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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 activitiesshall 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.



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

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





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.



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



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



What is NOT a False Statement?

Opinions



Parody



Puffery

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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

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- 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

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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

Damages

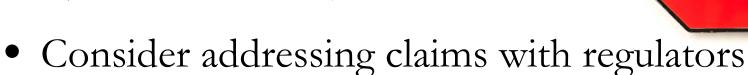
• Disgorgement of defendant's profits may be available

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



- FDA, FTC or FCC
- State law claims for competitors and consumers
- Other ancillary claims: antitrust, RICO, etc.



- 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.)



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



- 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.





Working with thebusiness

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

- 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."
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Questions?

