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CORPORATE COUNSEL

9 Key Questions About Lanham Act False Advertising Suits

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In today's competitive business environment, nothing stings quite so much as a competitor's false advertising campaign. Unless addressed promptly, false advertising claims can inflict short- and long-term damage, suppressing market share and injuring your product's sales, reputation, and standing.

But an aggrieved company can fight back with the Lanham Act.

False advertising suits brought in federal court under Section 43(a) of the Lanham Act are a potent weapon to combat a competitor's false and misleading promotional statements. A plaintiff who prevails on a Lanham Act claim can obtain prompt relief that has real and immediate commercial impact, most notably by putting a stop to a competitor's offending ads. These suits are an effective means not only to protect a company's business interests, but also to compete for and maintain market share. Corporate counsel should arm themselves with basic knowledge about false advertising suits under the Lanham Act.

1. Who can sue and be sued for false advertising under the Lanham Act?

Generally, companies that are in commercial competition with one another may sue or be sued, no matter the industry or field. Individual consumers, on the other hand, generally lack standing under the Lanham Act and must look elsewhere—primarily to state consumer protection statutes—to challenge advertisements alleged to be false or misleading.

2. What counts as "advertising"?

False advertising suits under the Lanham Act are not limited to traditional print or TV ads. Almost anything designed to influence consumers' purchasing decisions may count, so long as the promotional material is sufficiently disseminated to the relevant public. Examples of actionable advertising and promotional material include radio commercials, coupons, labels, and Internet advertising. Oral communications may be actionable if they are sufficiently disseminated and not merely individual or isolated comments. Courts have also held that false statements made by sales representatives are actionable.

3. Must the advertising be made directly to ultimate consumers?

Not necessarily. Lanham Act claims may be predicated on ads directed at those in a position to influence the purchasing decisions of ultimate consumers. Two examples of ads that are not directed to consumers but are actionable are prescription drug advertising directed at physicians and ads directed at retailers of consumer products.

4. Must the advertising make a comparison to my company's product or service?

No. A Lanham Act claim may challenge false statements made about the advertiser's own product or service, or made about your company's product or service, whether or not those statements are comparative.

5. What if my competitor's advertising is literally true but is nevertheless misleading?

Truthful advertising can give rise to a Lanham Act claim if found to convey a misleading message, despite the literally truthful language of the ad.

Generally speaking, Lanham Act plaintiffs can assert "literal" or "implied" claims. A literally false claim is one that is false on its face: "Product X relieves pain more effectively than Product Y," where Product Y is in fact more effective or just as effective as Product X.

If a Lanham Act plaintiff persuades the court that the challenged advertisement is literally false, the court may grant relief without considering extrinsic evidence of consumer reaction to the ad. But a plaintiff may also argue that even though a competitor's advertisement is literally true, the ad nevertheless conveys an implied false message. In that instance, the plaintiff must come forward with extrinsic evidence, usually in the form of a consumer survey, showing that a substantial portion of the audience takes away a false or misleading message from the ad.

So, for example, when a competitor runs an ad claiming, "There is no pain reliever more effective than Product X," which on its face is not a superiority claim, but the imagery in the commercial is thought to convey a message that Product X is more effective than Product Y, the makers of Product Y may sue and prevail if they show that consumers take away from the ad the message that Product X is more effective than Product Y, and Product X is not more effective than Product Y.

6. What is a Lanham Act plaintiff's burden of proof?

A Lanham Act plaintiff normally has the burden of proving that the challenged advertising claim is false or misleading and not merely unsubstantiated by testing or other proof. For example, if an ad claims that "Product X is a more effective pain reliever than Product Y," a suit challenging that advertising brought by

the makers of Product Y may be successful only if it has proof that Product X is not more effective than Product Y.

Only when an advertisement makes what is called an "establishment" claim—a claim stating or implying that the advertiser has tests proving that its product will perform a certain way—may the plaintiff prevail merely by showing that the advertiser has no such supporting tests, that the cited tests do not in fact support the claim, or that the supposed test proof is somehow flawed and unreliable. Thus, the makers of Product Y can prove false an ad claiming that "Tests prove Product X provides more effective pain relief than Product Y," by showing that the tests relied upon by the makers of Product X are not valid or reliable, or that the tests do not provide proof of the claim made in the ad.

7. Are there any types of advertising claims that cannot form the basis of a Lanham Act claim?

Only untrue or misleading statements are actionable. Truthful but negative statements and opinions are not actionable. Also not actionable is what is called "puffery," meaning statements that either are not capable of being proven true or false—for example, "the best car on the road"—or which are so wildly exaggerated that no would believe them.

8. What remedies can I obtain under the Lanham Act?

Most significantly, a court can issue a prompt and even an immediate injunction barring the challenged advertising claim. Lanham Act suits are typically accompanied by a request for a preliminary injunction seeking to stop the offending ads pending a full trial; in extreme situations, a plaintiff can also request a temporary restraining order to halt the advertising immediately. Courts typically authorize expedited discovery within a tight time frame and then a prompt hearing, followed by a ruling on the motion. Depending on the circumstances, a Lanham Act plaintiff may obtain preliminary injunctive relief within a matter of weeks after commencing suit.

Beyond that, a plaintiff who prevails after a trial on the merits can obtain a permanent injunction, forever preventing the competitor from disseminating the same false claims. At either the preliminary stage or after trial, the court can also order corrective advertising or even a product recall if the offending claims are found on the product's packaging and labeling. A plaintiff prevailing at trial can likewise recover damages, which may be trebled in exceptional cases, and attorneys' fees in appropriate cases.

9. Is there an alternative forum in which to bring a false advertising suit?

Yes. A competitor can commence a voluntary, non-binding proceeding before the National Advertising Division of the Council of Better Business Bureaus (NAD).

There are several crucial differences between a federal Lanham Act action and an NAD proceeding, both in terms of substance and procedure. Most importantly, the remedies available in an NAD proceeding are limited. Because NAD decisions cannot be enforced by the courts, the losing party can choose to ignore the NAD's decision. The NAD then will refer the matter to the Federal Trade Commission, but the FTC may not pursue the matter further. By contrast, a plaintiff prevailing in a Lanham Act suit can obtain the powerful remedies described above, including the all-important injunction.

At the same time, certain aspects of NAD proceedings favor the complaining party. A plaintiff in a Lanham Act case must advance affirmative proof that the challenged ad is false. Before NAD, however, it is the advertiser who must in the first instance offer reasonable substantiation for its advertising. Also, in implied falsity cases under the Lanham Act, the plaintiff must offer a consumer survey showing that the ad misled a material number of consumers; courts are not permitted to make that determination based on their own reactions to the ad. Although surveys are used in NAD proceedings, they are not required. Rather, NAD itself can determine what interpretations of the ad are reasonable and then require the advertiser to support each such interpretation.

There are other differences. NAD proceedings are informal and avoid some of the costs and burdens associated with litigating a civil action in federal court. For example, NAD does not permit discovery. That can reduce expenses but can also hinder a challenger's case if information in the advertiser's possession might support the challenger's position. In addition, while the Lanham Act addresses a wide variety of advertising and promotion, including national and local advertising, and less traditional formats such as product labels and oral communications, NAD will decline to adjudicate the dispute if it concludes that a challenged ad is not national or not what is typically thought of as "advertising." Finally, NAD proceedings take between four to six months from challenge letter to resolution; there is no provision for interim relief.

Particularly in light of the voluntary nature of NAD proceedings and the limited remedies available, a Lanham Act suit is your fastest and most effective remedy when a competitor's false advertising campaign poses a serious threat to your company's business. Corporate counsel would be remiss not to consider such a suit in an appropriate case. Be prepared.

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