

# *Confusion in Use: Trademark and Public Safety*

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Trademark law protects consumers and mark owners against economic harm. When consumers are confused about the source of a good or service, this increases consumer search costs or imposes reputational costs on trademark owners. But what happens when a pharmacist, confused by two similar drug names, accidentally prescribes estrogen instead of an antidepressant? Trademark law, in such cases, has adapted its core doctrine—likelihood of confusion—to protect the public from another kind of injury: physical harm. By lowering the standard required for confusion when physical harm could result, courts recognized that standard trademark analysis did not always capture the harms posed by various kinds of confusion. In this Article I argue that courts should, for similar reasons, adjust the standard for deceptiveness. When a mark's potential to mislead consumers about the nature of the product poses a risk to the consumer's physical safety, courts should be lower their standards for finding the mark deceptive.

Under current law, the law bars from registration “deceptive” trademarks—trademarks that influence consumer purchasing decisions by misdescribing the nature, quality, or characteristics of the good on which the mark appears. The test for determining whether a mark is deceptive, however, is unpredictable and fact-intensive. To make matters worse, under current doctrine all marks are treated equally harmful if deceptive. Yet not all deceptive marks pose the same quantity or quality of harm. Sometimes, the harm, or the risk of harm, is only economic, or has only economic effects. A customer who receives SPUNOUT ICE CREAM may erroneously think that its ice cream was produced by a special spinning process, and they may buy it for that reason. In other cases, however, the risk of harm may implicate more serious considerations, such as physical safety. A consumer who buys BRAINSTRONG because it suggests, without evidence, that it will improve brain function faces a variety of potential physical effects—effects not experienced by the patron of ice cream. Risks posed by misleading marks, in other words, vary by the type of good on which they appear. Where a good or service implicates serious concern of physical harm, courts should, as they have in the confusion context, pay closer attention. This means that, for dietary supplements, trademark law should the lower the standard required to prove deceptiveness. Lowering this standard will discourage the use of misleading marks, increase the quality of consumer information, and improve product quality.