



False Advertising

Trademark & Unfair Competition
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False advertising, in general

- Legal prohibitions on false advertising and footings for causes of action for false advertising exist in a wide array of federal statutes, state statutes, and common-law sources.
- The Federal Trade Commission (FTC) has the authority to bring actions against entities for false advertising, and they frequently do. Analogous state agencies and practice groups within state attorneys general's offices can and do bring actions against false advertisers.

Advertising & Law: The importance of understanding the regulatory space

- If you provide a general sort of legal-counsel role to a business, it's worth learning about specific regulatory rules and guidance that apply to your client.
- For instance, the FTC has issued broadly applicable "guidelines" regarding advertising that aren't technically "rules," but are best obeyed to stay out of trouble. Particular industries may be constrained in advertising by rules or guidance from sector-specific agencies – e.g., FDA, USDA, CFPB, and so forth. FCC has regulations pertaining to broadcast advertisements.
- Such rules and guidance are broadly meant to shield consumers from misleading communications regarding products and services, but they can be very specific in their requirements. Merely avoiding false statements won't assure compliance.

An action for false advertising under Lanham Act §43(a)

- As you know, Lanham Act §43(a) (15 U.S.C. §1125) provides a statutory basis for plaintiffs to have a federal cause of action for infringement of unregistered trademarks.
- The same section also provides a basis for a federal private right of action for false advertising.

Lanham Act §43(a); 15 U.S.C. §1125.

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) 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.

False advertising elements

Generalized list of elements for a prima facie case of false advertising (applicable to claims using various statutory bases, including §43(a)):

- (1) defendant made a false or misleading statement of fact about a product or service
- (2) the statement deceived or had the capacity to deceive a substantial segment of potential consumers;
- (3) the deception is material, i.e., likely to affect purchasing decisions;
- (4) the misrepresented product or service affects interstate commerce;
- (5) the plaintiff has been, or is likely to be, injured by the false statement.

(This is a synthesis of *Clock Spring, L.P. v. Wrapmaster, Inc.*, 560 F.3d 1317, 1329 n.10 (Fed. Cir. 2009) and *J-B Weld Company, LLC v. Gorilla Glue Company*, 978 F.3d 778, 796 (11th Cir. 2020).)

False advertising elements

Generalized list of elements for a prima facie case of false advertising (applicable to claims using various statutory bases, including §43(a)):

- (1) defendant made a false or misleading statement about a product or service
- (2) the statement is likely to affect purchasing decisions of a substantial segment of consumers
- (3) the deception is material, i.e., likely to affect purchasing decisions;
- (4) the misrepresented product or service affects interstate commerce;
- (5) the plaintiff has been, or is likely to be, injured by the false statement.

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Presumably, of course, an effect on interstate commerce would be unnecessary for a state law cause of action for false advertising

False advertising elements, simplified

Generalized list of elements for a prima facie case of false advertising (applicable to claims using various statutory bases, including §43(a)):

- (1) false or misleading statement of fact
- (2) capacity to deceive a substantial segment of consumers
- (3) materiality
- (4) effect on interstate commerce
- (5) plaintiff's injury

(Synthesis and simplification of *Clock Spring v. Wrapmaster* (Fed. Cir. 2009) and *J-B Weld v. Gorilla Glue* (11th Cir. 2020).)

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(1) false or misleading statement of fact

- The statement must be of fact, not opinion.
- A factual statement is capable of being proved true or false.
- The false statement could concern negative things about the plaintiff's product or positive things about the defendant's product.
- Future-looking statements, if made with knowledge that the event will not happen, are considered statements of fact.
- Courts use the term "puffery" for statements that aren't actionable fact.

(1) false or misleading statement of fact

If the court says it's "puffery," the court is saying it's not actionable fact.

How do you know what's puffery?

"The distinguishing characteristics of puffery are vague, highly subjective claims as opposed to specific, detailed factual assertions."

Hammer v. Vital Pharmaceuticals, Inc., (D.N.J. 2012)

(1) false or misleading statement of fact

Examples

- Apricot Computer's advertisement that its computers are "better in every way" than Hexetron's computers would be non-actionable opinion.
- Apricot saying that Hexetron computers emit a chemical, tetroxinide, which causes cancer, would be a statement of fact.
 - (BTW: A scientific journal article that said Hexetron computers emit tetroxinde and that this causes cancer wouldn't be actionable as false advertising because it's not commercial speech.)
- Hexetron's statement that it will release Call of Halo 17 for its X-Station 9000 consoles – when, in fact, Hexetron has no plans to do this – would qualify as a false statement of fact.

(1) false or misleading statement of fact

Realothenicals

- Manufacturer's claims that its TVs produce "breathtaking" and "vivid" colors.
- "You're in good hands with Allstate"
- Energy drink has "half the caffeine of regular coffee" but "twice the buzz of a regular energy drink"
- Baby food packaging claiming snacks were made with "fruity juice and other all natural ingredients," and were "specifically designed to help toddlers grow up strong and healthy"

(1) false or misleading statement of fact

Realothenicals

- Manufacturer's claims that its TVs produce "breathtaking" and "vivid" colors.
 - **OK.** Held puffery. *Hughes v. Panasonic* (D.N.J. 2010)
- "You're in good hands with Allstate"
 - **OK.** "nothing more than puffery" *Rodio v. Smith* (N.J. 1991)
- Energy drink has "half the caffeine of regular coffee" but "twice the buzz of a regular energy drink"
 - **Potentially actionable.** Statements survived a motion to dismiss. *Hansen Beverage v. Innovation Ventures* (S.D. Cal. 2009)
- Baby food packaging claiming snacks were made with "fruity juice and other all natural ingredients," and were "specifically designed to help toddlers grow up strong and healthy"
 - **Potentially actionable.** Statements were specific enough to survive a motion to dismiss. *Williams v. Gerber Products* (9th Cir. 2008)

(2) capacity to deceive a substantial segment of consumers

- What constitutes a substantial segment of consumers can be analogous to what percentage of survey respondents indicates likelihood of confusion in trademark infringement cases.
- In various cases, courts held surveys indicated a substantial segment of consumers were deceived when surveys indicated a misleading message was received by these percentages: 15%; 20%; 21% to 34%; “over 25%”; 33%; 50%
- In one case, 7.5% of survey respondents being deceived or misled was held *not* sufficient to indicate a “substantial portion of the intended audience”

(3) materiality

- The false representation has to be *material* to the consumer’s purchasing decision.
- *Materiality* sounds like a big word and a fancy concept in law.
- But it’s actually simple!
- It just means that something “matters.” You can just substitute the words in your mind. For instance:
“The falsity is material.” *means* “The falsity actually matters.”
- The word “material” and “matter” both come from Latin *materia*, which means “matter.”

(3) materiality

- Three issues for materiality of a false statement:
 - Is the thing misrepresented actually important to the consumer's motivation and purchasing decision?
 - Is the consumer likely to rely on, or has a consumer actually relied on, the false statement?
 - Is the difference between the false statement and the literal truth something that would matter to the consumer?

(3) materiality

Hypo

Volumes of documentation provided with a sales proposal for a multi-million-dollar commercial solar panel installation at an automobile plant included a brochure with a quote from an executive named Bob said that one week the solar panels at his mall were the subject of 18 compliments by mall patrons. But actually it was 17 compliments.

Material?

(3) materiality

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Material? No. This would likely fail to be material in multiple ways:

- The reactions of mall patrons aren't important to the auto manufacturer in buying solar panels.
- The difference between 18 and 17 compliments isn't enough to matter to anyone.
- The auto plant isn't going to base this huge decision on anything in a random brochure. It'll be about crunching hard numbers.

(4) effect on interstate commerce

- This is a requirement for Lanham Act §43(a). But it may not be a requirement under state law causes of action.
- Regardless, this is generally very easy to satisfy and rarely an issue.
- Courts have, for instance, held that a defendant's purely local, intrastate activities affect interstate commerce sufficiently for §43(a).

(5) plaintiff's injury

- The injury requirement is bound up with standing to sue.
- A rival firm has standing to sue a defendant (and a compensable injury) where the defendant's false advertising traceably caused the plaintiff firm to suffer lost sales or some reputational harm.
- Under Lanham Act §43(a), a consumer's injury is not sufficient!
Ripped-off consumers can't use a §43(a) claim to vindicate their interests.
 - For aggrieved consumers, maybe a state cause of action will work. Maybe a fraud claim will work. Or maybe they can encourage a government agency to take action. But they can't bring a §43(a) lawsuit.

(5) plaintiff's injury

- For one firm to sue another for 43(a) false advertising, the injury/standing requirement is quite strict, and it includes notions of both actual causation (a/k/a cause-in-fact, factual causation) and proximate causation linking the injury to the defendant's false statement.
- It's worth an extended quote from the U.S. Supreme Court to get an understanding of it ...

(5) plaintiff's injury

“We thus hold that a plaintiff suing under § 1125(a) ordinarily must show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff. That showing is generally not made when the deception produces injuries to a fellow commercial actor that in turn affect the plaintiff. For example, while a competitor who is forced out of business by a defendant's false advertising generally will be able to sue for its losses, the same is not true of the competitor's landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor's ‘inability to meet [its] financial obligations.’”

Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 133–34 (2014)