCA.[17] Filing such a complaint begins a formal administrative procedure that can lead to cease and desist orders, monetary penalties, corrective advertising,

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animal's stage of production; (3) Conditions under which the health, safety, or well being of the animal could be jeopardized; or (4) Risk to soil or water quality; (c) The producer of an organic livestock operation must manage manure in a manner that does not contribute to contamination of crops, soil, or water by plant nutrients, heavy metals, or pathogenic organisms and optimizes recycling of nutrients.").

[13] 67 Fed. Reg. 79552-02, 79553 (Dec. 30, 2002) (closing the comment period on Mar. 31, 2003).

[14] *Id*.

[15] *Id.* at 79554.

[16] *See supra* n. 6 (discussing consumer complaint jurisdiction).

[17] 15 U.S.C. §§ 45, 53 (2003); *FTC v. Pantron I Corp*., 33 F.3d 1088, 1095 (9th Cir. 1994) (discussing the FTC enforcement process).

and eventually court review.[18] In short, the FTC has broad statutory authority to target false advertisers.

The FDA by comparison, acts as a more conventional regulatory agency, in essence making findings through its administrative procedure that can result in action by the Commissioner to prevent the advertising.[19] As noted above, the USDA's enforcement authority is more specific to the particular product in question, rather than a broad authority over false advertising or improper labeling, but can be used to levy civil penalties and reject labeling.[20]

Of the federal agencies charged with taking action against false advertisers, the FTC has primary responsibility for advertising in general, while the FDA takes primary responsibility over product labeling.[21] Both are empowered to take action against false advertisers identified to them by members of the public, regardless of whether the complainant is a consumer, competitor, or animal advocacy organization.[22] The FDA tends to have a much more formal set of procedures as part a "citizen petition filing" whereas the FTC is able to receive simple complaints that it then investigates independently.[23] The process for complaints to the USDA regarding specific instances of false advertising depends more on the particular product in question, and is based on section 4(d) of the Administrative Procedure Act.[24] To the extent that a particular product (or service) falls within the jurisdiction of more than one agency, or jurisdiction is not clear, there is no prohibition in filing with multiple agencies. The complaint or petition should,

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[18] 15 U.S.C. §§ 45, 53; *FTC*, 33 F.3d at 1095.

[19] 21 C.F.R. § 10.30(e) (2003).

[20] 21 U.S.C. § 1036(b) (2000); 7 U.S.C. § 6509 (2000); 7 C.F.R. §§ 3.91, 56.35(b), 57.5, 58.50 (2003). It should be noted that neither the FDA nor the USDA have made clear whether they construe their statutes to cover false advertising complaints by consumers regarding animal production methods; however, there are limits to how far any agency can go in ignoring its statutory mandate. *See Chevron U.S.A., Inc. v. Nat. Resources Def. Council, Inc*., 467 U.S. 837, 843 (1984) (establishing the arbitrary and capricious agency actions standard).

[21] *Working Agreement Between FTC & FDA*, 4 Trade Reg. Rep. (CCH) ¶ 9,850.01 (1988); *see generally In re Blanton Co*., 53 FTC 580 (1956) (finding that the commission is empowered to take action when the advertising is incidentally part of the product's label).

[22] 16 C.F.R. § 2.1 (2003) ("Commission investigations and inquiries may be originated upon the request of the President, Congress, governmental agencies, or the Attorney General; upon referrals by the courts; upon complaints by members of the public; or by the Commission upon its own initiative. The Commission has delegated to the Director, Deputy Directors, and Assistant Directors of the Bureau of Competition, the Director, Deputy Directors, and Associate Directors of the Bureau of Consumer Protection and, the Regional Directors and Assistant Regional Directors of the Commission's regional offices, without power of redelegation, limited authority to initiate investigations."); 21 C.F.R. § 10.30(a) (2003) ("Citizen petition. (a) This section applies to any petition submitted by a person (including a person who is not a citizen of the United States) except to the extent that other sections of this chapter apply different requirements to a particular matter.").

[23] 21 C.F.R. § 10.30(a).

[24] 5 U.S.C. § 553(e) (2000).

of course, notify the agency that the complainant has filed with other agencies, and explain why.

A commonality to complaints before federal and state agencies, and perhaps vital to remember in cases involving the treatment of animals, is that the enforcer has discretion whether or not to act. The FTC recently reported that the number of fraud complaints it received jumped from 220,000 in 2001 to 380,000 in 2002.[25] While a complaint may prove beyond a reasonable doubt that the seller is falsely advertising, the complainant must also convince the enforcer that this is the case to take in terms of prosecutorial discretion. Animal advocacy groups must show that, despite competing consumer complaints of retirees deprived of their life savings and baby formulas completely devoid of nutrition, the "humane foie-gras" or "animal-friendly glue traps" must be stopped.

As a general matter, false advertising differs from other animal advocacy cases because either the consumer or relatively humane competitor is the victim actually protected under the law. To the extent animals as victims are marginalized under the law and in law enforcement's perception, this is helpful and can be a point of focus.[26] Also, as a general matter, it could be argued that as consumer opinion newly begins to form in this area, law enforcement has an opportunity to have a greater impact with its resources, sending a signal to the would-be false advertisers.[27] Furthermore, these cases inevitably involve interference with consumers' right to make socially responsible marketing decisions, and as such implicate the function of the free market.[28] As further discussed below, this makes social change via the free market less likely, and in turn invites governmental regulation.[29] These general attributes and the specific factors of the case which make it appropriate in the enforcer's exercise of discretion should be included in the case arguments, because proving a violation of the law is simply not enough. Furthermore, while such general attributes and the specific sympathetic aspects of the case may make it more appropriate for action, the FTC has published specific guidelines that can be cited and that some animal-related cases may fit nicely into.[30]

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[25] Fed. Trade Commn., *FTC Releases Top 10 Consumer Complaint Categories in 2002*, http://www.ftc.gov/opa/2003/01/top10.htm (Jan. 22, 2003).

[26] False advertising actions also differ from many other animal cases in that the substantive law and procedure is long established and readily available (as is discussed herein) and can provide for substantial damages.

[27] *See supra* n. 1 (increased court involvement in false advertising of animal products).

[28] *See supra* n. 3 (concerning free market remedies to false advertising problems).

[29] *See infra* pt. V (discussing advocates' choice between free markets and government regulation).

[30] The FTC states that it "pays closest attention to . . . ads that make claims that consumers would have trouble evaluating for themselves, such as: . . . ABC Hairspray is safe for the ozone." Fed. Trade Commn., *Frequently Asked Advertising Questions: A Guide for Small Business*, http://www.ftc.gov/bcp/conline/pubs/buspubs/ad-faqs.html (accessed Feb. 15, 2004). Normally, because the false advertising in animal related

While agencies have total discretion to act on complaints, and may not be totally independent from the industries they regulate, preparing and filing these complaints will put the agencies on notice of the issue and create a basis for public pressure and lobbying. Because the complaints will also mirror filings in other forums, they should also be relatively easy to prepare and cost nothing to submit.

B. Independent Review

As discussed further below, perhaps the most effective means of taking an advertiser to task is by filing a complaint with the National Advertising Division (NAD) of the Council of Better Business Bureaus. This organization and its appeal body, the National Advertising Review Board (NARB), are the advertising industry's self-regulating forums and provide for formal adjudication of claims against false advertisers.[31] The NAD receives complaints from any interested person or organization, including competitors, and begins a formal process with responses from the advertiser.[32] The NAD focuses on national cases involving consumer deception, maintains a strict confidentiality policy, and will not deal with cases that are pending in litigation or subject to federal agency action.[33] This is important to remember because adjudication with the NAD must precede much of the action described in this article.

Depending on the outcome, there is then a formal appeals process to the NARB, which empanels members of the public, ad industry representatives, and actual advertisers to decide the matter.[34] The organization may publicize its determinations and is empowered to refer matters to the appropriate federal agencies.[35] Because sellers themselves are hurt when consumers are deceived (endangering consumer

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cases deal with production methods as opposed to how the product functions, consumers will not have a basis to evaluate the claim. The FTC lists as a factor in deciding which cases to bring "[t]he extent to which an ad represents a pattern of deception, rather than an individual dispute between a consumer and a business or a dispute between two competitors." *Id.* Generally, a seller seeking to exploit consumers' beliefs about the product's impact on animals can be considered to be engaging in a pattern of deception. The FTC also lists as a factor in deciding which cases to bring "[t]he amount of injury . . . to consumers' . . . wallets—that could result if consumers rely on the deceptive claim." *Id.* As discussed above, because consumers may pay more for products they perceive to be humane, this factor should lean in favor of such cases. Furthermore, to the extent that such products are repeatedly purchased and represent a significant percentage of consumers' expenditures, the agency may be persuaded to act. *See* Henry, *supra* n. 2 (consumers will pay more for animal-friendly products).

[31] Jeffrey S. Edelstein, *Self Regulation of Advertising: An Alternative to Litigation and Government Action*, 43 IDEA 509, 516 (2003); Natl. Adv. Rev. Council, *The Advertising Industry's Process of Voluntary Self-Regulation*, *Policies and Procedures*, http://www.caru.org/guidelines/procedure.pdf (accessed May 1, 2002) [hereinafter *Procedures*].

[32] *Procedures*, *supra* n. 31 at §§ 2.2–2.12.

[33] *Id.*

[34] *Id.* at §§ 3.1–3.8.

[35] *Id.* at §§ 2.1, 2.10, 3.1.

confidence and hurting competitors) there is an incentive for self-regulation and the NAD process can function well. Participation in the process, and compliance when the organization asks an advertiser to change or desist its ads, is voluntary and this might suggest that the whole thing could be a paper tiger that can be ignored.[36] To the contrary, filing with this organization could be the most important part of any action against a false advertiser.

False advertising law involves analysis of fairly convoluted substantive factors and complex evidence to arrive at a final conclusion that an ad is illegal. Adjudicators hearing a case might be curious if a prior adjudicator has "done the work" and might find their conclusion persuasive. This should be especially true when the prior adjudicator is the preeminent expert private organization in the field, made up of a variety of elements which focus exclusively on the issue of false advertising. Prior favorable decisions in a case can be the best evidence, and, regardless of whether they are simply advisory or not, should be sought out and used. Furthermore, advertisers often comply with the NAD/NARB findings, and the FTC has recognized their importance.[37]

One benefit to all the possible actions described above is that virtually anyone may bring the complaint. However, it raises the question: against whom do they bring the complaint? Suffice it to say that for all of the actions described in Part I, anyone engaging in deceptive advertising as defined under the particular law could be liable, which could potentially include the manufacturer, distributor, retailer, or trade organization.[38] As a matter of practice all potential false advertisers should be included in any complaint. An exception exists for the media entities publicizing the advertising in question, though they may become liable if they knew of the falsity or were reckless in publicizing it.[39]

C. State Agencies

In addition to the federal agencies discussed above, the various states act to protect consumers from false advertising and have a variety of enforcement mechanisms that animal advocates can appeal to. However, to the extent that states are primarily concerned with protecting consumers from actual harm and are inundated beyond their resources, they may be less reactive to the more ethereal cases involving animal advocacy. While the federal agencies have begun to deal

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[36] *But see* Edelstein, *supra* n. 31, at 526–29 (voluntary compliance with NAD is almost universal).

[37] *AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 458 (E.D.N.Y. 1985); Fed. Trade. Commn., *Advertising: Interpretation and Enforcement Policy*, *Remarks by Mary L. Azcuenaga, Cmmr. FTC*, http://www.ftc.gov/speeches/azcuenaga/aaf94.htm (Mar. 8, 1994).

[38] *Grant Airmass Corp. v. Gaymar Indus., Inc.*, 645 F. Supp. 1507, 1511 (S.D.N.Y. 1986); and *see supra* n. 1 (regarding claims against retailers, government boards, and trade organizations).

[39] Edelstein, *supra* n. 31, at 512–14.

with ethical and animal welfare issues in the context of false advertising as matters of national and political importance, state agencies by their mandate are concerned with illegal acts affecting their residents. However, because law enforcement resources may eventually focus where there is a continuing demand, and to the extent advocates are willing to simply play the odds that a particular state will take an interest in their complaint, this mechanism should be used.

Every state in the union has enacted a "little FTC" (after which they are designed) act that prohibits false advertising, and usually empowers a state agency to take action to prevent it.[40] A survey of the 50 states' consumer protection laws is beyond the scope of this article, but it might be helpful to discuss some of the authority that authorizes various states to take action against false advertising. As a general matter, complaints are filed directly to the particular state attorney general's office, or a particular sub-component, that has jurisdiction over false advertising occurring in the state and is empowered to take action against it.

For example, under the Massachusetts Consumer Protection Act, deceptive acts or practices in the conduct of any trade or commerce are unlawful and the state attorney general can bring an action to enjoin such activity.[41] Under regulations promulgated by the state attorney general,

> (1) No claim or representation shall be made by any means concerning a product which directly, or by implication, or by failure to adequately disclose additional relevant information, has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect . . . (2) No advertisement shall be used which would mislead or tend to mislead buyers or prospective buyers, through pictorial representations or in any other manner, as to the product being offered for sale.[42]

Such advertisements may include labels on products used by retail sellers, and can be found misleading if they cause consumers to act differently than they otherwise would have.[43] Once notified of a particular false advertiser, the attorney general may take several actions, from requesting mediation to seeking civil penalties.[44]

Under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, deceptive acts or practices may also be enjoined by the state attorney general.[45] Such deceptive acts can include "causing a likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services," and "representing that goods or services have sponsorship, approval, characteristics,

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[40] Jeff Sovern, *Protecting Privacy with Deceptive Trade Practices Legislation*, 69 Fordham L. Rev. 1305, 1349 (2001).

[41] Mass. Gen. Laws Ann. ch. 93A §§ 2, 4 (West 2003).

[42] 940 Code Mass. Regs. 3.05 (2003).

[43] 940 Code Mass. Regs. 6.01, 6.04 (2003); *Hogan v. Riemer*, 619 N.E.2d 984, 988 (Mass. App. 1993).

[44] Mass. Gen. Laws Ann. ch. 93A §§ 4, 5 (West 2003).

[45] 73 Pa. Consol. Stat. Ann. § 201-4 (2003).

ingredients, uses, benefits or quantities that they do not have."[46] The attorney general is also empowered to recover civil penalties from malfeasants.[47]

Various state officials in California, including city and district attorneys, can request proof in support of a particular advertiser's claims, bring an action to halt the claims if such proof is insufficient, and disseminate corrective information about the advertising to consumers in the state.[48] They may also seek restitution for the injured party.[49] In 1992, a court held that the injunctive relief provisions of the statute, which allows for the correction of false impressions built up by prior advertising and deterrence of future violations, authorized courts to order that a warning label be affixed to a dairy producer's consumer products.[50]

In New York, the state attorney general again has authority to act to prevent the deception of consumers and may seek a preliminary injunction to avoid the deception, or restitution after it has occurred.[51] What constitutes false advertising is quite broad and is defined in the consumer protection statute itself to include "advertising, including labeling, which is misleading in a material respect."[52]

Perhaps the easiest way for advocates to assess how and where to file complaints is by accessing the various online consumer protection services offered by the state agencies directly. They make available basic complaint forms and explain filing procedures for the particular state attorney general's office or other state agency. Again, because these agencies have discretion whether or not to act, and because they will undoubtedly have significant demand for their limited resources, advocates must appeal to the enforcers discretion and provide ample evidence[53] in support of the complaint. In this regard, it may be helpful to obtain as many resident consumers who believe that they have been defrauded and can articulate the fraud in affidavits before filing with the state attorney general. This will show the far-reaching impact of the deception, allow for the various consumers to describe how they

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[46] *Id.* at § 201-2.

[47] *Id.* at § 201-8.

[48] Cal. Bus. & Prof. Code Ann. §§ 17500, 17508(b)–(c) (1997).

[49] *Id.* at § 17535.

[50] *See Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 6 Cal. Rptr. 2d 193, 197 (Cal. App. 1st Dist. 1992) (Alta-Dena was ordered to place the following warning on its raw certified milk products for ten years: "WARNING: THIS MILK MAY CONTAIN DANGEROUS BACTERIA.").

[51] N.Y. Gen. Bus. Law § 349(b) (McKinney 1988) ("Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unlawful he may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices.").

[52] *Id.* at § 350(a).

[53] *See infra* pt. IV (discussing basic evidence which should accompany any complaint).

were deceived, and perhaps reflect concerns among a significant political constituency in the state.

D. Federal Court

Rather than relying on a third party government agency to act, perhaps the preferred method of exposing a seller for deceiving consumers regarding an animal-related product or service is to bring them directly to court. However, as discussed below, this is difficult in any case and perhaps more so in the context of animal advocacy where litigants may lack traditional "injuries" or other grounds for standing. Consumer protection laws, while gracious in the authority they give to executive agencies to act, either expressly limit or have been interpreted to limit consumers' and non-governmental organizations' access to court. This limitation is predicated on many questionable theories discussed further below, but in the current state of the law it certainly makes challenging false advertisers in court less likely.

Federal court, which can only be accessed by a few narrowly defined litigants, exemplifies this. For example, while the Federal Trade Commission Act appears to be Congress's attempt to create a broad consumer protection mechanism that might afford a private cause of action, it had been squarely held not to.[54] In light of this authority it would also be hard to argue that anything under the USDA and FDA consumer protection laws afford a private cause of action for false advertising.

However, one avenue for calling false advertisers to account for their acts, in terms of original jurisdiction in federal court, is the Lanham Act.[55] This act creates a federal cause of action for false advertising in interstate commerce with broad remedies ranging from injunctive relief and damages, to corrective advertising.[56] The act effectively brings the force of federal courts to bear against false adver-

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[54] *See Holloway v. Bristol-Myers Corp*., 485 F.2d 986, 1002 (D.C. Cir. 1973) ("A fair reading of the statute and its legislative history evinces a plain intent by Congress to make the administrative program for enforcing the Federal Trade Commission Act an exclusive one."); *Kaiser v. Dialist Co*., 603 F. Supp. 110, 111 (W.D. Pa. 1984) (dismissing a private claim based upon the FTCA in a diversity jurisdiction case); *see also supra* n. 6 (explaining how the FTC, FDA, and USDA share jurisdiction on advertising).

[55] 15 U.S.C. § 1125 (2000). There are many ways in which these issues could potentially be addressed in federal court, in removal or diversity jurisdiction cases for example. *See Animal Legal Defense Fund v. Provimi Veal Corp*., 626 F. Supp. 278, 280–81 (D. Mass. 1986) (state unfair competition claims removed to federal court, discussed at length in Part 1(E)); *New York v. Trans World Airlines*, 728 F. Supp. 162, 166 (S.D.N.Y. 1989) (review of removed state false advertising law claims in federal court). Also, a litigant could use other substantive claims that nonetheless deal with accuracy of a seller's representations, such as federal trademark law.

[56] *Lanham Act*, 15 U.S.C. § 1125(a)(1)(B) (providing in relevant part: "Any person who . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.").

tisers and it has become a major source of federal litigation that has created volumes of case precedent on issues regarding false advertising and the evidence needed to prove it. [57]

Unfortunately, in the context of animal advocacy, the statute presents some initial pitfalls. While the statute allows for "any person who believes that he or she is or is likely to be damaged by" false advertising to bring a civil action, courts have almost universally rejected consumer actions, holding that a plaintiff must suffer some sort of *commercial* (and in some Circuits *competitive*) injury to have prudential standing and have consistently rejected consumer actions.[58] While there may be questionable jurisprudential reasons for narrowing the statute (namely judicial economics), this has effectively limited Lanham actions to claims between competing sellers.

In 1997 Huntingdon Life Sciences sued PETA claiming, among other things, that their investigation of Huntingdon's laboratory and subsequent publicizing of conditions there constituted a violation of the false advertising provisions of the Lanham Act.[59] The court dismissed the claim holding that PETA's publicizing of the lab conditions constituted political rather than commercial speech, and that PETA was not a competitor within the meaning of the act.[60] Ironically, if the court had strayed from established precedent in this case of first impression and read the statute more broadly, potentially making PETA liable, there could be precedent for animal advocacy organizations to sue for false advertising under the act.

As it stands, there is almost no jurisdiction in which a typical consumer (as opposed to a plaintiff who is in some sort of commercial position) can bring a Lanham Act claim.[61] Based on current law the claimants in cases such as the "Happy Cows" cases[62] could not have filed under the Lanham Act, nor could the deceived consumers they may represent. To the extent that an animal advocacy organization or simple consumer wishes to be a party to the action, the Lanham Act is not an option.

However, the statute does provide an excellent opportunity for relatively humane sellers to target their false advertising competitors, and thereby offers a public forum rarely accessible to the movement. A

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[57] *See* Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. Rev. 807, 887–88 (1999) (characterizes current false advertisement case law as inconsistent and calls on federal courts to base decisions on consumer welfare); *see* James S. Wrona, *False Advertising and Consumer Standing Under Section 43(a) of the Lanham Act: Broad Consumer Protection Legislation or a Narrow Pro-Competitive Measure?*, 47 Rutgers L. Rev. 1085, 1154 (1995) (warning that broadening standing under the Lanham Act to include consumers could burden the federal courts and encroach on states' rights).

[58] *See* Wrona, *supra* n. 57 (analysis of interpretation of standing under the Lanham Act).

[59] *Huntingdon Life Sciences v. Rokke*, 978 F. Supp. 662, 663–64 (E.D. Va. 1997).

[60] *Id.* at 666–67.

[61] Burns, *supra* n. 57, at 837.

[62] *See PETA Memo*, *supra* n. 1 (discussing the "Happy Cows" cases).

district court action of this type allows for thorough discovery of an inhumane defendants practices and advertising policies, and as discussed below, the substantive law of the act requires a court to compare those practices to consumer perceptions about animal treatment. In this way, a competitor plaintiff would achieve the same ends that an ethical consumer or animal advocacy organization would.

Moreover, the plaintiff, who is in a sense the protagonist, is likely to be a small business owner attempting to honestly appeal to a growing market niche for humane products, but prohibited and injured by a relatively inhumane and deceptive competitor. Again, to the extent animal activists and organizations are marginalized in the law, the small business owner is the preferred litigant.

The range of remedies also makes this type of action attractive. Unlike many animal advocacy actions, there are broad remedies available under the Lanham Act including injunctions, corrective advertising, damages for lost profits or defendant's profits, costs, and attorney's fees.[63] This creates a financial incentive that rarely exists in animal advocacy. For all of these reasons, the Lanham Act should not be ignored but rather embraced as a favorable means of addressing animals in the market and consumers' perception about them.[64]

E. State Courts

Along with the attorney general enforcement powers discussed above, the "little FTC" acts passed by the various states often created private causes of action in one form or another, and added to existing causes of action under traditional state law. While some states' traditional tort law, such as fraud and misrepresentation, might have covered some instances of false advertising, the "little FTC" acts, being concerned with consumer protection, may be more tailored to the type of claims animal advocates might bring. There is a limited extent to which animal advocates may avail themselves of these suits, but they represent another effective means of targeting sellers hiding the actual treatment of animals from consumers.

Again, a detailed review of possible claims in the 50 states is beyond the scope of this article. However, it may be helpful to identify possible actions in a few states, and some of the general pitfalls animal advocates may encounter. As in any false advertising action, the claimant will be a consumer (or class of consumers), a commercial entity (such as a business competing with a false advertiser), or perhaps even an advocacy or consumer protection organization. As a general rule,

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63 Courtland L. Reichman & M. Melissa Cannady, *False Advertising Under the Lanham Act*, 21 Franc. L.J. 187, 193–95 (2002).

64 The Lanham Act has also been used by PETA in other contexts. In 2001 PETA sued under the act for service mark infringement, unfair competition, dilution and cyber squatting in a case involving use of the domain name "peta.org." *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 362–63 (4th Cir. 2001) (where the standing issues discussed above do not apply).

such claimants will seek declaratory and injunctive relief because they wish to expose and stop the ads and because they will likely lack sufficient monetary damages to use as the sole basis to maintain an action. There are, however, many states in which plaintiffs may be entitled to statutory minimum, treble, or punitive damages if successful, and of course there are theories under which claimants may allege non-economic damages.[65]

Interpretations of the FTA often guide courts deciding these state actions. This is even mandated in some state statutes.[66] As the issue of deception of ethical consumers becomes more nationally important and hence of more concern to the FTC, state courts should theoretically follow suit. This is important because as long as federal law is void of a cause of action for consumers and advocacy organizations, state court is the only court available.

The Pennsylvania Unfair Trade Practices and Consumer Protection Law, which empowers the state attorney general as discussed above, also provides for a private cause of action by consumers against false advertisers.[67] The act provides for treble and minimum statutory damages and allows for any state action against the defendant on the issue to be used as prima facie evidence of wrongdoing.[68] While a consumer who suffered an ascertainable loss as a result of deception from purchasing the defendant's "free range veal" on several occasions could make out a claim, that consumer would not prevail because the statute was recently held not to apply to a nationwide class that "might" be deceived by certain advertising.[69] The court did suggest that the action could have been brought by the state attorney general.[70]

In Florida, the relevant statutes provide a cause of action for "anyone aggrieved" by violations and allows for damages, injunctive relief, and attorneys' fees.[71] Also, one of the provisions has been held to allow for class action suits by consumers.[72] In a recent case that represents an interesting twist on the Lanham Act jurisprudence discussed above, a court held that the statute, intended by the legislature to protect consumers, did not apply to claims for damages by commercial liti-

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65 *See* Sovern, *supra* n. 40, at 1350 (giving examples of state statutes that might allow for non-economic damages).

66 *Id.* at 1352.

67 73 Pa. Consol. Stat. Ann. § 201-9.2.

68 *Id*.

69 *Weinberg v. Sun Co., Inc.*, 777 A.2d 442, 446 (Pa. 2001).

70 *Id.* at 445.

71 *See* Fla. Stat. §§ 501.211, 817.4 (2003) (the latter is specific to false advertising while the former deals with the broader concept of deceptive business practices). For a good example of the various actions and how they relate, including common law fraud claims, *see generally Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489 (Fla. Dist. App. 2001).

72 *Davis v. Powertel, Inc.*, 776 So. 2d 971, 975 (Fla. Dist. App. 2000).

gants unless they themselves were in the position of being a consumer when harmed.[73]

In Virginia, anyone who "suffers loss" as a result of false advertising may bring an action, and is entitled to statutory minimum damages.[74] In contrast, Mississippi requires a settlement process with the advertiser before a claim may be filed and is limited to claims by actual consumers.[75] As is the case in many states, Mississippi retains its original statutory cause of action for false advertising, enacted before the "little FTC" act, which differs significantly.[76]

State consumer protection laws may also require certain disclosures by sellers that can form the basis for an action. In 1985 the Animal Legal Defense Fund–Boston, Inc. (ALDF), sued a veal producer under the Massachusetts state consumer protection law, discussed above, and the case was removed to federal court.[77] ALDF claimed that the defendant's failure to notify purchasers how the veal calves were raised was unfair and deceptive because the cruelty, and threat to consumers' health from the use of antibiotics, was relevant information that under state law should be disclosed.[78] The court held that the consumer protection act could not be read to essentially enforce state cruelty laws, and found that ALDF's claim regarding consumer health was implicitly preempted by federal law.[79] However, in its decision, the court did not address whether the defendant was affirmatively engaging in false advertising and declined to rule on the constitutional standing issues in the case.[80]

The consumer protection statute in Kansas allows for consumers to obtain declaratory and injunctive relief, as well as damages and civil penalties, but has specific restrictions for consumers seeking damages in class actions.[81] Most interestingly, while the statute requires that a "consumer be aggrieved by an alleged violation," the statute and commentary make it clear that a consumer may obtain declaratory and injunctive relief regardless of whether she has standing to recover damages.[82] As discussed further below the term "aggrieved" could then

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[73] *Guy. Tel. & Tel. Co. v. Melbourne Intl. Communs.*, 329 F.3d 1241, 1247 (11th Cir. 2003) (however, the statute was amended after the acts giving rise to the claims in that case).

[74] Va. Ann. Code § 59.1-68.3 (2003). The action has specifically been distinguished from the state common law action for fraud. *See also Parker-Smith v. Sto Corp.*, 551 S.E.2d 615, 619 (Va. 2001) (granting statutory minimum damages).

[75] E. Barney Robinson III, *Mississippi Statutory Claims for False Advertising*, 20 Miss. C. L. Rev. 165, 171–72 (1999).

[76] *Id.*

[77] *Animal Legal Defense Fund*, 626 F. Supp at 278–79.

[78] *Id.* at 279–80.

[79] *Id*. at 283; *but see Reese v. Payless Drug Stores Northwest, Inc.*, 40 Cal. Rptr. 2d 75, 79 (Cal. App. 1st Dist. 1995) (finding similar health claim under California's consumer protection statute to not be implicitly preempted).

[80] *Animal Legal Defense Fund,* 626 F. Supp. at 279–80.

[81] Kan. Stat. Ann. § 50-634 (2003).

[82] *Id.* at § 50-634(a), Kansas Comment 1; *see also* Kan. Stat. Ann. § 50-634(d) (referring to a consumer who "suffers loss" as opposed to being "aggrieved").

be read to include consumers acting in the public good against malfeasants, regardless of whether they themselves have suffered harm. This type of action has been more thoroughly codified in other states in the context of false advertising, and may be used by animal advocacy organizations wishing to be party to such an action.

F. Private Attorney General Actions

While the statutes discussed above as a general matter require that there be an injured consumer or commercial entity bringing the action, some states have enacted legislation enabling private individuals to bring causes of action as private attorneys' general. These allow virtually any party to bring an action to remedy illegal acts for the public good. These would also allow animal advocacy organizations, and even concerned citizens, to sue false advertisers.

Perhaps the most well known, after its recent media attention and review by the Supreme Court, is the California Unfair Competition Law (UCL).[83] In essence, the law allows a broad range of parties to challenge illegal business practices, including false advertising and animal cruelty.[84] The UCL allows actions to be brought "by any person acting for the interests of itself, its members or the general public."[85] Actions can be based on the defendant's violation of any other state law, regardless of whether the plaintiff could sue under this other law directly.[86] The statute also sweeps up general "unfair or fraudulent" business acts and practices.[87] Litigants may seek injunctive relief, including corrective advertising, restitution, disgorgement, and depending on whether they have in fact been injured, damages and civil penalties.[88] Not surprisingly the breadth of the statute, and its frequent use and misuse has made it highly controversial.[89]

In *Nike, Inc. v. Kasky*, the Supreme Court came close to addressing this controversy, perhaps in a way that could have severely limited the UCL.[90] By a narrow margin the court declined to rule on the issues. However, the dissent's discussion of the UCL echoes widely held

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[83] Cal. Bus. & Prof. Code Ann. §§ 17200–17581.

[84] *Id.* at § 17500; *see supra* n. 1 (regarding PETA's filing under this provision); Chuck Squatriglia, *Foie Gras Farmer Sued by Animal Rights Groups*, S.F. Chron., A21 (Oct. 23, 2003) (regarding two animal advocacy groups' section 17200 suit against foie-gras producers for violating California state animal cruelty laws).

[85] Cal. Bus. & Prof. Code Ann. § 17204.

[86] *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 71 Cal. Rptr. 2d 731, 740 (Cal. 1998).

[87] Cal. Bus. & Prof. Code Ann. §§ 17200–17581.

[88] James Wheaton, *California Business and Professions Code Section 17200: The Biggest Hammer in the Tool Box?*, 16 J. Env. L. & Litig. 421, 437 (2001).

[89] *Id*. at 443.

[90] *Nike*, 123 S. Ct. at 2555 (2003) (in which the Court could have further extended the First Amendment's protection of commercial speech); *see also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980) (regarding the limits of that protection).

views about its possible infringement on constitutionally protected speech:

> The delegation of state authority to private individuals authorizes a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums. Where that political battle is hard fought, such plaintiffs potentially constitute a large and hostile crowd freely able to bring prosecutions designed to vindicate their beliefs, and to do so unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies focused upon more purely economic harm.[91]

Even if the dissent had succeeded in curbing false advertising by condemning private attorneys general actions, the speech at issue in *Nike* involved a rare general media campaign of letters and press releases about the company's practices, rather than more traditional advertising such as labeling.[92]

Contrary to the dissent's speculation in *Nike* that California might be the only state with such a law,[93] the District of Columbia has provided that:

> A person, whether acting for the interests of itself, its members, or the general public, may bring an action under this chapter in the Superior Court of the District of Columbia seeking relief from the use by any person of a trade practice in violation of a law of the District of Colombia . . . .[94]

While certain cases have narrowed the statute's general application, a private attorneys general cause of action is a recent enactment that repealed many of the former statute's limitations.[95] While courts may again attempt to limit its scope based on appropriate statutory construction, it should now be read to allow animal advocacy organizations and concerned citizens, as well as consumers and commercial competitors, to target false advertisers.

In Massachusetts, ALDF took advantage of broad standing under that state's consumer protection statute to essentially challenge the false advertising of veal.[96] The court did not address the complaint as

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[91] *Nike*, 123 U.S. at 2559 (Kennedy, J., dissenting).

[92] *Id.* at 654.

[93] *Id.* at 667.

[94] D.C. Code § 28-3905(k)(1) (2001).

[95] 2000 D.C. Stat. 13-172; *c.f. Dist. Cablevision Ltd. Partn. v. Bassin*, 828 A.2d 714, 723 (D.C. Cir. 2003); *see Athridge v. Aetna Cas. and Sur. Co*., 163 F. Supp. 2d 38, 55 (D.D.C. 2001) (holding that that there must be a consumer-merchant relationship and the consumer must suffer actual damages), *rev'd in part and aff'd in part*, *Athridge v. Aetna Cas. & Sur. Co.*, 351 F.3d 1166 (D.C. Cir. 2003); *Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 710 (D.C. Cir. 1981) (holding that the statute only supplies consumers with a cause of action against merchants selling them goods or services and that there must be a consumer-merchant relationship); *Osbourne v. Capital City Mortgage Corp.*, 667 A.2d 1321, 1329–30 (D.C. Cir. 1995) (holding that the statute requires a showing that the consumer suffered actual damages because of the misrepresentation or omission claimed to violate the statute); *Beard v. Goodyear Tire & Rubber Co.*, 587 A.2d 195, 204 (D.C. 1991) (requiring damages as a condition precedent to suit).

[96] *Animal Legal Defense Fund*, 626 F. Supp. at 283.

alleging affirmative false advertising, which is ostensibly a proper allegation under the statute.[97] The court also declined to deal with the standing issue before it,[98] but the statute has since been held, at least in dicta, to allow for a private attorneys general cause of action in other contexts.[99]

Also, as discussed briefly above, the Kansas Consumer Protection Act (KCPA) provides that a consumer "aggrieved" by a violation of the act may take several actions against the advertiser.[100] The plain language of the statute suggests this might include a private attorneys general cause of action for declaratory and injunctive relief.[101] Furthermore, legislative commentary to the civil penalty provision states that "[t]he purpose of this provision is to encourage enforcement of the act by a consumer acting as his own 'private attorney general.'"[102] While the plain language of the act could be read to allow any consumer to file an action, regardless of injury, and while the commentary certainly supports this reading, a recent case has narrowed its application, at least in the context of class actions.

In *Stein v. Sprint Corp*., the court, like the dissent in *Kasky*, called into question the very constitutionality of private attorneys general actions, specifically in the context of class actions.[103]

Although the court is not necessarily persuaded that section 50-634 is ambiguous on its face concerning whether a private plaintiff must be "aggrieved" to bring a class action for injunctive relief under the KCPA, it does agree that a contrary interpretation would violate the standing requirement. The court concludes that section 50-634 should be interpreted to preserve the statute's constitutionality and require that a private plaintiff have suffered an injury.[104]

The cases discussed above show a pattern of legislatures empowering citizens to quash false advertising, thus creating a strong incentive for business to keep in line, only for courts to declare standing unconstitutional in some cases. Such statutes have come under direct attack for violating constitutional standing requirements, with opponents arguing that general law enforcement duties fall within the ex-

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97 *Id.*

98 *Id.* at 284.

99 *Local 1445, United Food & Commercial Workers Union v. Police Chief of Nattick*, 563 N.E.2d 693, 695–96 (Mass. App. 1990).

100 Kan. Stat. Ann. § 50-623 (2002).

101 Kan. Stat. Ann. § 50-634 (2002).

102 Kan. Stat. Ann. § 50-636, Kansas Comment 1 (2002). Of course, it could also be argued that a civil penalty provision inspires "private attorney generals" who have been harmed but not badly enough to make a claim, and that the provision thus is not really an exception to general standing requirements.

103 *Stein v. Sprint Corp.*, 22 F. Supp. 2d 1210, 1216 (D. Kan. 1998).

104 *Id.* If the court is reading the term "aggrieved" to mean injured in terms of traditional standing requirements, under the statute this would bar individual "attorney general" actions as well. However, this decision in based on federal standing requirements and should not apply in state court actions.

clusive authority of the executive and legislative branches and should not be exercised by courts.[105]

As discussed more fully below, it is the unresponsiveness of legislatures and executive law enforcement to the mistreatment of animals, combined with its concealment from the market, that makes an especially compelling case for exactly this type of judicial intervention.[106]

This part has focused on some of the basic procedures and forums advocates may use to address false advertising. There are significant pros and cons as to where one files that should be considered. For instance, anyone can file with the appropriate state or federal agency, the filing will cost very little, and assuming the agency acts, the advertiser will be under great pressure to desist. However, agencies that may not be completely independent from the advertiser being targeted, are under no obligation to act whatsoever, and can simply ignore the complaint. Also, these complaints do not air the public issues the way filing suit would. Suits, on the other hand, create a public forum for the issues, assure the parties of some resolution, and allow for broad remedies. However, they are also costly, time consuming, and as discussed above, are not available to all interested parties. While the NAD captures the best of both forums by assuring some resolution to the parties and at the same time costing very little, proceedings are confidential and compliance is voluntary. A Lanham Act case is a powerful tool, but it certainly will not be easy to identify relatively humane animal-product competitors with standing to sue. Regardless of where one files though, each victory should make success in the next forum more likely and advocates may strategize with this in mind.

III. SUBSTANCE

A comprehensive review of all the states' substantive law on false advertising would be impossible here, and since most states follow federal substantive law ("little FTC" acts), this discussion focuses on federal law.[107]

Federal substantive law on false advertising can generally be divided into the Lanham Act and FTC strains, though they often inter-

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[105] *Nike*, 539 U.S. 667 (Kennedy, J., dissenting). Along these lines, it is important for advocates to be aware of a concept (that has become embodied in legislation) known as "Strategic Lawsuits Against Public Participation." While its potential interplay with false advertising suits is complex, the concept basically embodies a type of suit that could be used to prevent animal advocacy actions. For a discussion of the concept and some statutory protection available, *see* Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U. Cal. Davis L. Rev. 965 (1999).

[106] *See infra*, pt. IV (showing the failure of regulatory enforcement of misrepresentation claims on animal products).

[107] *Sovern*, *supra* n. 40, at 1352. For an important discussion of the dangers of allowing consumers to bring state actions based on substantive law which is designed to be enforced by a federal agency, *see generally* Jeff Sovern, *Private Actions Under Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 Ohio St. L.J. 437 (1991).

twine with case law. The "FTC Policy Statement on Deception," "The FTC Policy Statement Regarding Advertising Substantiation," and the "Enforcement Policy Statement on Food Advertising," along with a substantial body of federal case law, provide the legal framework for the Commission's action and interpretation of 15 U.S.C. §§ 45, 52, and 55 (2004).[108]

The Commission will find an advertisement deceptive if it contains a representation or omission of fact that is likely to mislead consumers acting reasonably under the circumstances, and that representation or omission is material.[109] A representation may be made by express or implied claims.[110] An express claim might be an actual statement of fact on the product label, while an implied claim would typically be the message that a consumer infers from that ad. To determine what claims an ad implies, the FTC will consider the entire context of the ad, including the nature of the claim and transaction.[111]

Thus, an advertiser that sells a product with the term "free range" on the label would presumably be making an express claim that the animal was in fact free-ranging, while an advertiser that sells meat with a design of an animal in a pasture on the packaging could also be said to be making an implied claim that the animal was in fact free-ranging.

In addition to the deception arising from claims, the omission of material information can be deceptive under certain circumstances.[112] Deception can occur through "omission of information that is necessary to prevent an affirmative representation from being misleading," as well as through silence which itself implies a claim.[113]

For example, if there is a reasonable understanding among consumers that free range does not mean free range of a small pen, the seller of the meat labeled "free-range" should include this fact on the

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108 *See In re Cliffdale Associates, Inc.*, 103 FTC 110, 176 (1984) (reprinting as appendix a letter dated Oct. 14, 1983, from the Commission to The Honorable John D. Dingell, Chairman, Committee on Energy and Commerce, U.S. House of Representatives); Federal Trade Commission, *Enforcement Policy Statement on Food Advertising*, http://www.ftc.gov/bcp/policystmt/ad-food.htm (accessed Feb. 22, 2004) [hereinafter *Food Advertising Policy*]; Fed. Trade Commn., *FTC Policy Statement Regarding Advertising Substantiation*, http://www.ftc.gov/bcp/guides/ad3subst.htm (accessed Feb. 22, 2004) [hereinafter *Substantiation Policy*].

109 *Food Advertising Policy*, *id*. at 3.

110 *Id. See also Cliffdale Associates, Inc*., 103 FTC at 176 (dealing with express and objective claims that a particular automobile device was novel, necessary, and specifically improved efficiency).

111 *Id. See In re Thompson Medical Co.*, 104 FTC 648 (1984):

> It is found that through the use of the brand name "Aspercreme" in advertisements, labels and promotional material, Thompson represented, directly or by implication, that Aspercreme contains aspirin as alleged in Paragraph 16 of the complaint. This determination is based on the advertisements and related consumer research in evidence and expert testimony regarding the use of the "Aspercreme" brand name.

112 *Food Advertising Policy*, *supra* n. 108, at 3.

113 *Id.*

label if this is in fact the case.[114] Likewise, the seller with the design of an animal in the pasture would be expected to do the same.

The Commission will next consider the representation from the perspective of a person acting as a reasonable or average consumer would under the circumstances.[115] Importantly, this "reasonable consumer" standard can change. If the representation is directed primarily to a particular group, the Commission examines reasonableness from the perspective of that group.[116]

To illustrate, assume that the animal in question had spent part of its life in a pasture and part in a feedlot. Presumably the Commission would ask whether a reasonable consumer seeing meat labeled with a design of an animal in a pasture would assume that the animal had in fact spent its entire life in a pasture. If, however, there was evidence to show that the seller was marketing specifically to an urban population that had no experience with how animals are raised, the Commission would presumably be more likely to find such an assumption reasonable—as opposed to marketing directed at a rural populace where feedlot use is common.

This "rule" of tweaking the standard per the audience is perhaps most important in the context of ads directed at children. The Better Business Bureau has an entire division devoted to policing children's advertising and different standards apply.[117] Some have convincingly pointed out that children are more susceptible to false advertising and are intentionally targeted, and that any advertising to children is inherently deceptive.[118]

Thus, any animal product or service ad directed at children is susceptible to challenge. For example, a zoo or circus, which may be presumed or shown to be directing its advertising at children, will have to account for all the possible interpretations children might take away from the ads. Focusing on certain conditions or animal experiences that children might easily misinterpret could make such ads deceptive. Likewise, a clown making hamburgers fun and exciting, or young celebrities making milk cool, should in certain contexts be susceptible to challenge.

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114 Despite the statute's exclusion of labels from FTC jurisdiction, the FTC has asserted jurisdiction over ads that may happen to also be labels. *See In re Blanton Co.*, 53 FTC 580 (1956) (holding use of the word "creamo" in the brand name was misleading); *see also In re Thompson Medical Co.*, 104 FTC 648 (holding brand name "Aspercreme" to be misleading).

115 *Food Advertising Policy*, *supra* n. 108, at 3; *see also Campbell Soup Co.*, NAD Case Reports 271, at 272 (June 2003) (regarding a case where the relevant disclosure was difficult to find on the packaging).

116 *In re Cliffdale Associates, Inc.*, 103 FTC at 177.

117 *Procedures*, *supra* n. 31, at § 2.1.

118 Dennis Crouch, *The Social Welfare of Advertising to Children*, 9 U. Chi. L. Sch. Roundtable 179, 182 (2002).

Finally, a representation or omission must be material, or "likely to affect a consumer's choice or use of a product or service."[119] Material misrepresentations are considered likely to cause "injury" to the consumer, in that they would have chosen differently but for the deception.[120]

Thus, if the seller in the example above could show, perhaps via consumer surveys, that the design did not affect the consumer's decision to buy the meat, even though the ads might be considered misleading, presumably the Commission would not find them "materially" misleading.

One important twist on all of this is that an interpretation of a claim will be presumed reasonable *and* material if it is the claim the advertiser attempted to convey.[121] Thus, if there were evidence that the seller had instructed its ad agency to create a graphic that suggested to consumers that the animal in question had spent its entire life in a pasture, the Commission would presumably have a fairly easy case before it. As is discussed in further detail below, there are different ways to establish this intent. It is also important to note that an advertisement that can reasonably be interpreted in a misleading way is deceptive even if non-misleading interpretations may be equally possible.[122] If meat consumers generally did not assume from the label that the animal had spent its whole life in a pasture, the ad could still be deceptive if those that did assume this were reasonable in doing so.[123]

As discussed further below, while the claims may be either express or implied in the ad, they may also be considered subjective or objective.[124] Importantly, sellers are responsible for supporting all reasonably interpreted claims. "One issue the Commission examined was substantiation for implied claims. Although firms are unlikely to possess substantiation for implied claims they do not believe the ad makes, they should generally be aware of reasonable interpretations and will be expected to have prior substantiation for such claims."[125]

Generally, once a claim has been identified, and perhaps determined to be reasonable and material, sellers can avoid being found deceptive by showing that the claim is true. Sellers are required to "have a reasonable basis for advertising claims before they are disseminated."[126] Thus, in the example above, if the graphic of the animal in

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[119] *Food Advertising Policy*, *supra* n. 108, at 3. One could argue that all sellers intend their ads to be material—that is affecting the consumer's decision to buy—or they would not be paying for them. However, it seems the law presumes that ads do not always work.

[120] *In re Cliffdale Associates, Inc.*, 103 FTC at 182.

[121] *Id*. at 178, 182.

[122] *Chrysler Corp. v. F.T.C.*, 561 F.2d 357, 363 (D.C. Cir. 1977).

[123] *See Mutual of Omaha Ins. Co. v. Novak*, 836 F.2d 397, 400 (8th Cir. 1987) (relying on a survey in which roughly 10% of survey respondents were deceived).

[124] *Food Advertising Policy*, *supra* n. 108, at 3.

[125] *Substantiation Policy*, *supra* n. 108, at 2.

[126] *Id.* at 1.

the pasture was determined to make a material claim to reasonable consumers that the animal had in fact spent its entire life in a pasture, the seller would have to be prepared to show this. The Commission has stated that "[i]n evaluating advertising representations, we are required to look at the complete advertisements and formulate our opinions of them on the basis of the net general impression conveyed by them and not on isolated excerpts."[127] An analysis of any ad must then take into account the "net general impression" created by that ad. So, for instance, if the ad described above nonetheless had a disclaimer written on the label notifying consumers that the animal had in fact spent its life in a pen, the ad might pass muster.

With animal production claims, the substantiation might be offered by a third party endorser, such as an independent organization that sets guidelines or confirms the seller's treatment of animals.[128] In these cases advocates should closely check how the seller and third party relate. In *Cliffdale Associates*, the Commission noted that "whenever there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement, it should be disclosed."[129]

Often, both advocates and adjudicators are confused by the fact that ads can be literally true yet still misleading—as opposed to literally false—and still constitute false advertising. The Ninth Circuit addressed this issue in a case that dealt with the falsity of claims regarding the efficacy of a hair loss treatment.[130] Here, an efficacy claim that may have been true because of a placebo effect[131] was nonetheless misleading because consumers would presume that the product was inherently effective.[132]

The question we must face, then, is not whether Pantron's claims were "true" in some abstract epistemological sense, nor even whether they could conceivably be described as "true" in ordinary parlance. Rather, we must determine whether or not efficacy representations based solely on the placebo effect are "misleading in a material respect," and hence prohibited as "false advertis[ing]" under the Act.[133]

Often the terms "false advertising," "deceptive advertising," or "deceptive acts or practices" are used in connection with the terms "unfair competition" or "unfair acts or practices."[134] Indeed, these closely related concepts often appear together in statutes, and are often al-

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127 *In re Standard Oil of Cal.*, 84 FTC 1401, 1471 (1974), *aff'd as modified*, 577 F.2d 653 (9th Cir. 1978), *reissued*, 96 FTC 380 (1980).

128 *Supra* n. 5 (discussing independent certification programs).

129 *Cliffdale Associates, Inc.*, 103 FTC at 173.

130 *FTC v. Pantron I Corp*., 33 F.3d 1088, 1091 (9th Cir. 1994).

131 *Id.* at 1090.

132 *Id.* at 1100–01.

133 *Id.* at 1099–100.

134 Fed. Trade Commn., *FTC Policy Statement on Unfairness*, http://www.ftc.gov/bcp/policystmt/ad-unfair.htm (accessed Feb. 22, 2004).

leged together as well.[135] In the *FTC Policy Statement on Unfairness*, the agency discussed the concepts and their relation to false advertising.[136] The FTC distinguishes between "unfair competition," which essentially falls under anti-trust law regarding issues between competitors, and "unfair acts or practices," which is a broad set of constantly evolving business activities which can include false advertising, emotional high-pressure sales tactics, late-night harassing phone calls, quasi-gambling sales techniques, or bait and switch.[137] In essence false advertising is a subset of this broader prohibition on business practices which harm consumers. However, because each ad must be assessed for its net general impression, false ads are more likely to be dealt with on an enforcement, case-by-case basis rather than under the agency's rule-making authority.

As discussed above, the Lanham Act, which developed from cases involving civil suits between commercial competitors as opposed to general federal law enforcement, is a major source of federal substantive law on false advertising. When analyzing this law's application to a particular case, courts often break a false advertising claim down into five statutory elements that a plaintiff must prove:

> (1) A false or misleading statement of fact about a product;
> (2) Such statement either deceived, or had the capacity to deceive a substantial segment of potential consumers;
> (3) The deception is material, in that it is likely to influence the consumer's purchasing decision;
> (4) The product is in interstate commerce; and
> (5) The plaintiff has been or is likely to be injured as a result of the statement at issue.[138]

These elements reiterate the principles discussed above, and are common to all false advertising law. However, because the Supreme Court has not weighed in on false advertising under the Lanham Act there is some variance in application among the circuits.[139]

Some false advertising cases under the Lanham Act concern representations that are literally false, while others concern representations that are literally true but misleading. As discussed above, both are considered false advertising for purposes of the law.[140] Recently, the Second Circuit considered a television ad depicting a competitor's plastic zipper storage bag constantly leaking when filled with water and turned upside down.[141] Test results did not support the depiction and the court concluded that the ad was literally false.[142] However, even if the ad was not proven false, it is still prohibited if it materially

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[135] *Id.*
[136] *Id.* 15 U.S.C. § 45 (2000).
[137] *FTC v. Sperry & Hutchinson C.*, 405 U.S. 233, 244–45, n. 5 (1972).
[138] *Pizza Hut, Inc. v. Papa John's Intl., Inc.*, 227 F.3d 489, 495 (5th Cir. 2000).
[139] Reichman & Cannady, *supra* n. 63, at 187.
[140] *S.C. Johnson & Son, Inc., v. Clorox Co.*, 241 F.3d 232, 238 (2d Cir. 2001).
[141] *Id.* at 239.
[142] *Id.*

misleads consumers. An ad materially misleads consumers if the consumer would perceive some important message that differs from the reality of the product.

A package that was labeled "Potato Chips" but in fact contained chips that were made from dried potato granules, as opposed to raw potatoes, was held to constitute false advertising.[143] Based on the evidence submitted, the phrase "potato chips" conveyed the specific meaning to consumers that the chips were made from raw, unprocessed potatoes.[144] Use of that phrase without further clarification was misleading and therefore prohibited.[145] Therefore, though it seems unlikely the plaintiff could have shown that calling powdered chips "potato chips" is literally false, it was enough to show that the phrase created a different perception in the consumer.[146]

Both literally false and literally true but misleading ads are actionable and must be distinguished from the non-actionable, vague, subjective assertions common in ads, known as puffery. The concept of puffery simply reiterates that for a false advertisement to be actionable, the message the seller is sending must be material and factual. One way of thinking about this and where to draw the line may be to consider what evidence one would present in support of a complaint alleging false advertising.[147] If one cannot refute the message with objective evidence, it may be puffery. Recently the Fifth Circuit dealt with this issue in a challenge to the slogan: "Better Ingredients. Better Pizza."[148] Despite the jury's findings to the contrary, the term was mere opinion rather than an objective statement of fact on which consumers would reasonably rely.[149]

Similar to the FTC's net general impression rule, ads under the Lanham Act cannot be parsed out of their context.[150] In *Pizza Hut, Inc*., the Fifth Circuit examined the "Better Ingredients. Better Pizza" slogan in connection with a series of television ads by Papa John's that

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143 *Potato Chip Inst. v. General Mills, Inc.*, 333 F. Supp. 173, 181 (D. Neb. 1971), *aff'd*, 461 F.2d 1088 (8th Cir. 1972).

144 *Id.* at 180 ("The words 'potato' and 'chip' analyzed separately mean a thin, crisp piece of food made of potato. In juxtaposition to form a term they permit an interpretation limited by the experience of consumers of products known by that name. That experience until 1965, at least, was entirely, and since then has been largely, associated with raw potatoes.").

145 *Id.*

146 *Id.*

147 *See infra* pt. IV (discussing basic evidence which should accompany any complaint).

148 *Pizza Hut, Inc.*, 227 F.3d at 495.

149 The court stated, "Moving next to consider separately the phrase 'Better Ingredients.,' the same conclusion holds true. Like 'Better Pizza.,' it is typical puffery. The word 'better,' when used in this context is unquantifiable. What makes one food ingredient better than another comparable ingredient, without further description, is wholly a matter of individual taste or preference not subject to scientific quantification. Indeed, it is difficult to think of any product, or any component of any product, to which the term better, without more, is quantifiable." *Id*. at 499.

150 *Id.* at 495.

compared its pizza to Pizza Hut's.[151] The court concluded that in that context, where ingredients were specifically compared, the slogan was given a specific meaning; while it may have been misleading, it was more than puffery.[152]

Again, not only must the ad be false or misleading, but it must be so in a way that is material to the consumer in that it affects their decision to purchase or use the item.[153] While under the Lanham Act this is presumed in the case of a literally false ad, it must be demonstrated with evidence for ads that are merely misleading.[154] For example, though the slogan in *Pizza Hut Inc.* became misleading when used in conjunction with comparative ads, the plaintiff failed to show that these misleading ads were material to the consumer.[155] Even though consumers might be deceived in the comparison ads, the survey evidence the plaintiff adduced simply did not show that this confusion made them buy Papa John's pizza over Pizza Hut's.[156]

Like the law enforced by the FTC, plaintiffs under the Lanham Act do not have to show that a majority of theoretical consumers would be deceived, rather only a substantial segment.[157] As discussed above, the Lanham Act could be used by a relatively humane seller against a competitor who is misleading consumers about its effect on animals. For example, a free-range egg producer could conceivably make out a claim against a battery-cage producer who is selling "Happy Hens" eggs if she could show that consumers reasonably assumed, because of the slogan, that the "Happy Hens" eggs were free-range, and that they would have bought her eggs rather than "Happy Hens" eggs but for the ads. Obviously substantive false advertising law is much more complex than the basic review provided above, but a basic understanding should allow advocates to identify causes of action in the current market.

IV. EVIDENCE

While certain ads may strike animal advocates as intuitively false or misleading, and likely to leave the same impression on any reasonable adjudicator, proving false advertising requires a lot of evidence. In addition to the evidence necessary to establish the basic background, history, and compelling nature of the claim, courts have held that plaintiffs must submit extrinsic evidence of consumer perception in order to establish the elements of consumer deception and materiality.[158] Even in cases where the adjudicator is empowered to find false

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151 *Id.* at 500.

152 *Id*. at 502.

153 *Id.*

154 *Castrol Inc., v. Quaker State Corp.*, 977 F.2d 57, 62 (2nd Cir. 1992); *Pizza Hut, Inc.*, 227 F.3d at 502; *Avila v. Rubin*, 84 F.3d 222, 227 (7th Cir. 1996).

155 *Pizza Hut, Inc.*, 227 F.3d at 502.

156 *Id.*

157 *Mutual of Omaha Ins. Co.*, 836 F.2d at 400.

158 *Pizza Hut, Inc.*, 227 F.3d at 497, 502–03.

advertising without extrinsic evidence, there is no reason to ask them to read consumers' minds if persuasive extrinsic evidence is available and can be provided.[159] The following general categories of evidence represent a few of the submissions that can support claims of false advertising.

A. The Ads and Their Background

The adjudicator will need to see the actual ads in all their challenged forms in order to make a determination. Less obvious is the need for evidence of the background and history surrounding the ads. This can be obtained through discovery, or through publicly accessible evidence such as sellers' ad industry and regulatory publications. Though the court in *Pizza Hut Inc.* opined otherwise, there is precedent that if a defendant intended to convey a particular message, that message is presumptively reasonable and material.[160] Therefore, if the seller of "animal friendly" glue traps has publicly acknowledged that the company intended to convince consumers that animals caught in the traps would happily await their release, those statements are relevant. Furthermore, even without direct evidence of a seller's intent, the background and history of an ad may establish a circumstantial case of seller intent. For example, if it has become common industry knowledge that a certain phrase conveys a certain claim, perhaps as a result of market research, a seller using that phrase may be found to have intended the claim.

In addition to establishing the seller's intent, the background and history of an ad campaign can reveal a seller's intent to deceive as opposed to intent to convey a message which is in fact deceptive. If this were the case, federal agencies should be more inclined to act as the conduct is now part of the broader "unfairness" realm discussed above, and that could potentially result in criminal liability.[161] Furthermore, as defendants attempt to rebut challenges by demonstrating that their ads are substantiated, the plaintiffs should be aware early on of what exactly was done to substantiate the ads before being released.[162] Also, plaintiffs with the full picture of an ad campaign can look for any im-

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159 *See Kraft, Inc. v. FTC*, 970 F.2d 311, 319 (7th Cir. 1992) (demonstrating that while the FTC need not rely on survey evidence, the FTC can make use of it to establish false advertising).

160 The court stated that "*Pizza Hut* provides no precedent. And we are aware of none, that stands for the proposition that the subjective intent of the defendant's corporate executives to convey a particular message is evidence of the fact that consumers in fact relied on the message to make their purchases." *Pizza Hut*, 227 F.3d at 503. The FTC has stated that materiality can be presumed from intent. *See e.g. In re Cliffdale Associates, Inc.*, 103 FTC 110 at 179, 182. Other circuits have found the same in the context of the Lanham Act. *See e.g. Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co.*, 228 F.3d 24, 36 (1st Cir. 1998).

161 Arthur Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry-Self Policing, and Private Litigation*, 20 Ga. L. Rev. 1, 12 (1985).

162 *Substantiation Policy*, *supra* n. 108.

proper and relevant association between the seller and the product's endorsers.

B. Actual Animal Conditions

In order to contrast consumer perception with the reality of the product, plaintiffs must submit evidence of the actual conditions or actions to which the animals are subjected. Though the seller's publications or admissions might technically establish this, plaintiffs may wish to resort to the most telling evidence available such as videos, photographs, or witness affidavits.[163] False advertising law and its protection of the free market and consumer choice present fairly abstract concepts, but like all law, it is grounded in real conflict and adjudicators should know 1) why it is important to protect ethical choice, and 2) the very real harm, emotional and otherwise, suffered by ethical consumers who become aware that they were duped into participating in cruelty.

C. Surveys

Surveys of consumer perception, which involve testing the "message" consumers receive from a given ad, may be the most important evidence in any false advertising case. The law on which surveys are admissible and what weight adjudicators give them is complex and deals almost exclusively with cases involving commercial competitor litigant surveys that are designed to show that the defendant competitor's ad, brand name, trademark, or slogan is being confused with the plaintiff's, and is luring the plaintiff's would-be consumers away as a result. With the exception of Lanham Act cases or state competitor suits, animal advocacy cases may deal with a single ad, and as such, the weight of current survey law is not on point and surveys must be designed with this difference in mind.

Though many animal advocacy organizations may lack funding, surveys are best designed and administered by market research experts who may later be called to testify. Adjudicators have become very savvy when it comes to the science of surveys, and sellers who wish to exclude or discount a plaintiff's survey may be prepared with experts of their own.[164]

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[163] Both PETA and COK provided ample evidence of actual animal conditions. *PETA Memo*, *supra* n. 1; *United Egg Producers, Inc.*, NAD Case Reports 636, 636 (Dec. 2003) *appeal filed*. COK could establish deception simply by contrasting the United Egg Producer's published program guidelines, which established the minimum conditions and treatment of egg hens, with consumers' perception of the actual conditions and treatment. However, the group submitted photos of actual Animal Care Certified facilities depicting the despicable conditions the hens are subjected to. *United Egg Producters, Inc.,* NAD Case Reports at 636.

[164] *Simon Property Group, L.P. v. mySimon, Inc.*, 104 F. Supp. 2d 1033, 1041–150 (S.D. Ind. 2000) (in which the court went through an exhaustive examination of the flaws in a particular survey, directly challenging the expert's findings).

The Manual for Complex Litigation, Third Edition, written by the Federal Judicial Law center, provides a very basic summary of what is expected in an admissible and probative survey.[165] Surveys will be scrutinized based on whether:

> [1] the population was properly chosen and defined; [2] the sample chosen was representative of that population; [3] the data gathered were accurately reported; [4] the data were analyzed in accordance with accepted statistical principles . . . ; [5] the questions asked were clear and not leading; [6] the survey was conducted by qualified persons following proper interview procedures; [7] the process was conducted so as to ensure objectivity (e.g. was the survey conducted in anticipation of litigation and by persons connected with the parties or counsel or aware of its purpose in the litigation?).[166]

Surveys can be easily impeached for, among other things, not using a control, leading the respondents, and not accurately recreating the market conditions.[167] Obviously, it will be impossible to perfectly replicate market conditions, but failing to present the stimulus, such as the logo, label, or phrase, in its actual form, such as on the egg carton, or isolated from other factors that might normally be present at the consumers' point of purchase can cause a survey to fail.[168] Again, because the Lanham Act cases that make up much of the precedent here usually deal with competing labels, advocates gauging one claim's effect on consumers should modify their surveys accordingly.[169]

In one particular case that dealt with both the issue of leading questions and controls, the plaintiffs wanted to show that a "VW" logo that appeared in the defendant's ads made consumers think the defendant's auto shop was in fact owned by Volkswagen.[170] In one survey the plaintiff's expert showed an ad with the logo to VW owners, and an ad without it to a separate control group—the court accepted that the carefully measured disparity between the two groups accounted for the logo's effect. The court's discussion of the survey gives an idea of the complexity involved in survey design:

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165 Federal Judicial Law Center, *Manual for Complex Litigation*, § 21.493 (3d ed., U.S. Govt. Printing Office 1995).

166 *Id. See* Bruce P. Keller, David H. Bernstein & Peter Johnson, *Surveys in False Advertising Cases*, 624 PLI/Pat 351, 366–81 (2000) (offering a concise and excellent summary of survey law and its recent trends).

167 *Id*. at 366–81.

168 *See Jordache Enterprises, Inc. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1487–88 (10th Cir. 1987) (survey compared the ads at issue without other factors that would normally be present); *ConAgra, Inc. v. George A. Hormel & Co.*, 784 F. Supp. 700, 734 (D. Neb. 1992) (discounting survey results where consumers were given as much time as they wanted to study the marks in question); *Riviana Foods v. Societe des Produits Nestle, S.A.*, 1994 U.S. Dist. LEXIS 20267 (S.D. Tex. Dec 20, 1994) (among other errors, survey failed to present stimuli as it would be at point of purchase).

169 *In re Thompson Medical,* 104 FTC at 788.

170 *Volkswagon A.G. v. Uptown Motors*, 1995 U.S. Dist. LEXIS 13869, at *9 (S.D.N.Y. July 13, 1995).

> I find the survey to have been fairly designed. Dr. Fong used classic scientific methods to measure the effect of the use of the logo against the use of the name in defendant's ad. He gathered data on certainty and measured five different levels of certainty. The confidence level was the same between the two conditions, the name and logo conditions, and, therefore, the difference in confidence levels cannot explain the logo effect. He invited respondents to give open-ended responses which allowed for review of their understanding and the rationality of their reasoning process in answering the survey, and that further allowed for measure of the significance of the logo effect . . . . Furthermore, Dr. Fong asked questions to evaluate whether there were other possible explanations for the logo effect, for instance, the age of the respondent or whether or not the car was under warranty . . . . There is no statistical significance in the difference in the responses between those interviewed by the trained personnel and the few interviewed or relatively few interviewed by the relatively untrained personnel. Moreover, Dr. Fong designed this survey so that the respondents filled out the questionnaires themselves, which reduced the likelihood that they were reacting to cues, even unintentional cues, from the interviewers.[171]

Other important concerns include choice of the appropriate population, adequate sample size and selection, exclusion of tainted respondents, adequate rotation of stimuli and answer sequence in order to avoid order bias, double-blind administration, and proper coding and analysis of the survey's result.[172] As discussed further below, there are instances of express, objective claims where survey evidence will be less relevant. However, where it is used advocates must be extremely careful to ensure that the evidence, along with the entire case, is not quickly tossed out.

D. Consumer Affidavits

Consumer affidavits, in which the complainant or plaintiff sets out their case under oath, is another valuable piece of evidence on these cases. As discussed above,[173] state agencies act on complaints by actual resident consumers who feel they have been deceived—and affidavits may support whatever complaint forms the particular state uses. Consumer affidavits can be helpful in other cases too, because they give the action a "face," a first-person account of the deception, and a narrative of what the consumer thought and why. This is an opportunity to put the elements of the false advertising case into a persuasive narrative form. Theoretically, a sufficient number of consumer affidavits would serve as the focus group for the ad's effect, and would be given weight where survey evidence is often used. These affidavits would normally note that the ads were material to the affiant's decision to purchase the item in question, explain in detail how and why

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171 *Id.* at *24.

172 Keller, et al., *supra* n. 166, at 365–78.

173 *Supra* pt. I(C) (discussing enforcement of consumer protection laws by state agencies).

the ads were misleading, and describe how the affiant was injured as a result of the deception.

E. Public Opinion Polls

Public opinion polls can show consumer deception and impact the outcome of the case, though they are less probative of consumer perception than scientifically designed market research surveys, and in some contexts not admissible.[174] This may prove especially true in animal advocacy cases where widely publicized public opinion polls may make certain industries well aware of consumer expectation regarding the treatment of animals. They may also represent a less expensive source of consumer perception than market surveys. Moreover, for advocates lacking resources, opinion polls may suffice where the misleading nature of the ad is more obvious and the adjudicating body is empowered to determine deception without extrinsic evidence.

F. Extrinsic Evidence Regarding Objective Claims

Often claims will contain objective representations that describe animal production methods, animal care conditions, or a seller's use of animal research. These representations, or claims, will be subject to scrutiny against extrinsic evidence of the objective meaning of the terms. For example, the court in *Potato Chip Inst*. resorted to using both dictionaries and general industry usage to determine that the term "potato chip" had a specific and concrete meaning.[175] Whether a particular claim is objective or subjective, and to what degree, will most likely be a point of contention in these cases, and parties should consider using both evidence of common usage and consumer surveys showing actual consumer perception.

As discussed above, objective claims may be substantiated or "proven true" by the seller.[176] Advocates can also use expert opinion and empirical test results as evidence to challenge substantiation in a given case. For example, in *S.C. Johnson & Son, Inc*., the court relied on evidence of how the plastic bags actually functioned in a given circumstance, contrasted with representations in the ads, to find that the ads were "literally false."[177] This is conceivable in animal cases where sellers attempt to make objective claims regarding animals.[178]

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[174] *See generally* Susan J. Becker, *Public Opinion Polls & Surveys as Evidence: Suggestions for Resolving Confusing & Conflicting Standards Governing Weight & Admissibility*, 70 Or. L. Rev. 463 (1991) (on using public polls & surveys as evidence).

[175] *Potato Chip Inst.*, 333 F. Supp. at 180.

[176] *Substantiation Policy*, *supra* n. 108, at 2.

[177] *S.C. Johnson & Son, Inc.*, 241 F.3d at 238.

[178] In the "Happy Cows" cases, the ads at issue make express, objective representations regarding animal living conditions that can be contrasted with evidence of the actual conditions. *PETA Memo*, *supra* n. 1.

Expert opinion may also be relevant, and even vital, extrinsic evidence in some cases. For example, a zoo that purports to take "good care" of its animals is ostensibly making an express and highly subjective claim. However, in that specific context, with its perhaps implicit comparison to other zoos and inherent reference to veterinary standards, it may become filled with more objective meaning, as in *Pizza Hut Inc.*, and subject to challenge by veterinarians offered as experts to the industry's standard of care.

As discussed in Part I, the federal government has just begun to wade into the issue of animal claims and their impact on consumers. Therefore, the regulation of certain terms in a given case can be dispositive. Consumers may be presumed to interpret officially defined or regulated terms in accordance with their official meaning and, as such, use of such terms or use of terms that imply the same meaning can easily mislead consumers.[179]

As such, if a farmer does not comply with federal regulations on animal confinement and therefore misuses the term "organic," it should be considered per-se deceptive and subject to correction in any of the forums discussed above.[180] Federal guidelines and policy may also suggest that certain uses may be deceptive. For example, the USDA has stated that use of the term "certified" in certain contexts may be deceptive because it implies official government inspection and evaluation, and therefore cannot be used without closely associating it with the name of the organization responsible for the "certification" process.[181]

The evidence discussed above is not an exhaustive list of what can be adduced in a given false advertising case, but may represent some of the crucial items adjudicators can use to determine whether a particular ad should be discontinued, whether compensation should be ordered, and whether corrective advertising is necessary. As a final matter, advocates may consider, within ethical bounds, whether members of advertising agencies, trade organizations, or endorsing organizations can and should be approached. The animal industry is not a monolith, and sympathetic parties may provide the best evidence of all.

V. WHERE THE LAW FAILS, ETHICAL CHOICE, AND REVISION

Readers may have noticed that in the discussion of forums and procedure in Part I, there are few legal measures by which advocacy organizations, or consumers without traditional injuries, can ensure review of a seller's advertising. While, state and federal agencies have discretion whether to act on complaints, few states have recognized

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179 *Food Advertising Policy*, *supra* n. 108, at 6.

180 *See* 7 C.F.R. § 205.239 (2003) (on livestock living conditions).

181 U.S. Dept. of Agric., Food Safety & Inspection Service, *Meat & Poultry Labeling Terms*, http://www.fsis.usda.gov/oa/pubs/lablterm.htm (accessed Feb. 22, 2004).

private attorneys general causes of action, and those that do have seen courts express concern that they may violate standing or other constitutional concerns. The Lanham Act has been interpreted to essentially exclude consumers, even those with traditional injuries. With fewer classes of potential litigants, sellers may have less incentive to ensure that their advertising is sincere and truthful.

This issue has been the subject of substantial discourse, especially in the context of the Lanham Act, with commentators sharply criticizing courts' exclusion of consumer litigants and its impact on false advertising law.[182] However, this discourse has focused only on including traditional consumers, often based on their function in the market.[183] Consumers can make market choices based on more than a product's price, efficacy, or durability, and may focus on a product or service's effect on foreign laborers or on the environment.[184]

The importance of protecting ethical consumer choice, which may be loosely understood as consumer choice based on a good's or service's total effect on other sentient beings, also militates strongly in favor of revising current law so as to open forums for a larger class of litigants to take action against false advertisers. In fact, it may be the most important type of consumer choice to protect, especially as it involves animals whose treatment may affect a huge percentage, if not the majority, of consumer decisions. This is because 1) ethical consumer choice, due to its nature, is not adequately protected under current law, and 2) interfering with ethical consumer choice harms society in ways that interfering with other types of consumer choice does not.

Unlike consumer concern over a product's price, efficacy, or durability, claims about animal production, or claims about the use of animals in research, for example, cannot be ascertained by the buyer simply from the product itself. Simply put, while the package of "free-range veal" should raise some concerns in the buyer, the "product" will work the same whether it is free range or not, and hence there will be no consumer backlash in terms of reduced consumer purchases as there would be for cars that break down or razors that do not work.

Furthermore, without these traditional consumer injuries there will not be significant pressure on executive agencies from the consumer constituencies they protect, which might be necessary to force those agencies to act. In essence, the traditional harm will be elsewhere, in factory farms or overseas sweatshops, and it will not factor high in terms of an over-burdened agency's decision of which cases before it to target.

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[182] Burns, *supra* n. 57, at 874–81; Best, *supra* n. 161, at 68–71; Tawnya Wojciechowski, *Letting Consumers Stand on Their Own: An Argument For Congressional Action Regarding Consumer Standing for False Advertising Under Lanham Act Section 43(a)*, 24 Sw. U. L. Rev. 213, 227 (1994).

[183] *Id.*

[184] *Supra* n. 7 (regarding ethical market choice in the context of foreign labor conditions and the "green market").

Likewise, commercial competitors cannot be relied upon to enforce false advertising laws to the benefit of consumers via suits. As discussed at length by the commentators, competitors often choose which cases to bring on factors that have nothing to do with consumer welfare.[185] This is doubly true in cases of animal mistreatment, where relatively humane competitors are rare. Also, such competitors may be small, private companies without the means to pursue costly litigation. With fewer competitors to act as potential litigants, and with those that can having limited resources relative to many would-be "factory farm" defendants, commercial litigation, which at least under the Lanham Act is assumed to serve as an adequate means of enforcement, cannot be relied upon. Nor can consumers be expected to shoulder the burden of enforcement. Goods or services that impact animals, such as food or cosmetics, are often relatively inexpensive and might not cause a consumer to take action, as false advertising in the sale of a car or home might. Also, many ethical consumers may go to great lengths to educate themselves about goods and services they buy, and may avoid consuming some common products altogether. Thus, many proactive consumers that might have taken action and have in fact been relied upon regarding "free range veal" will not act, leaving less-informed consumers to continue blindly purchasing.

Lacking the protection of consumer backlash, motivated enforcement agencies, litigious competitors, and irate consumers, ethical consumer choice seems to fall through the cracks of today's false advertisement enforcement regime. In essence, without allowing animal advocates to target false advertisers directly, there are few current corrective forces to remedy deception, and sellers may have little incentive to ensure that their advertising is sincere and truthful. In fact, as discussed above, because consumers will often pay more for humanely produced goods, and because those goods often cost more to produce, there may be an incentive to convince buyers at the point of purchase that the goods are created under more animal-friendly conditions than they in fact are.

In addition to not being adequately prevented under current law, interference with ethical consumer choice harms society in ways that interfering with other types of consumer choice does not by preventing consumers from creating social change via their market choices. Ethical consumers are presumably attempting to create some sort of social change by exercising their market choices in particular ways. This is certainly true in the case of consumers concerned about animal treatment and who have significant influence via market choice due to the prevalence of animal-related products and services. It has been argued that social activists should focus their efforts in this way, exercising

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[185] Best, *supra* n. 161, at 29–32 (listing and analyzing several cogent reasons why business competitors might tolerate false advertising that harms the public); Burns, *supra* n. 57, at 876 (conflicting interests between competitors and consumers are favored).

their market choices in particular ways and effecting social change in the free market rather than pursuing restrictive government regulation.[186] However, as discussed above, the free market cannot function if false advertising is not closely curtailed.[187] It is the ultimate "bait and switch" to shuffle activists off to a non-functioning free market where advertisers can create the appearance of social change. If consumers cannot use market choice, as they have been urged to, the alternative is restrictive governmental "command and control" regulation. If, however, the free market is to be relied upon, there can be no arguments against creating the maximum disincentive for false advertising by allowing a large class of potential litigants to effectively take the advertisers to task.

As discussed above, giving consumers standing under the Lanham Act would expand the existing class of potential litigants immensely, creating a major disincentive for advertisers to make false or misleading representations.[188] However, the minimal extent to which such consumers are "injured," either traditionally or ethically, in these cases, may raise valid constitutional standing concerns and may not provide the type of incentive, in terms of recovery, necessary for plaintiffs to endure the hardships of federal litigation. One solution may be for states to embrace private attorneys general causes of action, thereby allowing animal advocacy organizations to take advertisers to task.

As discussed above, private attorneys general actions would allow animal advocacy organizations to bring actions on behalf of the public good. If state statutes were amended to clearly establish such a cause of action for false advertising and to clarify standing,[189] watchdog organizations could effectively fill in gaps where the current law fails ethical choice by wrongly relying on consumer backlash, overburdened agencies, or commercial competitors.

Consumer actions should go forward even if injunctive and declaratory relief are the only remedies available because of the publicity, which, if successful, is both beneficial for the organization and negative for the advertiser that would be associated with such a case.[190] It would seem inapposite to argue that this would have a chilling effect on protected, truthful advertising, because that is the very issue that would be decided in the proceedings. Such proceedings would create speech-engendering public forums where the actual treatment of animals and consumers' perception of that treatment could be dealt with

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[186] *See generally* Cass R. Sunstein, *Free Markets and Social Justice* (1997 Oxford U. Press 1997) (advocating for market-driven self-regulation).

[187] Burns, *supra* n. 3, at 54.

[188] Wojciechowski, *supra* n. 182 (how individual consumers would swamp the court system).

[189] Discussed *supra* pt. I(F) (Perhaps by expressly recognizing certain legally cognizable and protected rights held by the organization or its members).

[190] *See e.g.* PETA, *PETA Takes "Happy Cows" Lawsuit to Higher Court*, http://www.unhappycows.com (accessed Apr. 4, 2004) (illustrating publicity caused by litigation).

while still in the context of an actual, judicially-appropriate, case and controversy.

Private attorneys general actions seem especially appropriate for protecting ethical consumer choice, because of the importance of such choice to society or to the public good. As discussed above, true ethical market choice allows for social change without restrictive regulation, and it is fitting that those organizations most interested in the particular social change be entrusted with bringing the false advertising harmful to it to light. Allowing for clear state private attorneys general causes of action, perhaps in addition to a federal cause of action for consumers, would go far in ensuring the truly free market that advertisers often claim to want.

VI. CONCLUSION

At the very least, the forgoing discussion should allow animal advocates to identify the basic forums, substance, and evidence necessary to challenge particular cases of false advertising where they find it. False advertising law represents a rare, albeit roundabout, legal opening for animal advocates to deal with issues of animal mistreatment, regardless of legislative and executive branch disregard for the underlying issue itself. Whether there is a beneficial change in the law or not, current opportunities in the market for these cases should be sought out and exploited, if only to protect the ground animal advocates have gained in the battle for consumer opinion.