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Heightened Immunity For Comparative Advertising Speech: A Response To U.S. Healthcare

HEIGHTENED IMMUNITY FOR COMPARATIVE ADVERTISING SPEECH: A RESPONSE TO *U.S. HEALTHCARE*

The United States Supreme Court has departed from the Court's traditional First Amendment analysis in defamation cases by forming the commercial speech doctrine.[1] Although declining to extend full, or heightened, protection to commercial speech, the Court has granted commercial speech limited First Amendment protection.[2] However, the Court has not addressed the issue of First Amendment protection in the context of comparative advertising. While comparative advertising retains some of the factors of traditional commercial speech, comparative advertising presents a unique situation in that two advertisers rather than one are presenting their products to the public. Therefore, the Court should re-examine the level of First Amendment protection that the Court affords comparative advertising speech.[3]

However, the Court need not reject its commercial speech doctrine for noncomparative advertising,[4] but, rather, should carve out an exception for comparative advertising.[5] In making this exception, the Court should adopt a three-pronged test to determine whether an advertiser's speech should receive heightened First Amendment protection.[6] Under the first prong of the proposed test, both competitors in the advertising campaign must have equal access to the media.[7] Next, the advertisers must direct the advertisements at specific products offered by the competitor.[8] Finally, the court should apply this test only to statements made in a commercial setting.[9]

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1. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637 (1984) (holding that First Amendment provides limited protection for commercial speech); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983) (restating that commercial speech receives less protection than other constitutionally safeguarded forms of expression); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976) (granting First Amendment protection to commercial speech for first time); *see also infra* note 30 (defining commercial speech).

2. *See infra* notes 44-50 and accompanying text (explaining that commercial speech receives limited First Amendment protection).

3. *See infra* notes 138-144 and accompanying text (explaining how comparative advertising differs from traditional commercial speech).

4. *See infra* notes 178-187 and accompanying text (discussing proposed three-pronged test for comparative advertising).

5. *See infra* notes 178-187 and accompanying text (proposing test for comparative advertising).

6. *See infra* notes 178-187 and accompanying text (discussing three-pronged test to determine whether commercial speech should receive heightened First Amendment protection).

7. *See infra* notes 179-182 and accompanying text (explaining reasoning behind requirement of equal media access).

8. *See infra* notes 183-185 and accompanying text (explaining requirement that advertiser direct advertisement at competitor's product).

9. *See infra* notes 186-187 and accompanying text (explaining requirement that statement be made in commercial setting).

The Supreme Court grants heightened First Amendment protection[10] to certain categories of individuals in specific circumstances. In defamation actions, the Court considers two factors to determine whether to grant heightened First Amendment protection.[11] First, the Court determines whether the issue involved is of public concern,[12] or, rather, is a private matter.[13] If the subject matter of the alleged defamatory statement is of public concern, the Court insulates the statement with greater First Amendment protection.[14] The policy behind this rule is that the protection of the free exchange of ideas is a fundamental principle of the constitutional system.[15] When the exchange involves matters that are of particular interest to the general public, rather than to a limited number of individuals, the Court protects that speech to avoid a chilling effect on speech from the institution of defamation actions.[16] In upholding the defamation heightened protection standard for noncommercial speech on matters of public concern in past

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10. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (giving for first time heightened First Amendment protection). Heightened protection means that the plaintiff must prove that the defendant acted with actual malice. *Id.* at 280. The Court defined actual malice as making a statement with knowledge of the statement's falsity, or with reckless disregard of whether the statement was true or false. *Id.*

In *New York Times* the court considered whether a public official plaintiff could recover damages for defamatory statements made regarding his official conduct without a showing of actual malice. *Id.* at 256. The plaintiff was an elected official in Alabama. *Id.* The defendant had published an advertisement that indicated that the police in Alabama had taken unfair actions against black students. *Id.* at 256-58. Although the allegedly defamatory statements never referred to the plaintiff specifically, the plaintiff contended that, because he was Commissioner of the Police Department, the statements had directly accused him of wrongdoing. *Id.* at 258.

The Court denied recovery for the plaintiff on the grounds that under the First and Fourteenth Amendments a state may not award damages to a public official absent a showing of actual malice. *Id.* at 279-80. The Court stated that a fundamental principle of the United States constitutional system is the free exchange of ideas, particularly when that exchange would result in political and social changes desired by the people. *Id.* at 269.

The Court stated that concern for the reputation of public officials does not make speech that is critical of those officials subject to less First Amendment protection. *Id.* at 272-73. The Court further concluded that potential dissemination of false information also is an insufficient reason for limiting free speech, because some falsity is inevitable in free debate, and must be tolerated to ensure protection of true statements. *Id.* at 271.

11. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-46 (1974) (outlining two distinctions used in determining whether to grant heightened First Amendment protection in defamation actions).

12. *See id.* at 337 (defining issue of public concern). An issue is of public concern if society at large would be interested in the matter. *Id.*

13. Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 762 (1985) (defining private matters). The Court defined private matters as those solely in the individual interest of the speaker and its specific audience. *Id.*

14. *New York Times*, 376 U.S. at 269.

15. *Id.*

16. *See id.* at 279 (describing chilling effect). The term "chilling effect" refers to instances in which the fear of a defamation action by the plaintiff silences a speaker. *Id.* The Court has granted heightened protection to matters involving public concern to avoid the chilling effect, thereby encouraging the free exchange of ideas. *Id.*

cases, the Court has recognized the inevitability that the Court also will protect some falsehood.[17] The Supreme Court has reasoned, however, that the goal of allowing freedom of speech on public issues outweighs the detrimental effect of insulating some defamatory material.[18]

The second factor that the court considers is whether the allegedly defamed plaintiff is a public figure or a private figure.[19] The Court grants statements concerning public figures a higher level of protection than statements concerning private figures.[20] According to the Court, the principle behind this dichotomy is that those individuals who deliberately have put themselves in the public eye have greater access to the media than do private citizens and, therefore, these public figures have a greater opportunity to correct false statements made about them.[21] Accordingly, in cases involving public figures, the Court need not intervene to protect the plaintiff, because the plaintiff can easily rebut the defamatory remark.[22] However, the Court grants to the private figure plaintiff greater protection from defamatory statements than to the public figure plaintiff.[23] The Court grants more protection to the private figure plaintiff because the private figure does not have ready access to the media and, therefore, cannot rebut a defamatory statement.[24] Accordingly, the Court intervenes to protect the plaintiff in situations where the plaintiff cannot directly refute the allegedly defamatory remark.[25] The Supreme Court grants this protection by giving the states the latitude to define standards of liability in defamation cases involving private figures.[26] However, the states may not impose liability without fault, nor

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17. *See id.* at 271-72 (explaining likelihood of protecting some falsehood by protecting matters of public concern).

18. *See id.* (stating that protection of free speech outweighs occasional protection of falsehood).

19. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974) (holding that court must decide whether plaintiff is public figure, because public figures have less need for protection from defamatory statements). In *Gertz* the Court considered whether a publisher of defamatory falsehoods about a private individual is entitled to heightened protection under the actual malice standard when the statement is of public concern. *Id.* at 332. The plaintiff, an attorney, represented a murder victim's family. *Id.* The defendant magazine had published an article which alleged that the murder trial was part of a communist conspiracy to discredit the local police. *Id.* at 325-26. The article had further implied that the plaintiff had a criminal record. *Id.* at 326.

The Court first recognized that no such thing as a false idea exists under the First Amendment. *Id.* at 339. However, the Court reasoned that intentional lies and careless errors do nothing to advance society's interest in free and robust debate on public issues. *Id.* at 340. The Court then distinguished between public and private figures and stated that private figures have less opportunity to correct false statements made about them. *Id.* at 344. The state interest in protecting the reputation of private individuals, therefore, is greater than the First Amendment protection of speech involving matters of public concern. *Id.*

20. *Id.* at 342-43.

21. *Id.* at 344.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 345-46.

26. *Id.* at 347-48.

may the states allow punitive damage awards absent a showing of actual malice.[27] In contrast, in cases involving public figure plaintiffs, the Court does not allow the states to impose liability absent a showing of actual malice.[28] This actual malice standard represents the heightened First Amendment protection that courts traditionally afford speech made about public figures.[29]

However, the Supreme Court rejected traditional First Amendment analysis in forming the commercial speech doctrine.[30] Originally, the Court denied commercial speech any First Amendment protection.[31] The first case to address the First Amendment issue in a commercial context was *Valentine v. Chrestensen*.[32] In *Valentine* the Court considered whether a municipal ordinance forbidding distribution of handbills containing commercial advertising matter was constitutional.[33] Chrestensen, the plaintiff in the case, owned a submarine, which he exhibited for profit.[34] Chrestensen distributed a handbill advertising the submarine and stating the submarine's admission fee.[35] Upon learning that the handbill violated the City Code, which forbade distribution of commercial advertising matter in the streets, Chrestensen prepared a double-faced handbill.[36] On one side, the new handbill advertised the submarine, and on the other side protested the City Dock Department's refusal to allow Chrestensen wharfage facilities at a city pier for the exhibition of his submarine.[37] The Police Department warned Chrestensen

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27. *Id.* at 348-49.

28. *Id.* at 342.

29. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 244 (1986) (explaining that speech concerning public figures receives heightened protection); Herbert v. Lando, 441 U.S. 153, 156 (1979) (same); Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 163-64 (1979) (same); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (same).

30. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65-66 (1983) (limiting First Amendment protection in commercial speech context); *see also* Brannigan & Ensor, *Did Bose Speak Too Softly?: Product Critiques and the First Amendment*, 14 HOFSTRA L. REV. 571, 579-583 (1986) (discussing history of commercial speech doctrine). The Supreme Court has broadly defined commercial speech as expression related to the economic interests of the speaker and its audience—generally in the form of a commercial advertisement for the sale of goods and services. *Bolger*, 463 U.S. at 66-67.

Brannigan and Ensor argue that the heightened First Amendment protection of the actual malice standard should extend to product critiques by consumers and consumer organizations. Brannigan & Ensor, *supra*, at 588. The authors contend that product critiques, "whether biased or unbiased, correct or incorrect, are an exposition of ideas and opinions concerning consumer choice in the marketplace." *Id.* Following the reasoning of the *Virginia Pharmacy* line of cases, the authors contend that criticism in this context is a valuable tool in the marketplace. *Id.* The authors liken this type of comparison to political speech. *Id.*

31. *See* Valentine v. Chrestensen, 316 U.S. 52, 55 (1942) (denying First Amendment protection to speech that is commercial in nature).

32. 316 U.S. 52 (1942).

33. Valentine v. Chrestensen, 316 U.S. 52 (1942).

34. *Id.* at 52.

35. *Id.* at 53.

36. *Id.*

37. *Id.*

that the handbill violated the Code and, consequently, when Chrestensen continued to distribute the handbill, the police arrested him.[38]

The district court granted Chrestensen a permanent injunction against the Police Commissioner to enjoin the police from interfering with Chrestensen's distribution.[39] The Supreme Court agreed with the district court's determination that the streets are a proper place to exercise the freedom of speech and that the states may regulate the privilege only to the extent necessary to protect the public interest.[40] However, the Court disagreed with the district court's holding that the Court should protect Chrestensen's acts because his handbills contained matters of public interest and were not solely commercial.[41] Finding that Chrestensen's distribution was an undesirable invasion of, or interference with, the public's full enjoyment of the streets, the Court held that the state legislative body had a right to enact legislation prohibiting the distribution of commercial material on the street.[42] Thus, the Court denied any First Amendment protection to commercial speech.[43]

Gradually, the Court began to indicate that commercial speech was entitled to some First Amendment protection.[44] The Supreme Court extended First Amendment protection to commercial speech for the first time in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*[45] In *Virginia Pharmacy* the Court considered whether the First and Fourteenth Amendments prohibited the states from restricting price disclosures in advertising by pharmacists.[46] The Virginia Citizens Consumer Council (Consumer Council) challenged the Virginia Board of Pharmacy's (Board) ruling that licensed pharmacists were not permitted to advertise the prices of prescription drugs.[47] The Board argued that such advertising was unprofessional.[48] The Consumer Council challenged the Board's ruling on the ground that restrictions on advertising violated the First Amendment, which protects free speech.[49] The Court held that the First Amendment protects commercial

38. *Id.*
39. *Id.* at 54.
40. *Id.*
41. *Id.* at 55.
42. *Id.* at 54-55.
43. *Id.* at 55.
44. *See* Bigelow v. Virginia, 421 U.S. 809, 818 (1975) (holding that speech is not stripped of First Amendment protection simply because speech is commercial in nature); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973) (upholding city ordinance prohibiting certain newspaper advertisements only because advertisements discriminated on basis of sex).
45. 425 U.S. 748 (1976). The Court in *Virginia Pharmacy* for the first time clearly enunciated the commercial speech doctrine, which extends limited First Amendment protection to commercial speech. *Id.* at 761-62.
46. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 749-50 (1976).
47. *Id.*
48. *Id.* at 752.
49. *Id.* at 754.

speech to the extent that such speech provides consumers with information necessary to make informed purchasing decisions.[50]

The Supreme Court had rejected in previous cases the reasoning that the First Amendment did not extend to commercial speech simply because the advertiser's interest was purely economic.[51] However, the *Virginia Pharmacy* Court maintained that while the state has a valid interest in promulgating rules to regulate professional conduct, the First Amendment interest regarding the free flow of information outweighs the states' interests in regulating conduct.[52] The Court compared the issues presented in commercial speech cases with the issues presented in labor dispute cases,[53] in which the Court had granted heightened First Amendment protection to speech for many years.[54] According to the Court, commercial speech resembles speech found in labor disputes in several ways. First, both types of speech are economically motivated.[55] Second, the aim of each is to inform the listener about a product or idea.[56] Third, the speaker in both situations tries to influence the listener and is, therefore, persuasive in nature.[57] Although economic interests motivate contestants in labor disputes, the First Amendment entitles both sides to speak about the merits of the dispute.[58] The Court has reasoned in labor dispute cases that the failure to give labor dispute speech heightened protection would dampen the free discussion of the issues involved in the dispute, or would allow management to use defamation actions as weapons of economic coercion.[59]

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50. *Id.* at 762.

51. *Id.* at 761.

52. *Id.* at 770.

53. *Id.* at 762. *See infra* notes 154-64 and accompanying text (discussing Supreme Court's reasoning in granting labor speech heightened protection); *see also infra* notes 145-151 and accompanying text (explaining similarities between commercial speech and labor speech).

54. *See infra* notes 154-64 and accompanying text (discussing history of First Amendment protection for labor dispute speech and Supreme Court's reasoning in granting labor speech heightened protection).

55. *See infra* notes 145-146 and accompanying text (explaining economic nature of both commercial speech and speech in labor disputes).

56. *Compare* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (explaining that First Amendment protects expression on merits of labor dispute); *with id.* at 764 (expressing idea that commercial speech may convey information to society).

57. *Compare Virginia Pharmacy*, 425 U.S. at 762 (stating that First Amendment protects labor dispute speech that is designed to influence outcome of debate) *with* Travers, *Federal Trade Commission Regulation of Deceptive Advertising—Foreword*, 17 U. KAN. L. REV. 551, 556 (1969) (stating that advertising by nature is persuasive).

58. *Virginia Pharmacy*, 425 U.S. at 762.

59. *See* National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 277 (1974) (holding that threat of liability for overenthusiastic use of rhetoric or innocent mistake of fact must not stifle right to persuade employees to join labor union); *see also* Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53, 64 (1966) (holding that in view of juries' propensity to award excessive damages in defamation actions, libel actions might be used as weapons against labor unions and smaller employers).

Similarly, the *Virginia Pharmacy* Court reasoned that the failure to grant heightened protection to commercial speech would have undesirable effects.[60] One essential element of the Court's decision in *Virginia Pharmacy* is the reasoning that the First Amendment protects both a speaker's right to convey information and a listener's right to receive information.[61] The Court reiterated its holding from numerous cases that citizens have a right to receive information and that the First Amendment protects this right.[62] Correspondingly, the Court held that if a right to advertise exists, a reciprocal right to receive the advertising also exists.[63] The Court, consequently, found compelling the argument that the suppression of prescription drug price information most affected those people who have the greatest need for the information to make an informed decision about their purchases—namely, the elderly, the sick, and the poor.[64] Accordingly, the Court concluded that denial of First Amendment protection to the conveyance of this information simply because the advertiser had a purely economic interest would result in a denial of information to a segment of the public with substantial need for the information.[65]

A second essential element in the *Virginia Pharmacy* decision is society's general interest in the free flow of commercial information.[66] While recognizing that not all advertisements supply essential information to the consumer, the Supreme Court reasoned that society in general benefits if information regarding the production, sale, and pricing of goods and services is readily available, whether through the advertising media or another source.[67] The Court reasoned that the general public will make more educated purchasing decisions if produet information is not restricted.[68] Consequently, the Court concluded that unrestricted access to information will properly allocate resources, a crucial element of the free enterprise system.[69]

Based on this reasoning, the *Virginia Pharmacy* Court granted commercial speech First Amendment protection to the extent that such advertising provides consumers with information necessary to make informed purchasing decisions.[70] *Virginia Pharmacy* does not grant any heightened protection under traditional First Amendment analysis to advertising that is

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60. *See infra* notes 64-69 and accompanying text (describing undesirable effects of not granting heightened protection to commercial speech).

61. *Virginia Pharmacy*, 425 U.S. at 757.

62. *See* Kleindienst v. Mandel, 408 U.S. 753, 762-65 (1972) (holding that First Amendment necessarily protects right to receive information); Lamont v. Postmaster Gen., 381 U.S. 301, 305-07 (1965) (holding that citizens have right to receive political publications sent from abroad).

63. *Virginia Pharmacy*, 425 U.S. at 757.

64. *Id.* at 763.

65. *Id.* at 763-64.

66. *Id.* at 764.

67. *Id.* at 764-65.

68. *Id.* at 765.

69. *Id.*

70. *See id.* at 763.

false or misleading.[71] This rule for commercial speech is in contrast to noncommercial speech cases, which require a showing of actual malice for recovery.[72] Accordingly, the Court concluded that while First Amendment protection extends to commercial speech because the free flow of commercial information is essential to the free market system, the states, nevertheless, have every right to ensure that the information the advertisers disseminate is truthful and legitimate.[73] Thus, the Supreme Court affords only a limited First Amendment protection to commercial speech.

In recent years the Supreme Court has given various reasons for giving only limited First Amendment protection to commercial speech. First, the economic interest of the advertiser is the primary motive of commercial speech.[74] In contrast, the First Amendment was designed to protect the free exchange of ideas. Specifically, the First Amendment was enacted to encourage political discussion about the nation's leadership.[75] Thus, the First Amendment was not enacted to protect advertising.[76] Second, because the Court has characterized commercial speech as more durable than other forms of speech,[77] regulation of commercial speech will not have a chilling effect that would silence the speaker.[78] Third, because commercial advertisers have the knowledge and ability to ensure the accuracy of the information before the information is disseminated and, therefore, are in the best position to verify the truthfulness of their speech,[79] the Court has insisted on literal truth in commercial advertising.[80] Finally, the Court has expressed fears that if it grants commercial and noncommercial speech equal protection, the efficacy of the protection might unduly be diluted for noncommercial speech.[81]

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71. *Id.* at 771.

72. *See supra* notes 10-15 and accompanying text (describing actual malice standard that courts apply in cases involving noncommercial speech).

73. *Virginia Pharmacy*, 425 U.S. at 771-72.

74. *See id.* at 762 (assuming that advertiser's interest is purely economic interest).

75. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (explaining that drafters enacted First Amendment to protect speech that criticizes government).

76. *See* Note, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027-38 (1967) (explaining that drafters enacted First Amendment to protect ideas of governed about those who govern). Because commercial speech is unrelated to the purpose of protecting ideas of the governed, commercial speech does not deserve the same amount of protection. *Id.*

77. *See Virginia Pharmacy*, 425 U.S. at 772 n.24 (holding that commercial speech may be more durable than other kinds of speech, because it is less likely to be chilled by proper regulation).

78. *Id.*

79. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 n.6 (1980) (holding that advertiser has ability and knowledge to verify accuracy of information).

80. *Id.*

81. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (holding that requiring parity of constitutional protection for commercial and noncommercial speech would invite dilution of force of First Amendment's guarantee with respect to noncommercial speech).

While the majority of the Supreme Court developed the actual malice test for noncom-

In addition to the Court's refusal to extend heightened First Amendment protection to commercial speech in general, the Court also has refused to extend any form of heightened First Amendment protection to commercial speech that involves matters of public interest.[82] While noncommercial speech

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mercial speech, at least one Supreme Court Justice supported *total* immunity for defamatory comment. *See* Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 899 (Douglas, J., dissenting), *denying cert. to* 438 F.2d 433 (3d Cir. 1971). Justice Douglas expressed his view that the Court should no longer allow defamation plaintiffs to seek relief in the court system. *Id.* at 899. Douglas rejected the actual malice test of *New York Times*, stating that "even untrue remarks," including calculated falsehoods, "may have positive effects upon the quality of our re-examination process." *Id.* at 903. The Court, according to Douglas, should not interfere with the "rough-and-tumble" of debate, because this process may produce the closest approximation of "factual truth or preferred opinion." *Id.* Therefore, Douglas concluded that the Court had struck an improper balance in *New York Times* with the actual malice standard.

Additionally, Douglas was concerned about the "continuing readjustment of constitutional doctrine" that the *New York Times* decision necessitated. *Id.* The Court continually must clarify the circumstances in which it must apply the actual malice standard, resulting in an ad hoc approach that, according to Douglas, has backed the Court into a "subjective quagmire." *Id.* at 904. Douglas pointed out that between the *New York Times* decision and the *Grove* case (1964-1971), the Court had to clarify the applicable circumstances of the actual malice standard sixteen times. *Id.* at 903. The logical extension of this tightening of the actual malice test, according to Douglas, is the complete elimination of libel and slander recoveries. *Id.* at 904.

More importantly, Justice Douglas did not limit his approval of total immunity only to noncommercial speech. In Cammarano v. United States, 358 U.S. 498 (1959), Douglas wrote a concurring opinion in which he succinctly stated his idea that the Court should grant immunity to all speech:

> [The First Amendment] has often been stressed as essential to the exposition and exchange of political ideas, to the expression of philosophical attitudes, to the flowering of the letters. Important as the First Amendment is to all those cultural ends, it has not been restricted to them. Individual or group protests against action which results in monetary injuries are certainly not beyond the reach of the First Amendment, as *Thornhill* v. *Alabama*, . . . which placed picketing within the ambit of the First Amendment, teaches. . . . A protest against government action that affects a business occupies as high a place. The profit motive should make no difference, for that is an element inherent in the very conception of a press under our system of free enterprise. Those who make their living through exercise of First Amendment rights are no less entitled to its protection than those whose advocacy or promotion is not hitched to a profit motive.

Id. at 514 (Douglas, J., concurring) (citations omitted).

See generally Note, *Eliminating Distinctions Between Commercial and Political Speech: Replacing Regulation with Government Counterspeech*, 47 WASH. & LEE L. REV. 1129 (1990) (arguing that Court should eliminate distinctions between commercial and political speech and grant full First Amendment protection because distinctions are based on faulty assumptions).

82. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985) (holding that First Amendment protects commercial speech unless speech is false or misleading); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983) (restating that commercial speech receives less protection than other constitutionally safeguarded forms of expression); *Ohralik*, 436 U.S. at 456 (holding that commercial speech receives limited protection commensurate with its subordinate position in scale of First Amendment values); *see also* Schmidt & Burns, *Proof or Consequences: False Advertising and the Doctrine of Commercial Speech*, 56

of public concern receives the heightened protection of the actual malice

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U. CIN. L. REV. 1273, 1283-1286 (1988) (discussing implications of *Zauderer*).

In *Zauderer* the Supreme Court considered whether Ohio's restraints on advertising by attorneys violated the First Amendment. 471 U.S. at 629. There, the defendant Zauderer, an attorney practicing in Ohio, first had run a small advertisement in a local newspaper stating that Zauderer would represent clients in drunken driving cases on a contingent fee basis. *Id.* at 629-30. After the plaintiff—the Office of Disciplinary Counsel of the Supreme Court of Ohio—had informed Zauderer that the advertisement violated the Ohio Code of Professional Responsibility, Zauderer withdrew the advertisement. *Id.* at 630. A year later, Zauderer ran a second ad, this time stating that he would represent women injured by the Dalkon Shield, an intrauterine contraceptive device. *Id.* On this occasion, the Office of Disciplinary Counsel filed charges against Zauderer on the grounds that both the first and second advertisements violated the Code of Professional Responsibility. *Id.* at 631. The complaint alleged that the first advertisement was false, fraudulent, misleading and deceptive, because the advertisement stated that Zauderer would take cases on a contingent-fee basis in violation of Ohio Disciplinary Rule 2-106(C). *Id.* The complaint alleged that the second advertisement violated Disciplinary Rules requiring that advertisements by attorneys be dignified, prohibiting illustrations, prohibiting self-recommendation, and prohibiting employment obtained through unsolicited advice. *Id.* at 632-33. The Supreme Court of Ohio found that Zauderer had violated the Disciplinary Rules. *Id.* at 634-35. Zauderer appealed, claiming that the Disciplinary Rules violated the First Amendment by prohibiting the right to advertise. *Id.* at 636.

The United States Supreme Court reiterated the holding of previous commercial speech cases that commercial speech is entitled to some First Amendment protection, although less than that given to noncommercial speech. *Id.* at 637. The Court also stated that the states are free to prevent the dissemination of false and misleading commercial speech. *Id.* at 638. The Court held, however, that the government can restrict speech which is not false or deceptive only in the service of a substantial government interest, and only through means that directly advance that interest. *Id.* The Court also stated that while some people may have found Zauderer's advertisments distasteful, the advertisments in no way invaded the privacy of those who read the advertisements, and so did not fall under the reasoning found in *Ohralik*. *Id.* at 642. *See Ohralik*, 436 U.S. at 464-66 (upholding ban on in-person solicitation by attorney due to possible undue influence; state interest in preventing fraud outweighed First Amendment considerations).

The *Zauderer* Court also rejected the state's argument in favor of the advertising restrictions because the Court feared that it then would have little basis for preventing governments from suppressing other forms of truthful and nondeceptive advertising simply to spare the state from having to distinguish truthful advertising from false or deceptive advertising. 471 U.S. at 646. The Court stated that the First Amendment would not retain its protective force if the ban were upheld. *Id.* Finally, the Court explained that the free flow of commercial information is valuable enough to justify imposing the costs of discerning truthful from deceptive advertising on regulators. *Id.*

Based on this reasoning, the Court held that Ohio's ban on advertising by attorneys violated the First Amendment. *Id.* The Court refused to apply prophylactic restraints on commercial advertising. *Id.* at 646-47. However, the Court did uphold Ohio's disclosure requirements and affirmed Zauderer's public reprimand for those advertisements that were deceptive regarding contingent fees. *Id.* at 651, 655.

Schmidt & Burns argue that *Zauderer* suggests at least two qualifications to the rule that false advertising and misleading commercial speech are entirely outside the protection of the First Amendment. Schmidt & Burns, *supra*, at 1283. First, the *Zauderer* Court suggested that a disclosure requirement, required in an attempt to counteract false and deceptive implications, might offend the First Amendment by being overly burdensome. *Id.* Second, the Court suggested that where an implied misrepresentation is not "self-evident," *Zauderer*, 471 U.S. at 652-53, the regulating body may bear the burden of proving the consumer's perception of

standard,[83] the Court has refused to extend the actual malice standard to commercial speech.[84] On the other hand, a company commenting on public issues outside the commercial advertising arena receives heightened protection, but does not receive heightened protection when commenting in a commercial context.[85] The Supreme Court has reasoned that virtually all advertisers could link their product to some issue of public concern and, thus, limiting heightened protection only to commercial speech involving public issues would not be an effective screening method.[86] The Court has drawn a distinction between commercial speech and noncommercial speech, placing greater importance on regulating commercial speech that advertisers disseminate to consumers than on a company's right to comment on issues of public concern within a commercial context.[87]

The commercial speech doctrine, however, does not influence Court decisions under the law of defamation. The commercial speech doctrine and the rules regarding defamation have developed independently of each other and have countervailing interests.[88] Until recently, the courts have not faced a case involving both doctrines and, therefore, have not had to balance the competing interests of commercial speech and defamation. The Court has not faced such a case because the traditional vehicle for relief between competitors in the commercial speech area is an action for product disparagement.[89] Recently, however, the United States Court of Appeals for the

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the advertisement. Schmidt & Burns, *supra*, at 1283.

Schmidt & Burns also note that the Court should apply a higher standard of review in determining whether speech in a particular context is unprotected. *Id.* at 1286. The authors state that the Supreme Court also has suggested that it should adopt this view. *Id.* In Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984), the Court listed five types of unprotected expression, including libelous speech, fighting words, incitement to riot, obscenity, and child pornography, and stated that the Court had regularly conducted an independent review of the record in each case to determine with certainty that the speech in question fell outside the protection of the First Amendment. *Id.* at 504-05. The Court also stated that it had defined the limits of unprotected speech narrowly to ensure that protected expression will not be inhibited. *Id.*

83. *See supra* notes 10-15 and accompanying text (defining heightened protection of actual malice standard).

84. *See Zauderer*, 471 U.S. at 637 (holding that protection given to commercial speech is less extensive than that afforded noncommercial speech).

85. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983).

86. *Id.*, (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563, n.5 (1980)).

87. *See supra* notes 74-81 and accompanying text (explaining government's interest in regulating commercial speech).

88. *Compare supra* notes 15-18 and accompanying text (explaining fundamental right of free exchange of ideas) *with supra* notes 79-80 and accompanying text (explaining that Court requires advertiser to ensure accuracy of information conveyed to consumer).

89. *See* Brannigan & Ensor, *supra* note 30, at 573 (explaining difference between product disparagement and defamation). *See generally* W. PROSSER & W. KEETON, THE LAW OF TORTS, § 128 (5th ed. 1984) (explaining difference between product disparagement action and defamation); Note, *The First Amendment and the Basis of Liability in Actions for Corporate Libel and Product Disparagement*, 27 EMORY L.J. 755 (1978) (explaining action of product dispar-

Third Circuit reviewed a district court decision on the issue of defamation in the context of commercial speech. In *U.S. Healthcare v. Blue Cross of Greater Philadelphia*[90] the court considered whether allegedly defamatory statements made in a comparative advertising campaign should receive the heightened protection of the actual malice standard of the First Amendment.[91]

U.S. Healthcare arose out of a comparative advertising campaign between two health insurers, U.S. Healthcare, a health maintenance organization (HMO),[92] and Blue Cross/Blue Shield (Blue Cross).[93] Blue Cross experienced a loss in profits during the mid-1980s, due in part to the increased enrollment in HMOs generally, but in U.S. Healthcare specifically.[94] To compete with the HMOs, Blue Cross introduced a new product called "Personal Choice," which provided customers with an established network of health care providers.[95] Blue Cross' Personal Choice resembled health plans that HMOs offered in that customers had to obtain permission from a member of the network before seeking treatment outside the network.[96]

Blue Cross launched a deliberately aggressive advertising campaign to introduce Personal Choice.[97] The campaign also sought to reduce the appeal of HMOs.[98] Blue Cross' campaign consisted of eight print advertisements, seven television advertisements, three radio advertisements, and a direct mailing brochure.[99] Most of the advertisements simply compared the features of the competing products.[100] One of the television advertisements, however,

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agement); *see also* Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984) (balancing private rights of sellers against First Amendment in product disparagement action).

Product disparagement is a tort action in which the plaintiff must prove that a false statement concerning the nature or quality of its product was made by the defendant. Brannigan & Ensor, *supra* note 30, at 572-73. Product disparagement relates to false or misleading criticism of a specific product, in contrast to defamation, which is an action relating to the character of the corporation. *Id.* at 573.

90. 898 F.2d 914 (3d Cir.), *cert. denied*, 111 S. Ct. 58 (1990).

91. U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 927 (3d Cir.), *cert. denied*, 111 S. Ct. 58 (1990).

92. *Id.* at 917. A health maintenance organization, or HMO, acts as both an insurer and a provider of services that are more comprehensive than those offered by traditional insurance policies. *Id.* HMO subscribers choose a primary health care provider from the HMO network. *Id.* The subscriber then works through the network to determine when the susbscriber requires treatment from a specialist. *Id.* Usually, the policy does not cover treatment by a specialist that the subscriber obtains without the network's permission. *Id.*

93. *Id.*

94. *Id.* U.S. Healthcare was the largest HMO in the Delaware Valley by 1986, claiming almost 600,000 members. *Id.*

95. *Id.* at 918.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* All eight of Blue Cross' print advertisements compared the various features of

was a dramatic portrayal of a grief-stricken woman, suggesting that she had experienced a great tragedy because of her choice of health care.[101]

In response to Blue Cross' advertising campaign, U.S. Healthcare sued Blue Cross for product disparagement,[102] defamation, and tortious interference with contractual relations.[103] Later, U.S. Healthcare added a Lanham Act claim.[104] U.S. Healthcare then began its own aggressive comparative advertising campaign.[105]

Blue Cross and U.S. Healthcare. *Id.* Seven of the eight print advertisements specifically stated that U.S. Healthcare required its subscribers to obtain permission from a U.S. Healthcare physician for an examination by a specialist. *Id.* The eighth print advertisement stated that Personal Choice did not require permission by its physicians for an examination by a specialist. *Id.* Three of the eight print advertisements and the print brochure implied that referrals to specialists take away money from U.S. Healthcare physicians. *Id.* Four of the seven television advertisements referred to HMOs only in the closing slogan, claiming that Personal Choice was better than U.S. Healthcare. *Id.* The fifth television advertisement presented an HMO subscriber who stated that he resented having to ask his HMO doctor for permission to consult a specialist. *Id.* The sixth advertisement featured a man saying that HMO plans give subscribers no choice of doctors or hospitals. *Id.* at 918-19.

101. *Id.* at 919. The seventh Blue Cross television advertisement was a dramatic portrayal of a grief-stricken woman who said, "The hospital my HMO sent me to just wasn't enough. It's my fault." *Id.* During this final advertisement, solemn music played. *Id.* The advertisement implied that a tragedy befell the woman because she subscribed to an HMO. *Id.*

102. *See supra* note 89 (defining product disparagement action).

103. *U.S. Healthcare*, 898 F.2d at 919.

104. *Id.* at 920. *See generally* Best, *Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation*, 20 GA. L. REV. 1 (1985) (declaring Lanham Act to be one method of correcting false advertising); Donegan, *Section 43(a) of the Lanham Trademark Act as a Private Remedy for False Advertising*, 37 FOOD DRUG COSM. L.J. 264 (1982) (explaining use of Lanham Act claims in false advertising context).

The Lanham Act states in pertinent part:

> Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

Lanham Act of 1946 § 43(a), 15 U.S.C. § 1125(a) (1982) (amended 1988). The Lanham Act prohibits false and misleading representations in connection with the promotion of goods or services. Donegan, *supra*, at 264. Congress's original incentive to enact the statute was to provide adequate protection against unfair competition that certain international treaties required the United States to provide. *Id.* at 271. However, the drafters also recognized the need to protect property rights of commercial interests. *Id.* Nonetheless, the first courts to apply the Act did so narrowly, using the Act as a bar against trademark infringements rather than against false and misleading advertisements. *Id.* at 272. The Third Circuit expanded the interpretation of the Act, however, in *L'Aiglon Apparel, Inc. v. Lana Lobell, Inc.*, 214 F.2d 649 (3d Cir. 1954). The *L'Aiglon* court rejected the idea that the Act was merely a codification of the common-law rule protecting only trademark infringement. *Id.* at 651. While post-

On appeal, the Third Circuit considered whether the district court had erred by denying U.S. Healthcare's defamation claim and granting heightened protection to Blue Cross' advertisements.[106] U.S. Healthcare argued that the court should not have applied the actual malice standard because the basis of the claims was false commercial speech.[107] On the other hand, Blue Cross argued that the court should grant heightened First Amendment protection because the Blue Cross commercials had done more than merely propose a commercial transaction and were at the center of a public debate, thus, making U.S. Healthcare a limited purpose public figure.[108]

L'Aiglon courts accepted the expanded interpretation of the Lanham Act slowly, by the late 1970's the Act had become a powerful remedy for false and misleading advertising. Donegan, *supra*, at 273. Today, several factors limit the application of the Lanham Act, including the cost of litigation compared to the unlikelihood of a full trial, litigants' preference for preliminary relief, and the courts' recent narrowing of standing only to business plaintiffs. Best, *supra*, at 24.

105. *U.S. Healthcare*, 898 F.2d at 919. The U.S. Healthcare campaign featured five print advertisements, four television advertisements, and two radio advertisements. *Id.* at 919. Some of U.S. Healthcare's advertisements attempted to directly contradict the implications made by the Blue Cross campaign. *Id.* The first of U.S. Healthcare's advertisements emphasized the length to which U.S. Healthcare will go to provide top medical treatment and featured a healthy little girl who was a former HMO patient. *Id.* The advertisement claimed that the HMO sent the girl to the best surgeon in the country for her operation. *Id.* The second group of advertisements featured a physician explaining that the purpose of a primary care physician is to decide what type of specialist the subscriber should consult, so that the subscriber receives the best treatment. *Id.*

The final group of advertisements was clearly "anti-Blue Cross," comparing the features of the competing products and further suggesting that Blue Cross was not representing its product accurately. *Id.* U.S. Healthcare's final television advertisement was U.S. Healthcare's response to Blue Cross' dramatic commercial. *Id.* at 920. The advertisement showed grieving family members standing around a hospital bed as someone pulled a sheet over a Personal Choice brochure. *Id.*

106. *Id.* During U.S. Healthcare's responsive campaign, Blue Cross filed counterclaims to U.S. Healthcare's lawsuit against Blue Cross. *Id.* Prior to trial, U.S. Healthcare added a Lanham Act claim, *see supra* note 104 (defining Lanham Act), alleging that Blue Cross had made a factual misrepresentation regarding U.S. Healthcare's insurance package. *Id.* U.S. Healthcare removed the case to federal court based on the assertion of a federal question and the court exercised pendant jurisdiction over the state law claims. *Id.* The trial lasted fourteen days. *Id.* After eight days of deliberations, the jury announced that it was deadlocked on all issues of liability and damages. *Id.* The United States District Court for the Eastern District of Pennsylvania declared a mistrial; then, finding virtual unanimity on the counterclaim issues, sent the jury back to decide the issue of Blue Cross' counterclaims. *Id.* The jury returned a verdict against Blue Cross. *Id.* The district court then entered judgment for U.S. Healthcare and scheduled a new trial for U.S. Healthcare's own claims. *Id.* Prior to the second trial, Blue Cross filed a motion for summary judgment on the grounds that the advertisements should receive heightened First Amendment protection and that U.S. Healthcare had not met the actual malice standard of proof. *Id.* In granting the motion and setting ground-breaking precedent, the district court held that, because the parties involved were public figures and because the advertisements involved issues of public concern, the advertisements received the heightened First Amendment protection of the actual malice standard. *Id.*

107. *Id.* at 927.

108. *Id.* at 935-36.

The Third Circuit relied on both established defamation and commercial speech law in reversing the district court's decision and holding that Blue Cross was liable for defamation.[109] Relying heavily on the principles established in *Virginia Pharmacy* and its progeny,[110] the Court reiterated the rule that the First Amendment entitles commercial speech to limited protection, but that the traditional interests of the First Amendment in defamation actions are less significant in the commercial speech context.[111] Specifically, the court relied on the reasoning of *Virginia Pharmacy* that economic factors motivate commercial speech, that regulation will not chill commercial speech as easily as other types of speech, and that the conveyors of commercial speech may verify more easily the veracity of the information they convey.[112]

The *U.S. Healthcare* court found that the advertisements in question possessed all the characteristics set forth in the Supreme Court decisions regarding commercial speech; namely, the advertisements were part of a professionally run promotional campaign, the advertisements specifically refer to a product, and the desire for revenue motivated the speech.[113] The court stated that it placed great importance on the durability of the speech in question; because commercial speech does not chill easily, the speech does not require the heightened protection of the actual malice standard.[114] In *U.S. Healthcare* the court stated that the health care market, because of its size, adequately would prevent any chilling effect that only limited First Amendment protection otherwise might cause.[115] Because the health care market in the region that Blue Cross and U.S. Healthcare cover generates hundreds of millions of dollars in insurance premiums, the insurers have a substantial incentive to advertise heavily to garner this business.[116] Consequently, the court stated that limits on the insurers' advertisements would not stifle the insurers' voices.[117]

Additionally, the court found that the companies easily could verify the information that they released, because the facts contained in the advertisements were well within the scope of the companies' knowledge.[118] The court further found that the dramatic, scare-tactic advertisements, which were capable of defamatory meaning, added little information to the marketplace.[119] To the extent that these statements were false, the court reasoned

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109. *Id.* at 928.

110. *See supra* notes 74-81 and accompanying text (outlining Court's reason for granting only limited protection to commercial speech).

111. *U.S. Healthcare*, 898 F.2d at 933-34.

112. *Id.* at 934-35.

113. *Id.* at 934.

114. *Id.* at 935.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

that the speech had no constitutional value and, therefore, should not receive full First Amendment protection.[120]

The *U.S. Healthcare* court also rejected Blue Cross' argument that health care is an issue of public concern and that the court, therefore, should grant the traditional heightened protection standard that it applies in defamation cases to these advertisements.[121] The court refused to extend defamation heightened protection to advertisements involving matters of public concern because of the fear that this extension would lead to the protection of virtually all advertising.[122] This broad protection, according to the court, would blur the distinctions that the Supreme Court established between commercial and noncommercial speech.[123] The court sought to avoid this outcome, fearing that a blur in the distinctions would reduce the efficacy of First Amendment protection in noncommercial settings.[124]

Finally, the Third Circuit in *U.S. Healthcare* refused to classify either U.S. Healthcare or Blue Cross as public figures under the traditional defamation analysis.[125] The court conceded that both U.S. Healthcare and Blue Cross would qualify as limited purpose public figures, because both parties have tremendous access to the media and because the risk of defamation arose because each party sought to influence consumer choices.[126] As evidence of the companies' access to the media, the court cited the massive advertising campaigns that each side launched.[127] The court also looked at each party's attempt to use dramatic comparative advertising to establish itself as the best health care provider and, thereby, influence the consumer's decision.[128]

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120. *Id.* (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 563 (1980)).

121. *Id.* at 935 (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983)).

122. *Id.* at 936 (citing *Central Hudson*, 447 U.S. at 562, n.5).

123. *Id.* at 936 (citing *Central Hudson*, 447 U.S. at 563, n.5).

124. *Id.* at 936.

125. *Id.* at 939; *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (defining public figure plaintiffs in traditional defamation analysis). Three classes of public figures exist: those who are public figures in all contexts, those who involuntarily are made public figures, and those individuals who are public figures solely for the purpose of a particular dispute. *Id.* The Court in *Gertz* defined the first group as those who have assumed roles of especial prominence in the affairs of society; these individuals occupy positions of very persuasive power and influence. *Id.* The second group is composed of those individuals who become public figures involuntarily and have taken no purposeful action of their own; this group is extremely rare. *Id.* The final group is composed of those individuals who are limited purpose public figures, and have thrust themselves to the forefront of a particular controversy to influence the resolution of the issues involved. *Id.*

Generally, two factors determine whether a person is a limited purpose public figure. *U.S. Healthcare*, 898 F.2d at 938. The first factor is the party's relative access to the media; the greater the party's access, the more likely the Court will be to consider the party a public figure. *Id.* The second factor is the manner in which the risk of defamation arose; if the risk arose because the party deliberately thrust itself into controversy, the Court likely will consider the party a public figure. *Id.*

126. *U.S. Healthcare*, 898 F.2d at 938.

127. *Id.*

128. *Id.*; *see* Brannigan & Ensor, *supra* note 30, at 591 (arguing that any vendor of commercial product is public figure).

Therefore, the court stated that the companies' access to the media and the situation surrounding the defamation suits strongly suggested that the parties were limited purpose public figures.[129] However, the court declined to label the parties as limited purpose public figures.[130] The court reasoned that Blue Cross and U.S. Healthcare became public figures only because of a comparative advertising war and because their motive was to generate revenue rather than influence the resolution of a public issue.[131] The Third Circuit concluded that classifying commercial advertisers as limited purpose public figures and granting advertisers heightened protection because of this classification would shield all future advertisers behind the actual malice standard.[132]

Based on this reasoning, the court held that the heightened protection of the actual malice standard did not extend to the advertisements in question.[133] Consequently, the result of the Third Circuit's decision in *U.S. Healthcare* is that in defamation actions brought in the Third Circuit, commercial speech in the comparative advertising context will not receive the heightened protection of the actual malice standard that the courts apply in traditional defamation actions.[134] Under the limited First Amendment protection analysis, a company will need to prove only that the competitor made a statement that was potentially harmful.[135] The plaintiff company will not have to prove the falsity of the statement, or that the competitor made the statement with actual malice.[136] Therefore, this leaves companies vulnerable to a flood of lawsuits challenging their advertisements.

The Third Circuit heavily relied on the commercial speech doctrine in denying heightened First Amendment protection to statements made in the course of a comparative advertising campaign.[137] While the court's analysis is sound, the court apparently did not take into consideration the special circumstances surrounding a comparative advertising campaign in contrast to traditional commercial advertising.[138] First, and most importantly, com-

129. *U.S. Healthcare*, 898 F.2d at 938.

130. *Id.* at 939.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* Another logical outcome of the *U.S. Healthcare* decision is that companies will attack their competitors by bringing defamation actions rather than the traditional product disparagement action. Defamation actions usually result in larger damage awards than do product disparagement actions; therefore, when a company can prove that a competitor made a false statement which potentially harmed the suing company's reputation, the Court may award both presumed and punitive damages. The decision greatly increases an advertiser's potential liability for statements made in a comparative advertising campaign.

135. *U.S. Healthcare*, 898 F.2d at 939.

136. *Id.*

137. *See supra* notes 109-112 and accompanying text (explaining *U.S. Healthcare* court's reliance on established commercial speech law).

138. *See generally U.S. Healthcare*, 898 F.2d 914 (failing to note any differences between traditional commercial speech and comparative advertising). The *U.S. Healthcare* court failed to make any distinctions between comparative advertising and traditional commercial speech. Specifically, the court did not point out that comparative speech is two-sided in nature rather than being focused on merely the advertiser's own product.

parative advertising involves two competitors directly addressing a certain product.[139] Traditional commercial advertising consists of one advertiser making statements about its own product.[140] No competing party exists in this setting to rebut the statement. Therefore, when statements made in the course of traditional advertising are false, the courts must intervene to correct the falsehood by not granting the speech full First Amendment protection, or by awarding relief through a Lanham Act claim.[141] The courts in this way protect the consumer from false information.[142] In contrast to traditional advertising, however, comparative advertising involves two competitors that will rebut false statements that the other party makes in the course of the campaign.[143] The particular nature of a comparative advertising campaign thus protects the consumer through the rebuttal process.[144]

The competitive nature of a comparative advertising campaign is very similar to that involved in labor disputes, in which speech receives the heightened protection of the actual malice standard.[145] First, economic factors motivate both comparative advertising and labor disputes.[146] Second, in both comparative advertising and labor disputes, the arguments are two-sided.[147] The government need not intervene to protect the employees who hear the statements arising from the labor disputes, because the opposing party is able to rebut any falsity made by the speaker.[148] Finally, in both comparative advertising and labor disputes, the listener expects the language to be persuasive; persuasion is the *sine qua non*[149] of

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139. *See generally* Buchanan, *Can You Pass the Comparative Ad Challenge?*, HARV. BUS. REV., July-Aug. 1985, at 106 (describing comparative advertisement).

140. *See* Best, *supra* note 104, at 26 (defining conventional advertising as noncomparative).

141. *See generally* Travers, *supra* note 57 (discussing government's role in regulating advertising).

142. *See id.* (discussing government 's protection of consumer from false statements by advertisers).

143. *See generally* Buchanan, *supra* note 139, at 106 (describing options available to comparative advertisers wishing to correct false representations concerning their products).

144. *See* Best, *supra* note 104, at 29 (discussing advertisers' preference of rebutting comparative advertisements in nonlitigious manner). Best suggests that competitors may prefer to counter comparative advertising with comparative advertisements of their own in order to avoid prolonged and costly litigation. *Id.*

145. *See supra* notes 53-58 and accompanying text (comparing commercial speech and speech arising from labor disputes).

146. *See supra* notes 55-59 and accompanying text (explaining that both commercial speech and labor dispute speech are economically motivated).

147. *See* U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 938 (3d Cir) (stating that both comparative advertisers had access to media), *cert. denied*, 111 S. Ct. 58 (1990).

148. *See* National Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 271 (1973) (stating that Court grants wide latitude to *competing parties* of labor controversies) (emphasis added); Linn v. United Plant Guard Workers, 383 U.S. 53, 60 (1965) (explaining National Labor Relations Board policy of setting aside elections only when party has not had opportunity to rebut).

149. *See* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. 425 U.S. 748, 772 n.24 (1976) (stating that persuasion is sine qua non of commercial and labor speech).

both types of speech.[150] The average consumer likely will not believe everything an advertiser says, just as the union worker will not believe all the propaganda stemming from a labor dispute.[151]

The Supreme Court has adopted the view that union workers will not believe all the propaganda stemming from a labor dispute.[152] In *Linn v. United Plant Guard Workers*[153] the Court granted heightened protection to speech arising from labor disputes.[154] There, the Court considered whether the actual malice standard should apply to speech made during a union organizing campaign.[155] The plaintiff, a manager of a manufacturing plant, filed suit against the union, two of its officers, and a plant employee after the defendants made statements in a leaflet to the employees that the plaintiff was a member of the management that robbed workers of any pay increases and denied workers a vote.[156] The plaintiff claimed that the statements were false, defamatory and untrue, and that the defendants knew of the falsity.[157] The district court dismissed the complaint, and the court of appeals affirmed.[158]

The plaintiff appealed the district court's dismissal of the plaintiff's claim to the Supreme Court, where the Court first characterized speech in labor disputes as being bitter, embellished, and vituperative, and which in other circumstances might be actionable per se.[159] The Court relied on previous National Labor Relations Board (NLRB) decisions in finding that language in labor disputes is not actionable per se in that specific context.[160]

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150. *See* FEDERAL TRADE COMM'N REAUTHORIZATION: HEARINGS BEFORE THE SUBCOMMITTEE ON COMMERCE, TRANSPORTATION AND TOURISM OF THE HOUSE COMMITTEE ON ENERGY AND COMMERCE, 97th Cong., 2d Sess. 387 (1982) (stating that advertising is art form which must motivate and persuade if it is to avoid being economic waste);
see also Ault v. Hustler Magazine, Inc., 860 F.2d 877, 881 (9th Cir. 1988) (explaining that audience anticipates persuasive speech in certain contexts such as labor disputes), *cert. denied*, 489 U.S. 1080 (1989); Koch v. Goldway, 607 F. Supp. 223, 225 (C.D. Cal. 1984) (holding that Court will consider language otherwise categorized as statement of fact as opinion when used in public debate, heated labor dispute, or other setting in which audience may anticipate efforts by parties to persuade), *aff'd*, 817 F.2d 507 (9th Cir. 1987).

151. *See supra* note 150 (explaining that listener expects persuasive speech in certain situations and is, therefore, likely to discount hyperbole and fiery rhetoric); *see also* Best, *supra* note 104, at 9 (stating that almost half of all consumers do not believe truthfulness of advertising claims). Best cites a study that appeared in ADVERTISING AGE, Mar. 5, 1984, at 1, col. 1, which reported that 47% of consumers do not believe that advertisers are truthful. *Id.* The study also reported that although consumers in the higher income brackets responded with more disbelief concerning the veracity of commercials, certain types of advertisements such as comparative advertisements fail to deceive the majority of consumers. *Id.*

152. *See* Linn v. United Plant Guard Workers, 383 U.S. 53, 60 (1966) (stating that union workers will not believe everything that parties in labor dispute say).

153. 383 U.S. 53 (1965).

154. Linn v. United Plant Guard Workers, 383 U.S. 53 (1966).

155. *Id.* at 57.

156. *Id.* at 56.

157. *Id.*

158. *Id.* at 57.

159. *Id.* at 58.

160. *Id.* at 60.

Instead, the Court held that it would leave the appraisal of labor dispute speech to the good sense of the voters and would leave the job of correcting inaccurate and false statements to the opposing parties.[161] The Court further relied on NLRB decisions which stated that the NLRB would set aside elections only when a party in the election misrepresented a material fact, when opportunity for reply was lacking, and when the misrepresentation had an impact on the free choice of the employees participating in the election.[162] The Court held that an action for libel would lie only when the defendant acted with actual malice.[163] Because the Court found that the defendant in the *Linn* case may have acted with actual malice, the case was remanded for the jury to determine whether the defendant actually did act with malice.[164]

While the NLRB has altered its position regarding falsity of speech in the labor setting in the past thirty years, currently the NLRB does not regulate the falsity or truth of labor speech.[165] The NLRB's position is based in part on findings that union workers are familiar with the tactics that the parties in labor elections use, and that, therefore, the tactics are relatively ineffective.[166] Because the workers expect the speech to be persuasive, the workers do not believe everything that the participants say.[167] Also, the opposing party in a labor dispute has ample opportunity and, indeed, is expected to contradict any false statements that the party's opponent makes.[168]

Because of the similarities between labor speech and comparative advertising speech, the courts would not be amiss in applying the labor dispute analysis to comparative advertising speech. The consumer will expect comparative advertisements to be persuasive and will not believe that all statements are true.[169] Also, the competitor company will have ample opportunity

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161. *Id.*

162. *Id.*

163. *Id.* at 64-65.

164. *Id.* at 66.

165. *See generally* Midland National Life Ins., 263 N.L.R.B. 127 (1982) (returning to unregulated speech in labor elections). Originially, the NLRB prohibited misrepresentations in labor speech. Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962). After 15 years, the NLRB overruled the holding of *Hollywood Ceramics* and banned restrictions on labor speech, holding that the workers were capable of recognizing and discounting campaign propaganda. Shopping Kart Food Market, Inc., 228 N.L.R.B. 1371 (1977). The Board then returned to the stricter regulation of *Hollywood Ceramics* after only 20 months. General Knit of California, Inc., 239 N.L.R.B. 619 (1978). Currently the NLRB is operating under the less strict rule of *Shopping Kart*, again recognizing that workers are properly able to weigh and discount campaign propoganda. Midland National Life Ins., 263 N.L.R.B. 127 (1982).

166. *See supra* notes 150-151 and accompanying text (explaining that workers expect speakers to use language filled with rhetoric and hyperbole).

167. *Id.*

168. *See* N.L.R.B. v. Houston Chronicle Publishing Co., 300 F.2d 273, 278 (5th Cir. 1962) (explaining that labor election will only be set aside in cases where party has not had opportunity to rebut falsehoods).

169. *See* FEDERAL TRADE COMMISSION REAUTHORIZATION, *supra* note 150 (stating that advertising is persuasive in nature); Travers, *supra* note 57, at 556 (stating that advertisements are and will continue to be persuasive).

to refute any false claims that the competing company makes.[170] Therefore, the similarities should warrant similar treatment.

Furthermore, comparative advertising not only resembles competing speech in the labor context, but also resembles competing speech in the political context, particularly political debates.[171] Although economic factors alone do not motivate political candidates, self-interest and the desire to defeat a competitor do motivate candidates.[172] The Court has long held that the free exchange of ideas regarding the government is at the heart of the First Amendment.[173] The Court protects any falsehood generated in political debates in order to protect the true statements.[174] The Court also relies on the ability of each party to correct inaccuracies reported by the opponent and further relies on the common knowledge of the audience that candidates design political speech to be persuasive.[175] Consequently, the Court grants political debate the heightened protection of the actual malice standard.[176]

Comparative advertising resembles political speech in two respects. First, both comparative advertising and political speech are economically motivated. Second, in both comparative advertising and political debates, the parties have access to the intended audience, and equal opportunity to correct false statements.[177]

Accordingly, the courts should apply similar reasoning when deciding a case involving comparative advertising. Specifically, the courts should apply the following three-pronged test to determine whether the context of commercial speech permits the court to extend heightened protection to that speech.[178] First, the court should determine that the parties involved in the

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170. *See* U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 938 (3d Cir.) (stating that both comparative advertisers had access to media), *cert. denied*, 111 S. Ct. 58 (1990).

171. *See infra* note 177 and accompanying text (explaining similarities between commercial speech and political speech).

172. *See* Secrist v. Harkin, 874 F.2d 1244, 1249 (8th Cir.) (stating that political candidates engage in vehement, caustic, and unpleasant attacks to obtain office), *cert. denied*, 110 S. Ct. 324 (1989).

173. *See supra* notes 15-18 and accompanying text (stating that by enacting First Amendment framers intended to protect speech by governed about governing).

174. *See* Pestrak v. Ohio Elections Comm'n, 670 F. Supp. 1368, 1377 (S.D. Ohio 1987) (holding that erroneous statement of fact is inevitable in free debate, and Court must protect it to ensure free exchange of ideas), *aff'd in part, rev'd in part*, 926 F.2d 573 (6th Cir. 1991); New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (same).

175. *See supra* notes 149-151 and accompanying text (explaining that listeners in certain circumstances expect speech to be persuasive and, therefore, do not believe speech as readily).

176. *See Pestrak*, 670 F. Supp. at 1375 (holding that plaintiff must prove actual malice to recover in political debate case).

177. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (stating that public official has greater access to channels of communication sufficiently to rebut falsehoods).

178. *See infra* notes 178-187 and accompanying text (describing proposed three-pronged test to apply to comparative advertising).

Alternatively, the courts could extend not only heightened protection to comparative advertising speech, but could grant this type of speech full immunity from any defamation

litigation have equal access to the media.[179] This prong is essential to the test, because without equal access, the plaintiff cannot effectively rebut any false statement.[180] Without the opportunity to rebut, the exchange is not two-sided, and the government or court should intervene to prevent an inequitable result.[181] In fact, in both labor disputes and political debates,

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claims. While the actual malice standard would afford comparative advertising speech greater protection than this speech currently receives, the actual malice standard still would encourage companies to file defamation actions claiming that the competing company acted with knowledge that the advertisement was false or with reckless disregard of whether the ad was false. U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 927 (3d Cir.), *cert. denied*, 111 S. Ct. 58 (1990).

In the limited situation of comparative advertising, a rebuttal by the injured company may be more beneficial than a defamation action, both to the injured company and to society at large. Even if successful, the defamation plaintiff will recover long after the alleged defamatory statement appeared in the media, and long after consumers heard the false statement. Conversely, if the plaintiff company quickly rebuts any misinformation that the competitor conveyed, consumers will be less likely to believe the false statement. Best, *supra* note 102, at 9. Additionally, the plaintiff company could include its rebuttal in an existing advertising campaign, which would be less expensive than litigating a defamation suit. *Id.* at 29. Furthermore, consumers will benefit by receiving a greater amount of information on which to base their purchasing decisions. The existing commercial speech doctrine recognizes as one of its goals the conveyance of information to the purchasing public. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976).

The situation in *U.S. Healthcare* illustrates the above proposition. When Blue Cross launched its advertising campaign featuring "anti-U.S. Healthcare" commercials, U.S. Healthcare immediately rebutted the allegations made in Blue Cross' campaign. *U.S. Healthcare*, 898 F.2d at 919. Consumers received information about both companies' products within a short period of time. The likely effect of this campaign was to make consumers look more carefully at what each insurer truly was offering. The ensuing defamation action did not benefit the consumer in any way, whereas the debate between the two insurers resulted in a greater release of information to the consuming public on which the public could base its purchasing decisions. By granting to comparative advertising speech full immunity, above the existing actual malice standard, the courts would preclude defamation actions that will burden an already overloaded court system. The *U.S. Healthcare* case also demonstrated that even if one company institutes a defamation action, that company nevertheless will rebut any misinformation conveyed by the competitor to prevent the public from believing the false information. If a company is going to engage in comparative advertising, the company should not be able to seek additional redress in the court system.

179. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974) (holding that public figures have less need for protection from defamatory statements); *see also supra* notes 20-23 and accompanying text (explaining that speech involving public figures receives greater First Amendment protection because public figures have easy access to media); *supra* notes 148, 175, & 177 and accompanying text (explaining that in comparative advertising, labor disputes, and political debates, parties have ability to rebut falsehoods). As long as the parties have equal access, they likely will rebut falsehood that the competitor makes. Pestrak v. Ohio Elections Comm'n, 670 F. Supp. 1368, 1375 (S.D. Ohio 1987).

180. *See Gertz*, 418 U.S. at 344 (stating that parties without access to media cannot rebut falsehoods and, therefore, deserve greater protection); *see also supra* notes 24-26 and accompanying text (explaining that private figure plaintiffs do not have easy access to media and, therefore, cannot rebut easily falsehoods that defendant makes).

181. *See Gertz*, 418 at 345-48 (holding that plaintiffs without opportunity to rebut require governmental protection); *see also supra* notes 26-27 and accompanying text (describing government regulation and court intervention in cases involving private figure plaintiffs).

the Supreme Court has relied on the ability of both parties to access the audience and rebut any inaccuracies in granting heightened First Amendment protection.[182]

Second, the court should determine that the advertiser directed the advertisements at specific products that the competitor offers.[183] While the competitors may compare the various features of one another's products, the court should not allow the competitors to make defamatory remarks about the company itself, its management, or its employees, even if in a comparative advertising setting.[184] These statements would not serve any purpose, as they would not promote thoughtful analysis on the part of the consumer, or add any product information to the marketplace.[185]

Finally, the court should apply this test only to statements made in a commercial setting.[186] Companies already receive the protection of the actual malice standard for statements made outside the commercial context.[187]

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182. *See Gertz*, 418 U.S. at 344 (explaining that parties with access to media have greater ability to rebut falsehoods); *see also supra* notes 21-22 and accompanying text (describing parties' access to media and consequent ability to rebut).

183. *See infra* notes 184-85 and accompanying text (explaining rationale for second prong of test). The very nature of a comparative advertising campaign allows the companies involved in the comparative advertising campaign to rebut any misinformation conveyed about their products by giving the consumer the correct information. The companies would have greater difficulty rebutting misinformation regarding the company in general.

184. *See supra* note 183 & *infra* notes 197-99 and accompanying text (explaining requirement of directing advertisement at specific product and consequent availability of Lanham Act claim).

185. *See* Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (rejecting protection for false or misleading advertisement that adds no information to marketplace); U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 935 (3d Cir.) (rejecting certain ads having no informational value), *cert. denied*, 111 S. Ct. 58 (1990).

186. *See infra* note 187 and accompanying text (explaining that companies already receive heightened protection outside the commercial arena).

187. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983) (stating that companies have full protection for direct comments on public issues); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n., 447 U.S. 557, 563 n.5 (1980) (holding that heightened protection not necessary for corporations' statements on public issues in commercial context because corporations have full protection when making statements in noncommercial setting); *see also supra* notes 83-84 and accompanying text (restating that Court grants full protection to company's speech outside commercial context).

Applying this test to the comparative advertising situation presented in U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914 (3d Cir.), *cert. denied*, 111 S. Ct. 58 (1990), the two insurers involved in the advertising campaign clearly would meet the qualifications of the test. First, both U.S. Healthcare and Blue Cross have equal access to the media. U.S. Healthcare spent approximately $1.255 million on its advertising campaign, and Blue Cross spent approximately $2.175 million on its campaign. *Id.* at 919. Secondly, the two insurers directed their campaigns at specific products that the competitor offered. *Id.* at 918-920. Although each company claimed that the advertisements in question negatively portrayed the actual company rather than the company's products, *id.* at 925-26, this was not true. The advertisements inferred that the *products* that the competitor offered, not the companies or those who ran them, caused some tragedy to befall the subscriber. Finally, the advertisments

Therefore, the court need not apply this test if the speech is made in a noncommercial context.

Several results flow from the application of this test.[188] First, the test will limit commercial, noncomparative advertisers to traditional product disparagement actions rather than defamation actions when the advertisers meet the proposed test.[189] The damage awards are less in product disparagement actions, but these awards generally have been adequate remedies.[190] By not granting heightened protection to comparative advertising, the courts risk an increase in litigation because companies are more likely to bring an action if the potential awards are higher.[191]

Another consequence of the proposed test's application is that consumers will receive more information regarding competitors' products.[192] Although some false information may escape regulation, the court will not filter out any true information in an attempt to avoid falsehood.[193] The exchange of free ideas outweighs the danger of falsehood entering the market place.[194] Indeed, the Supreme Court has recognized the inevitability of the dissemination of some falsehood since the earliest cases addressing First Amendment protection in defamation actions.[195]

Furthermore, the government does not lose its ability to regulate the commercial arena by applying the proposed test.[196] For example, the Lanham

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were made in a clearly commercial setting, and were not part of any noncommercial statement by either insurer. *Id.* at 918-19. Consequently, the advertisements by U.S. Healthcare and Blue Cross would qualify for heightened immunity under the proposed test.

188. *See supra* notes 178-187 and accompanying text (describing three-pronged test).

189. *See supra* note 89 (explaining that product disparagement action is traditional remedy for false statements regarding company's product).

190. *See id.* (describing remedies allowed in product disparagement actions).

191. *See id.* (stating that defamation awards generally are higher than awards from product disparagement actions). A logical consequence of higher awards in defamation actions is that advertisers would file defamation suits rather than product disparagement actions to receive greater monetary relief.

192. *See* Bigelow v. Virginia, 421 U.S. 809, 822 (1975) (stating that public had right to information in advertisement that provided referral services for legal abortions); Chicago Joint Bd. v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970) (stating that consumers had right to information in advertisement that promoted product as alternative to imports that put American laborers out of work), *cert. denied*, 402 U.S. 973 (1971); Fur Information & Fashion Council, Inc. v. E.F. Timme & Son, 364 F. Supp. 16, 22 (S.D.N.Y. 1973) (explaining that consumers should know that manufacturer of artificial furs provided alternative to extinction of fur-bearing mammals by competitors), *aff'd*, 501 F.2d 1048 (2d Cir.), *cert. denied*, 419 U.S. 1022 (1974); *see also supra* notes 67-70 and accompanying text (explaining that reduced restrictions on commercial speech result in greater flow of information to consumers).

193. *See supra* notes 17-18 and accompanying text (describing Court's willingness to allow some falsehood to protect free exchange of ideas).

194. *See supra* notes 17-18 and accompanying text (stating Court's reasoning that First Amendment protection of free speech outweighs dangers that falsehoods pose).

195. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964) (explaining that while some falsehoods inevitably escape by protecting free debate, goal of protecting free debate outweighs dangers that falsehoods pose).

196. *See infra* notes 197-200 and accompanying text (explaining options available to government in regulating commercial speech).

Act will remain a force in controlling deceptive advertising.[197] The Lanham Act prohibits express and implied false representations made in connection with the sale of goods and services.[198] In the event that the parties in a comparative advertising campaign do not qualify for immunity under the proposed test and are deceiving the public, the Lanham Act would serve as a safety net to prevent continued deception.[199]

Traditionally, the Supreme Court, in deciding defamation cases, has granted heightened First Amendment protection to allegedly defamatory statements when the plaintiff is a public figure[200] and when the speech involves a matter of public concern.[201] Conversely, the Court had refused to extend any heightened protection to commercial speech.[202] The Court has distinguished commercial speech from other types of speech that have traditionally received heightened protection such as speech arising out of political debates[203] or labor debates[204] and has held that because of these distinguishing characteristics, commercial speech should not receive heightened First Amendment protection.[205] However, given the similarities between comparative advertising speech, labor debate speech, and political debate speech, the three types of speech warrant similar treatment.

Accordingly, comparative advertising is a unique form of commercial speech in which the traditional commercial speech doctrine should not apply.[206] Instead, the courts should adopt the proposed three-pronged test,[207] and if the speech meets the criteria of the test, the court should grant the speech heightened protection in defamation actions.[208] By protecting the speech, the courts will ensure that the consumer receives the maximum amount of information regarding a product.[209] The courts will also avoid

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197. *See supra* note 104 (describing history and usage of Lanham Act to control deceptive advertising).

198. *Id.*

199. *See supra* note 104 (describing availability of Lanham Act to protect public from deceptive advertising).

200. *See supra* notes 19-23 and accompanying text (discussing public figure plaintiff analysis).

201. *See supra* notes 12-18 and accompanying text (discussing issues of public concern).

202. *See supra* notes 44-50 and accompanying text (outlining commercial speech doctrine of limited First Amendment protection).

203. *See supra* notes 171-176 and accompanying text (explaining First Amendment protection for political debate speech).

204. *See supra* notes 159-163 and accompanying text (explaining First Amendment protection for labor dispute speech).

205. *See supra* notes 75-81 and accompanying text (outlining distinctions between commercial speech and other forms of traditionally protected speech).

206. *See supra* notes 138-144 and accompanying text (explaining unique nature of comparative advertising).

207. *See supra* notes 178-187 and accompanying text (proposing three-pronged test for comparative advertising).

208. *See supra* note 178 and accompanying text (stating that speech meeting proposed test is granted heightened First Amendment protection).

209. *See supra* notes 192-195 and accompanying text (explaining that three-pronged test will result in more information in marketplace).

time-consuming, costly defamation actions,[210] and instead will have to intervene only when the parties cannot effectively rebut their competitors' statements.[211]

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210. *See supra* notes 189-191 and accompanying text (explaining that proposed three-pronged test will prevent undue burden on Court that could result from increased number of defamation actions).

211. *See supra* notes 196-199 and accompanying text (discussing need for court to intervene in other situations, but not in comparative advertising context).