

Tactics of Defense of False Advertising Claims

A Practical Guide on Approaching Various Disputes in False Advertising

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Let's Set the Stage

- Claims of false advertising must be taken seriously.
 - Successful legal action against a company from a TRO, PI, or permanent injunction can mean:
 - Losing market share
 - Having product in retail packaging (that contain false claims) recalled
 - Losing shelf space in big box retailers
 - High dollar damages
 - Loss of reputation
- So, for our clients – are claims of false advertising legal problems and legal issues, or are they business problems and business issues?
- This is a critically important mindset.
- The company needs a solution, and a strategy to get there.
- What's the end game?

The Beginning

- The Players: Who Do You Have to Worry About?
- The First Step: Preparation and Substantiation
- The Cease and Desist: Make It a Double-Edged Sword
- The Investigation: Post-Action Regroup
- The Competitor Lawsuit
- The Resolution and Creative Solutions

The Players

- **The Federal Trade Commission (FTC)**
 - Section 5 of the FTC Act (15 U.S.C. § 45) prohibits deceptive advertising; the FTC is authorized to take action against misleading advertising, utilizing civil investigative demands, cease and desist orders, injunctive relief, and civil penalties.
- **The Attorney General**
 - State “mini-FTC Acts” or Unfair and Deceptive Trade Practices Acts (UDAPs) make deceptive advertising illegal under state law; Attorneys General are authorized to enforce these statutes.
- **The Competitor**
 - Section 43(a) of the Lanham Act (15 U.S.C. § 1125); competitors can bring lawsuits in federal court.
 - May have a private rights of action under UDAPs.
 - Competitors also can challenge advertising through the National Advertising Division (NAD), which is a self-regulatory forum for competitors to bring disputes; NAD also can sua sponte initiate a challenge.

The FTC: Section 5 of the FTC Act

(a) DECLARATION OF UNLAWFULNESS; POWER TO PROHIBIT UNFAIR PRACTICES; INAPPLICABILITY TO FOREIGN TRADE

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

The FTC: Civil Investigative Demands

- Perhaps the most daunting start to an FTC false advertising dispute is an investigation or action from the FTC.
 - Often initiated with a request for information known as a civil investigative demand (CID)

(c) ISSUANCE OF DEMAND; CONTENTS; SERVICE; VERIFIED RETURN; SWORN CERTIFICATE; ANSWERS; TAKING OF ORAL TESTIMONY

(1) Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 45(a)(1) of this title), or to antitrust violations, the Commission may, before the institution of any proceedings under this subchapter, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to submit such tangible things, to file written reports or answers to questions, to give oral testimony concerning documentary material or other information, or to furnish any combination of such material, answers, or testimony.

The FTC: Civil Investigative Demands (cont.)

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The FTC: Enforcement Actions

- **Administrative Adjudications** – A quasi-judicial, trial-like proceeding that is held before an administrative law judge. Can result in a cease-and-desist order, but no monetary relief
 - If party violates that order, the FTC can sue in federal district court and obtain an injunction and civil penalties. 15 U.S.C. § 45(c).
 - Alternatively, after obtaining an administrative order, the FTC can pursue monetary relief from the party in question but must demonstrate that “a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent. 15 U.S.C. § 57b.
- **Direct Litigation for Rule (and Some Statutory) Violations** – Section 19 of the FTC Act (15 U.S.C. § 57) authorizes the FTC to go directly to federal court to obtain redress for violations of rules (and some statutes).
- **Referrals to Department of Justice** – The FTC can refer the case to the Department of Justice to commence a lawsuit for civil penalties.
- **Penalty Offense Authority** – Section 5(m)(1)(b) (15 U.S.C. § 45(m)) of the FTC Act authorizes the FTC to seek civil penalties against a defendant where the defendant has engaged in conduct it actually knew to be unfair or deceptive because the FTC identified it as unfair or deceptive in a prior, unrelated proceeding.
- **Section 13(b) for Preliminary and/or Permanent Injunctions** – Limited to preliminary and permanent injunctive relief after the Supreme Court’s decision in *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

The Attorney General: Unfair and Deceptive Practices Acts

- AGs investigate and bring actions under their states' respective unfair, deceptive, and abusive practices laws (UDAP laws).
- UDAP laws tend to broadly prohibit “deceptive” or “unconscionable” acts against consumers. For example:
 - Florida Deceptive and Unfair Trade Practices Act (FDUTPA)
 - Broadly declares in §501.204(1) that “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce” are unlawful
- Much like the FTC, AGs can begin actions by issuing civil subpoena for information about suspected violations.

The Competitor: Section 43(a) of the Lanham Act

The most common avenue for a competitor action is under Section 43(a) of the Lanham Act.

(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.

The Competitor: Section 43(a) of the Lanham Act

- Under Section 43(a) of the Lanham Act, the plaintiff must show:
 1. Defendant made false or misleading statements as to his own products (or another's);
 2. Actual deception, or at least a tendency to deceive a substantial portion of the intended audience;
 3. Deception is material in that it is likely to influence purchasing decisions;
 4. The advertised goods travel in interstate commerce; and
 5. A likelihood of injury to plaintiff. However, the plaintiff does not have to prove actual injury.

The Competitor: Section 43(a) of the Lanham Act

- In order to bring a claim under Section 43(a), the competitor does not necessarily have to be in direct competition with your business.
 - Since the Court's decision in *Lexmark Intl., Inc. v. Static Control Components Inc.*, courts apply a two-part test for standing under the Section 43(a):
 1. Plaintiff's interest fall within the "zone of interests" protected by the law invoked; and
 2. Plaintiff's "injuries are proximately caused by violations of the statute."

The Competitor: Industry Self-Regulation

The National Advertising Review Council (NARC), a non-profit industry group, provides the best-known self-regulatory process.

- Council of Better Business Bureaus – publishes the Code of Advertising
- National Advertising Division (NAD) – hears competitor and NAD-initiated challenges to advertising
 - Decisions appealed to the National Advertising Review Board (NARB)
 - Noncompliance with NARB decisions are referred to the FTC for investigation



**National Advertising
Division (NAD)[®]**
Of **BBB National Programs, Inc.**

The First Step: Preparation and Substantiation

- Like good medical care, the first step to any potential false advertising claims is prevention.
 - Engage competent advertising counsel often and early to review your advertising claims.
 - All advertising claims must be:
 - Truthful and not misleading (or puffery)
 - Substantiated
 - Claims interpreted from the perspective of a reasonable consumer looking at the ad as a whole
 - What message does the ad convey (express and/or implied)?
 - Message can be conveyed by words, graphics, pictures, brand names, and/or logos
 - Net impression

Claims Come in Many Shapes and Sizes

- Determination of what claims are being made is critical first step in analyzing an ad.
- Claims can be explicit or implied:
 - Express claims – directly makes a representation
 - Implied claims – requires examination of both the representation and the overall context of the ad, including juxtaposition of phrases, images, and nature of the claim (i.e., overall net impression). Is that net impression false?
- Types of claims may include:
 - Performance claims
 - Superiority claims; direct comparative and parity claims (Brand A beats Brand B)
 - Establishment claims (“tests prove”; “studies show”)
 - “Up To” claims
 - Product attribute claims (“natural”; “made in the USA”)
- The key defense to all of these potential claims is substantiation.

Substantiation: Have It in the Bag

- The best defense against potential claims of false advertising is substantiation.
- The best time to get substantiation is before the alleged false advertising claims are made.
- Scientific Substantiation – often through industry standard testing
 - Express claims
 - Necessary implication claims
 - Tests prove claims (must have a test and the test must be relevant)
 - Direct comparative claims
 - Superiority claims
- Expert consumer perception studies
 - Implied claims
 - Net impression defense

Puffery: Prevention and Defense

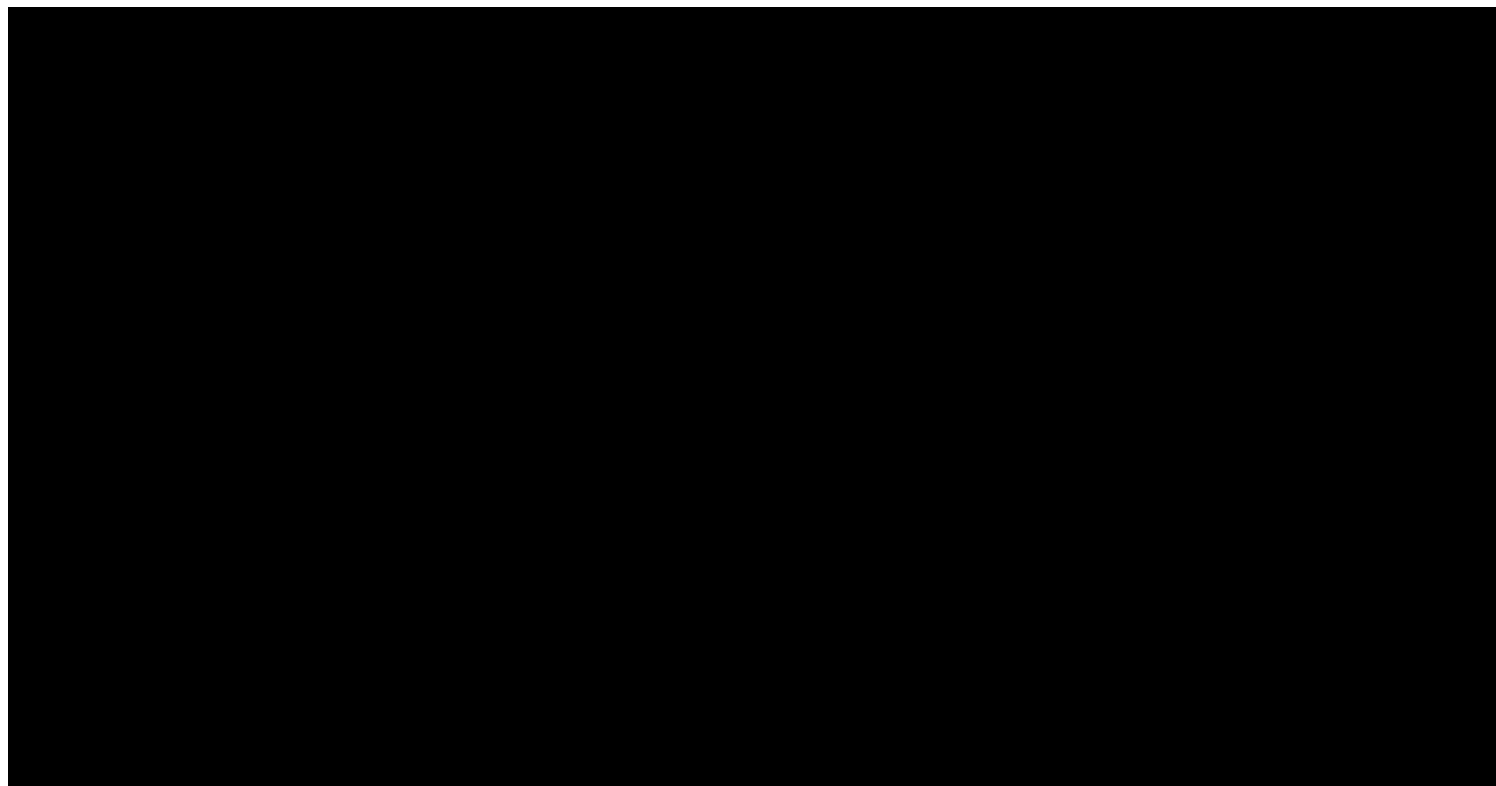
- Statements in advertising that do not convey facts or measurable claims, but mere opinion
- Why puff?
 - Gain attention for brand
 - Use humor/provide entertainment value for consumers
 - Say something positive about your product/service, without making a claim of literal truth
- If statement is puffery:
 - Not actionable in a false advertising lawsuit
 - Does not require substantiation (e.g., NAD challenge)

Puffery Definitions

- Third Circuit
 - Marketing “that is not deceptive, for no one would rely on its exaggerated claims.”
- Fifth Circuit
 - “[A] general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion.”
- Ninth Circuit
 - “[E]xaggerated advertising, blustering and boasting upon which no reasonable buyer would rely.”
- FTC
 - Marketing claims “that ordinary consumers do not take seriously.”

Exaggerated Claims as Puffery

Walking the line between humorous exaggeration and bold claims



The Cease and Desist Letter: Level the Playing Field

- Often a false advertising dispute does not start with a lawsuit, but a cease and desist letter.
 - Letter often comes from inside or outside counsel of competitor alleging violations of advertising law.
 - These letters are sometimes written as intimidation to regulate unwanted advertising of competitors.
 - Just like a lawsuit, there should be “counterclaims.”
 - More importantly, if you are inhouse, you should have a relationship with your counterparts at your competitors.
 - How does this work?

The Cease and Desist (cont.)

- One of the best potential tactics for defense when receiving a cease and desist letter is to send a counter cease and desist.
 - Often an initiator of a cease and desist to a competitor may also have potential violations of the law in its own advertising.
 - Do a close examination of the initiator's advertising to determine if there are issues that the party receiving the cease and desist letter could also raise.
 - Raise any such issues in response to the cease and desist letter, making clear the potential counterclaims that could arise if the competitor pursues action.
 - The purpose of this tactic is not to threaten your own lawsuit, but to provide leverage in any potential resolution.

The Regulatory Investigation: What Steps Should You Take?

- Instruct relevant staff to preserve all documents related to issues outlined in the CID or civil subpoena.
- Retain counsel to do initial research concerning advertising practices at issue and current state of the law concerning such practices.
 - Include research into recent settlements with the regulator to assess outside risk.
- Counsel should reach out to the regulator to discuss the purpose and scope of the investigation.

The Regulatory Investigation: What Steps Should You Take? (cont.)

- Work with counsel to interview relevant employees and identify relevant sources of information.
 - The faster counsel can understand the potential scope of information the demand covers, the more likely there can be fruitful discussion concerning potentially narrowing the demand.
- Consider whether to file a motion to quash or a motion for a protective order.
 - This is a question of confidentiality versus a potentially public fight.

The Regulatory Investigation: What Steps Should You Take? (cont.)

- Counsel should negotiate the scope of the demand.
 - Relevance
 - Search terms
 - Types of electronically stored information that should be searched
 - Hard copy v. emails v. messaging apps v. phone data
 - Custodian limitations
 - Timing of document production
 - Rolling versus deferred
 - Properly narrowing the scope of a demand could potentially stop the investigation from “fishing” and finding new issues to investigate.
 - Collect information from interviews and documents to gain an internal understanding of the issues before providing substantive information to the regulator.

The Regulatory Investigation: Your Narrative

- In every investigation, the regulator is searching for information to support a potential narrative of wrongdoing.
 - **FIND YOUR NARRATIVE FIRST!**
 - What is your or your company's story?
 - How was your company built and what was your mission to consumers?
 - Why did you get into the business?
 - What are the justifications for the actions surrounding the concerns of the investigating body?
 - What does the investigating entity misunderstand those actions?
 - How can you best explain it?

The Regulatory Investigation: Your Narrative (cont.)

- The answers to such questions should inform all responses in the investigation.
 - Interrogatory responses are one of the best places to provide explanations that fit your narrative.
 - Ensure that documents that must be produced support the narrative.
 - Identify sources of potential interviews or testimony to make sure those sources do not have contradictory information to your narrative.
 - A narrative must be truthful, but present all required information in the best light.
 - The above information will be the backbone of later advocacy for advantageous resolution.
- White papers are critical.
 - Identifies the failure of the regulator to make its case on the merits
 - Lays out the facts and law that would support a summary judgment victory
 - This not only may help put you in a position to get the investigation closed, but also may provide a pathway to resolution.

The Competitor Lawsuit: Counterclaims

- The best defense is a strong offense.
 - Strong counterclaims are a great way to raise the stakes on aggressive plaintiffs.
 - Cause the plaintiff to now have “skin in the game,” which can increase pressure for advantageous resolution
 - Forces the plaintiff to not only focus on attacking its claims against you, but also defending your claims against the plaintiff
 - Provides potential benefit to litigation if counterclaims are successful
 - May balance any ultimate award even if plaintiff is successful on the original claims

The Competitor Lawsuit: UDAP?

- One important nuance in many cases concerning competitor claims when brought under state UDAPs is whether there is actually a private right of action for competitors.
 - Often UDAP provisions arguably only provide rights of action for a consumer or AGs. For example:
 - Pennsylvania's Unfair Trade Practices and Consumer Protection Law (UTPCPL)
 - The UTPCPL authorizes a lawsuit by “[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal,” as a result of conduct that the statute prohibits. (73 P.S. section 201-9.2.)
 - Texas Deceptive Trade Practice Act
 - There are three elements to claim under Texas Deceptive Trade Practices Act (DTPA): (1) plaintiff is a consumer, (2) defendant engaged in false, misleading, or deceptive acts, and (3) these acts constituted producing cause of consumer’s damages. *Brush v. Wells Fargo Bank, N.A.*, S.D.Tex.2012, 911 F.Supp.2d 445.
 - Many states, such as New York and California, also have complicated precedent concerning when a competitor can bring a claim under consumer protection laws.
 - It is always a good issue to research and raise, as it may knock out state claims early.

Settlement

- Settlement negotiations at any stage often allow for creative solutions outside of dollars and cents.
 - Advertising disputes with competitors may be solved by agreeing to cease allegedly problematic advertising.
 - This can be a quick and clean solution if competitor claims are specific to a particular campaign or advertisement not vital to the business.
 - Competitors are sometimes more interested in advantageous business arrangements than in protracted litigation.

Settlement (cont.)

- Government entities are often more interested in regulating particular market activities than in issuing monetary penalties.
 - Agreeing to unprecedented compliance measures as an example to the market could be more attractive than higher monetary awards.
- Government entities are sometimes more interested in making statements concerning the actions of individual bad actors than in issuing onerous penalties and compliance against companies.

Questions?



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