

# False Advertising Litigation 101: Some Like it Misleading

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# The Lanham Act

Any person who...uses in commerce any ... false or misleading description of fact, or false or misleading representation of fact, which ... in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities ....shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(B)

# The Lanham Act

1. A false or misleading statement
2. Made in a commercial advertisement or promotion
3. Deceives or tends to deceive consumers
4. Deception is material
5. Disseminated in or effects interstate commerce; and
6. Likelihood of harm to Plaintiff.

**I'M NOT LYING,  
I'M ADVERTISING** 🤪

# Commercial Advertising

## The *Gordon & Breach* Test:

1. commercial speech;
2. by a defendant in commercial competition with the plaintiff;
3. for the purpose of influencing consumers to buy defendant's goods or services; and
4. disseminated sufficiently to the relevant purchasing public to constitute “advertising” or “promotion” within that industry.

## Overzealous Sales Representatives?

- Systematic / pattern and/or involvement or signaling by management



# False Statements

**Literally False** claims are unambiguous statements of fact that, on their face, conflict with reality.



# False Statements

Claims are **False by Necessary Implication** when considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated.



# False Statements

**Establishment claims** are either express or implied messages that "tests prove" a particular fact, or that "studies show" a particular product attribute.

- Considered False if:
  - Test do not establish proposition
  - Test not sufficiently reliable





# False Statements

An advertisement can be **False** by **Omission** if it selectively advertises its advantages over its competitor when disclosure would weaken the superiority claim.

**U-HAUL® it to Pasadena...\$547.\***

**Jartran. it to Pasadena...\$499.**



**BRAND NEW TRUCKS** 

If you're moving, Jartran is your best buy!  
Jartran can save you up to 50% on one-way truck rentals to many western and southwestern cities. For example, just look over the chart below. We also have savings to other cities and we can serve your local truck rental needs, too.

You get to choose from a full selection of **brand-new**, dependable Dodge and other fine gas or diesel trucks. You don't have to be a truck driver to drive a Jartran truck because most are equipped with automatic transmissions, comfortable, roomy cabs and fuel-saving bodies designed specifically for long-distance moving.

And you won't have to drive miles out of your way to find us. Jartran has convenient neighborhood pick-ups and drop-offs.

Now you can move everything you've got without spending everything you've got. To rent your Jartran truck, call a neighborhood Jartran dealer. It's your best move.

**Jartran**  
Truck Rental

**CHECK THESE SPECIAL INTRODUCTORY ONE WAY RATES**

DESTINATION	U-HAUL® 14 Van \$1085	JARTRAN® 10 Van \$345
San Francisco	\$681	\$245
Atlanta	\$ 833	\$349
Fl. Worth/Dallas	\$ 766	\$349
New Orleans	\$ 677	\$349
Kansas City	\$ 251	\$199
Washington, D.C.	\$ 260	\$199
Philadelphia	\$ 289	\$199
Minneapolis	\$ 661	\$399
Denver		

\*Based on phone survey of U-Haul dealers and Moving Centers in the Pacific area (12/85).  
\*\*Rates subject to change without notice.  
†Based on equipment availability.  
Rates applicable from Detroit area.

**JARTRAN NEIGHBORHOOD DEALERS**

DEARBORN 14025 W. Warren 866-4438	DETROIT (East) 21322 Eastern 779-2252	FRASER 779-2252	PARMINGTON 476-8467	DETROIT 743-8811	UTICA 743-1116	WARREN 2444 Mt. Elliott 862-2682	20822 Joy Rd. 846-2130	19251 Convent 862-3930	18421 E. 7 Mile Rd. 535-5880	YPSILANTI 875-7606	FRANKLIN 798-9723	HAZEL PARK 547-7021	LANING 871-8330	140116 Sibley 874-2320	4711 N. East St. 865-8976	784-0574	20822 Convent Hwy. 779-8200	4241 E. 7 Mile Rd. 874-8090	WANNICOTT 885-7996	MT. CLEMENS 868-8626	PONTIAC 334-8187	FORT HURON 291-1929	364-8390	1521 18th Avenue 884-2161	REDFORD 335-5558	ROCHESTER 825-8800	LINCOLN PARK 362-7878	474-8090	LIVONIA 474-8090	TAYLOR 332-0688	FLINT 234-9423
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# What is NOT a False Statement?

Opinions



Parody



Puffery

# Misleading Statements

A claim is misleading – not literally false – if it is:

- ambiguous; or
- equally open to true or false interpretations.



# Misleading Statements

A claim that is not literally false violates the Lanham act if it is likely to mislead consumers.

IMPORTANT

False Claims

deception is  
presumed

Misleading Claims

Plaintiff must  
prove deception



# Consumer Surveys

- Survey showing that 15% perceived a false message often sufficient to show deception
- Survey must be objective, properly filtered, no leading questions
- Consider a pilot survey
- Caution: a court may disregard survey in rare cases!



# Disclaimers



- Disclaimers do not cure literally false claims
- Disclaimers can eliminate a deception created by ambiguity if:
  - Presented in near the claim to be modified
  - Legible, meaningful, and sufficiently sized
  - Use terms commonly understood by consumer

# Injunctive Relief

## Traditional elements

1. whether movant has demonstrated strong likelihood of success on the merits;
2. whether movant would suffer irreparable injury in the absence of injunctive relief;
3. whether issuance of the injunction would cause substantial harm to the defendant;
4. whether the public interest would be served or undermined by an injunction

Be prepared for affirmative defenses: unclean hands; laches.

Consider requesting expedited discovery

Cases often settle after preliminary injunction ruling because court opines on likelihood of success on the merits.

# Injunctive Relief

- Precedent requires showing of irreparable harm
  - Trademark Modernization Act of 2020 may have created presumption of harm, but no court rulings yet.
- Irreparable harm examines whether or not plaintiff will more likely than not suffer lost sales, lost market share, harm to reputation or good will.
  - Evidence of actual diversion required for damages, not injunction
- Courts consider:
  - Reputation of plaintiff's product among consumers;
  - Plaintiff's investments to develop its reputation;
  - Competition between plaintiff's and defendant's products;
  - Proximity of the products in the store
  - Whether the claims relate to a product feature which consumer find important



# Injunctive Relief

- Remaining elements will likely support injunction if likelihood of success and irreparable harm established
- Balancing of Harms
  - Defendant only required to not disseminate false information.
- Public Interest
  - Strong public interest in truthful advertising

# Damages: Causation

- To recover damages, plaintiff must show actual diversion of sales and a causal connection
  - Proof = actual diversion of sales
  - Expert testimony, statistical studies, consumer surveys, etc.
- Difficulties in multiple competitor market



- Need not show every buyer was deceived by the advertising

# Damages

- Common measure of recoverable damages include:
  - Plaintiff's lost profits in sales diverted
  - Plaintiffs lost profits on sales made at reduced prices
  - Costs of corrective advertising
  - Quantifiable harm to good will
- Treble damages are possible
  - Usually premised on finding of willfulness
  - Based upon the principles of equity
  - Plaintiff should be made whole, without punishing defendant
- In exceptional cases, a court may award attorney's fees

x 3 =

# Damages

- Disgorgement of defendant's profits may be available if
  - Intent to confuse or deceive
  - Diversion of sales
  - Adequacy of other remedies
  - any unreasonable delay by the plaintiff in asserting its rights
  - the public interest in making the misconduct unprofitable
- 2020 SCOTUS decision ruled that showing of willfulness not required in Lanham Act trademark case



# Lanham Litigation Alternatives

- Lanham: only competitors can sue
- NAD as alternative forum
- Consider addressing claims with regulators
  - FDA, FTC or FCC
- State law claims for competitors and consumers
- Other ancillary claims: antitrust, RICO, etc.



# Practical Considerations

## COMPLAINT

- Identifying what is actionable vs. non-actionable.
- Risks associated with bringing a claim?
  - Additional scrutiny upon your own marketing campaigns & materials
  - Complaints to regulatory agencies (FDA, NAD, etc.)



# Practical Considerations

- Assessing the risks
  - Early case assessments
  - Holistic review of your marketing materials
- What do you do if you find a problem?



# Practical Considerations

- How do you engage with your competitor?
  - Business-to-business reach out?
  - Through a regulator?
  - Outside counsel?
- Timing considerations
  - Want to protect your rights promptly.
  - Delay will weaken claim for injunctive relief
- Publicity – a blessing and a curse.





# Practical Considerations



- Working with the business
  - Conducting initial assessments discreetly
  - Understanding discovery challenges and other burdens of litigation
  - Need to gather evidence
  - Managing the sales force before and during litigation

# Practical Considerations

- Managing expectations regarding damages
  - Battle of the experts to prove
- Expense of litigation
  - Consumer surveys can cost \$200,000+
  - Economic experts
- Fear of the “stale” survey
  - A defendant cannot “dodge the legal consequences of [a] survey by making superficial tweaks to its marketing materials, turning Lanham Act litigation into a never ending shell game.”



# Questions?

