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False Advertising Litigation: Hear The Train, Clear The Tracks

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As with all litigation, false advertising disputes that land in court are the tip of the iceberg.¹ Many potential cases are avoided through the efforts of in-house lawyers who counsel the *brand* groups on a day to day basis, and their colleagues in other “technical” departments who participate in the internal *advertising review* process. However, matters that have broken through the front lines to be decided by the courts, viewed with the benefit of hindsight, share certain common traits worth noting:

- Rigorous corporate competitors
- Head to head, product/brand competition
- Product differentiation efforts in aggressive advertising
- Fight for market share month to month
- R+D/technical support/consumer studies
- Urgency to act and tight timelines
- Apparent success at product differentiation leading to a new claim
- Potential/Actual harm to competitor by loss of market share and significant revenue loss

Whether the context is prescription drugs, OTC drugs, medical devices, cosmetics, toys or other promoted products, intense pressure exists on a marketing team to tout its brand as the best or better or different than the competition, with specific claims of efficacy and superiority. Used in an aggressive advertising and promotional campaign, such claims can bring huge rewards in the form of increased market share, which usually translates into

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markedly increased sales and revenue. Counsel and other internal reviewers must take into account the overall competitive dynamics, as well as internal business pressures, when called upon to review new claims or ad copy with accompanying substantiation, or when required to respond to “informal” objections by competitors to existing claims.

Ad copy and claims fully vetted in house often wither when placed under the microscope of *discovery* in litigation. How can this be, when the well designed review process has been diligently followed? A combination of factors can converge to result in claims slipping through the review process:

- On the surface, the substantiation for a given claim seems compelling
- Enthusiasm over valid good news leads to over-reaching in the final message
- Key sources providing approvals and authorizations early-on are not consulted again after modified final copy
- Assertions that the competitor is

already doing it/saying it cloud judgment

- Reluctance to “cross examine” corporate colleagues and work product leaves key questions unanswered

- Technical/scientific teams fail to understand the level of scrutiny their substantiation will be subjected to in *discovery*, and by experts

- Economic harm to the competition and resulting probability of aggressive competitor reaction is underestimated in the risk/benefit analysis

- Marketing often exerts greater influence than legal and technical support teams, so objections that seem equivocal, or cautions that are not absolutely convincing, will be ignored

Recent decided cases under the Lanham Act (referred to herein as “A” through “F”) provide some insight, “after the fact” into the kinds of weaknesses not addressed and eliminated by internal review.

Advertisement “A” portrayed exaggerated product performance activity based on trials of a precursor prototype rather than the actual effectiveness of the promoted product, and was found to be literally false.² In comparison, claim “B” was deemed acceptable because the exaggeration of its products established advantage over a competitor was non-actionable “puffery.”³

An establishment claim supported by a patient preference study in example “C” fell apart when scrutiny of follow up study questions revealed that the preference of a significant percentage of the study participants was arrived at by “random selection” of one of the two options.⁴ Another claim in example “C” was deemed literally false because the company took interpretive liberties with apparently supportive conclusions of a scientific study author, who subsequently surfaced in the litigation on the side of the challenging party. Illustrating “mixed results” that such decisions often yield for a party, plaintiff’s success in example C was tempered by the court’s

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refusal to strike down defendant's overall health superiority claim as either literally false or impliedly false where plaintiff did not prove defendant's product was equal or inferior to plaintiff's product.⁵

Claim "D," touting the significant oral healthcare benefits of a product, was deemed literally false, in part because it went too far in suggesting that competitive products using a different method could consequently be dispensed with given the advertised benefits.⁶

Product "E" was removed from the shelf after its name was deemed literally false by necessary implication because it conveyed a specific product formulation that did not exist, with falsity also proven in the litigation by a consumer "take away" survey conducted by plaintiff's expert confirming that a sizeable percentage of consumers expected specific benefits after viewing the ad.⁷

Ads for Product "F" made "completely unsubstantiated" claims of product superiority that were deemed per se false; the challenging party's inability to prove their falsity was not a bar to injunctive relief, particularly because the defendant conceded that there was no direct substantiation for their claims.⁸

As these examples bear out, marketers regularly seek to "push the envelope" in the effort to make the company and its products succeed. "Risk/reward" is part of every successful company's lexicon. Yet organizations that depend heavily on promotion and advertising can benefit greatly from recognizing that, in certain circumstances:

a) litigation is inevitable and

b) the litigation "microscope" may turn apparently acceptable risk into unhealthy risk and economic harm.

When is Lanham Act litigation inevitable? As mentioned earlier in this article, when the economic stakes are very high, and the claim in dispute will cause significant competitive harm with lost revenue to another party, expect litigation. Boards and management committees are highly motivated to invest in litigation when the vice president of marketing, presenting the data, shows serious market share loss at the hands of a prime competitor, purportedly resulting from a "dubious" new competitive claim. Unlike many other decisions on whether to litigate or not, when the alternative to litigation is dramatic loss of millions in revenue to a rival making an apparently unsubstantiated claim, the choice is clear. Usually, injunctive relief is the only solution.

To be sure, the company making the competitive claim is motivated to do so by this prospect of significant market share gain – as well as by its belief in the claim

and the excellence of its product. The promoting company's goal must be to make its claims as airtight and unassailable as possible, so it survives any challenge – whether informal, at the Television Networks, at NAD/BBB⁹ or in federal court preliminary injunction proceedings.

For a harmed competitor to challenge an advertisement, there must be real weakness in the claim that can be successfully attacked. If there is no substance to the challenge, a company stands to lose even more money in complex, costly and unsuccessful litigation. However, if the substantiation for the given claim is questionable, or the claim goes too far, the harmed competitor can challenge the advertisement through the various avenues available, including, ultimately, injunctive relief under the Lanham Act.

How does the "litigation microscope" apply to advertising review? Given that litigation is inevitable in those situations when the economic stakes are so high, the litigation "microscope" must be affirmatively employed by the company considering the new claim, during the internal review process. Lanham Act false advertising litigation involves furious digging and scrutiny by the challenging party into alleged claim substantiation, in a truncated but extremely intense time period before the preliminary injunction hearing. Technical experts are brought in by plaintiff to attack the validity of scientific and other technical claims. Extensive and artfully designed consumer "take away" surveys are conducted by survey experts engaged by one and sometimes both parties, which dissect the promotional claim through intricate questionnaires to establish how consumers interpret the message. While an exact "prequel" or replication of this typical Lanham Act litigation firestorm is not a true option, a company and corporate counsel considering a new claim in an "inevitable litigation" context should seek to impose similar exacting scrutiny in the internal advertising review process. Only if every possible weak point is questioned to the fullest extent, and survives as true and defensible, should the claim be cleared. This may mean use of third party, objective technical experts to verify the science, and of consumer focus groups designed to mimic possible expert litigation survey questions related to consumer "take-away." It may also require engagement of outside counsel to protect as privileged information such efforts undertaken in anticipation of litigation.

In addition, using analytical tools developed by the courts to define falsity in Lanham Act cases, and being mindful of burden of proof requirements in such cases, would

enhance the internal review process. Courts will examine whether a claim is *literally false* (false on its face or explicitly false) or *impliedly false* (literally true but likely to mislead or confuse),¹⁰ or even in some jurisdictions, *false by necessary implication* (where the challenged advertisement is susceptible to no more than one interpretation).¹¹ *Establishment claims*, those that rely either implicitly or explicitly on scientific studies, will trigger a burden on plaintiff to show the studies are not sufficiently reliable to permit one to conclude with reasonable certainty that they establish the proposition for which they were cited.¹² Other claims not false on their face, or not allegedly based on such scientific studies, must be proven false by plaintiffs using extrinsic evidence, such as through consumer "take away" surveys (the results of which will not be credited by the court if leading questions are used or other bias is exhibited in the survey methodology).¹³

Anticipating "inevitable" litigation by awareness of the competitive dynamics, engaging in rigorous self-imposed *discovery* and then applying standards and analytical guidelines developed by the federal courts for false advertising cases, all at the internal *advertising review* stage, is simply prudent practice. With a rigorous self-review that effectively mirrors the microscopic scrutiny accompanying a federal court challenge, Lanham Act litigation can be either avoided by a manufacturer or a challenge can be confidently defeated.

¹ Such cases are typically brought in federal court under Section 43(a) of the Lanham Act. 15 U.S.C. § 1125(a) (1994). See cases cited *infra* for application and analysis.

² Schick Manufacturing, Inc. v. Gillette Co., ___ F. Supp. 2d ___, 2005 WL 134764 (D. Conn.).

³ SmithKline Beecham Consumer Healthcare, L.P. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co., 2001 WL 588846 (S.D.N.Y.), *aff'd*, 19 Fed. Appx. 17, 2001 WL 1168026 (2nd Cir.).

⁴ Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp., 348 F. Supp. 2d 165 (S.D.N.Y. 2004).

⁵ CIBA Vision, 348 F. Supp. 2d at 182-184.

⁶ McNeil-PPC, Inc. v. Pfizer, Inc., 351 F. Supp. 2d 226 (S.D.N.Y. 2005).

⁷ Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co., 290 F.3d 578 (3d Cir. 2002) (affirming the lower court opinion found at 129 F. Supp. 2d 351 (D.N.J. 2000)).

⁸ Pharmacia Corp. v. GlaxoSmithKline Consumer Healthcare, L.P., 292 F. Supp. 2d 594 (D.N.J. 2003).

⁹ The National Advertising Division of the Council of Better Business Bureaus, a private dispute resolution forum to which many companies subscribe.

¹⁰ See e.g., McNeil-PPC Inc., 351 F. Supp. 2d at 248-49, 250-56.

¹¹ See e.g.; Pharmacia Corp., 292 F. Supp. 2d 598 606-608; c.f., CIBA Vision, 348 F. Supp. 2d at 182-83. (court discusses standard but mentions that Second Circuit has not yet adopted the doctrine of Falsity by Necessary Implication).

¹² See e.g., CIBA Vision, 348 F. Supp. 2d at 178-80, 184.

¹³ See e.g., McNeil-PPC, Inc., 351 F. Supp. 2d at 249, 252-53.