IS YOUR COMPETITOR MAKING FALSE COMPARATIVE ADVERTISING CLAIMS?

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By: Leonard K. Samuels and Jeffrey S. Wertman

Each year, false advertising lawsuits cost companies millions of dollars in damages and cause significant damage to their reputation and goodwill. Just recently, on November 9, 2016, a former customer of Krispy Kreme doughnuts filed a $5 million false advertising class action lawsuit in federal court in California alleging that Krispy Kreme doughnuts falsely marketed and sold certain products representing that they were filled with actual fruit, when the products allegedly contained no raspberries, blueberries or maple. (*Jason Saidian v. Krispy Kreme Doughnuts Inc.*, Case No. 2:16-cv-08338, in the U.S. District Court for the Central District of California).

Just as consumers sue companies for false advertising, so do competitors. A frequently used marketing strategy to increase sales and gain market share is for a competitor to use advertising to compare its product with similar competitive products. This is comparative advertising. The Federal Trade Commission defines comparative advertising as "advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other distinctive information." Comparative ads often appear in product labels, commercials, point of sale displays, websites, social media, and direct mail.

Comparative advertising includes, (1) "superiority" claims, which assert, explicitly or implicitly, that the product advertised is better than all others in the marketplace, or better than the product sold by a competitor), and (2) "parity" claims, which compare the product to others in the marketplace and assert that their product is as good as the competitor's. Comparative advertising is legal if is truthful and not false or deceptive.

If your competitor is making false or deceptive comparative advertising claims affecting your business, there are a variety of available legal claims and remedies.

Federal Law. The Lanham Act is the exclusive federal law that governs litigation between competitors over comparative advertising. This federal law gives private individuals and companies a claim against competitors for false and misleading advertising. Under Section 43(a) of the Lanham Act, a plaintiff must prove: (1) a false or misleading statement of fact about a product or service; (2) such statement either deceived, or had the capacity to deceive a substantial segment of potential consumers; (3) the deception is material because it is likely to influence the consumer's purchasing decision; (4) the product is in interstate commerce; and (5) the plaintiff has been or is likely to be injured because of the statement.

Certain advertising claims are not actionable under the Lanham Act. "Puffery" or "puffing" is not a claim because it is a statement of pure opinion. Puffing is exaggerated advertising, blustering and boasting upon which no reasonable buyer would rely. Examples of puffery include:

"Better Ingredients. Better Pizza" – Papa John's
"POWERADE" is "The Complete Sports Drink"
"Discover the better taste of Progresso"
"The King of Beers" – Budweiser
"America's Favorite Pasta"

The Lanham Act provides for broad injunctive and monetary relief. Courts can issue injunctions to prohibit defendants from further false advertising. Monetary relief is also available, including recovery of the lost profits resulting from the defendant's false advertising, disgorgement of the profits gained by the defendant because of its false advertising, monies for corrective advertising, and attorneys' fees in "exceptional cases."

State Law. A plaintiff can also bring false or misleading comparison claims against a competitor under state statutes for false advertising and deceptive business practices. Section 817.41, Florida Statutes, prohibits misleading advertisement claims. The Florida Deceptive and Unfair Trade Practices Act, Section 501.201, *et seq.*, Florida Statutes prohibits unfair methods of competition and unconscionable trade practices, which includes false and misleading advertising.

National Advertising Division of the Better Business Bureau ("NAD"). The NAD provides a voluntary administrative process in which experienced attorneys review challenged advertising claims and the substantiation for the claims. The remedies available in a NAD proceeding, however, are limited and NAD decisions cannot be enforced by the courts. Therefore, for most claimants, litigation is the preferred option.

Competitors use different advertising, including comparative advertising, to promote their products and services. Comparative advertising can be a useful tool to promote a company's goods, highlight the superior quality of a company's goods over those of its competitors, and provide beneficial information to consumers. However, comparative advertising often leads to disputes. Companies should carefully scrutinize claims they make in their advertising and be prepared to defend and substantiate their claims. Ask yourself, "What evidence, tests or data do I have to support the truth of the statements in my advertising?"

If you face having to defend your advertising claims or you wish to challenge the advertising claims of a competitor, it is essential to conduct an early analysis of the alleged claims and understand the legal framework in which advertising claims are decided. The fate of your company may depend on it.

For more information on this topic, please contact Lenny Samuels or Jeff Wertman on the firm's Dispute Resolution Team.

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Leonard K. Samuels

Jeffrey S. Wertman