legal

Competitor-Versus-Competitor False Advertising Litigation

BY GREG SATER

An interesting and hotly contested false advertising lawsuit is scheduled to go to trial soon in Los Angeles.

The lawsuit—which pits the Sugar Association and other representatives of the sugar industry (the "Sugar Plaintiffs") against McNeil Nutritionals ("McNeil"), the maker of the artificial sweetener Splenda, whose advertising slogan has been "Made from sugar, so it tastes like sugar"—is an excellent case study of competitor-versus-competitor false advertising litigation under the Lanham Act.

According to the Sugar Plaintiffs, "McNeil has engaged in false advertising by making false, deceptive or misleading representations about Splenda in order to attract customers away from their purchase and consumption of sugar. McNeil has falsely advertised that Splenda is 'Made from sugar, so it tastes like sugar'…deceiv[ing] consumers into believing that Splenda is natural, safe, contains sugar, and has the same taste as sugar without the calories."

Many people in our industry only think of the FTC when they think of false advertising litigation, but competitor-versus-competitor false advertising litigation also exists, and it is something to consider and to understand, as part of the federal Lanham Act.

The Sugar Plaintiffs say, "Splenda is not sugar, and does not contain sugar." They point out that it is made not from sugar, but from sucralose, a man-made sweetener "that cannot be found anywhere in nature." They further point out that even the sucralose in it comprises only about one percent of the product (because McNeil uses other ingredients, too).

They claim that McNeil's ad campaign was deliberately designed to convey the impression that Splenda was a natural product—much like sugar, and unlike all the other leading sugar substitutes that contain artificial ingredients such as aspartame or saccharin—because McNeil and its advisors knew that consumers would respond better to Splenda that way and therefore, would purchase more Splenda (and less sugar), thinking erroneously that Splenda was a natural product.

Based on court filings, it appears that, as part of their case, the Sugar Plaintiffs intend to present internal McNeil evidence allegedly showing that, during the planning and fine-tuning of the ad campaign for Splenda, McNeil and its marketing advisors were "very nearly obsessed with the subject of consumer confusion" and took proactive steps "to learn [whether] the product [was being] perceived as natural or chemical…based on [consumers'] interpretation of the product's sugar origins." They allege McNeil commissioned focus groups and, using different versions of its ads, tracked whether people exposed to those ads interpreted Splenda to be artificial or "not artificial," with McNeil favoring the ads that led people to conclude that Splenda was "not artificial."

SUGAR: IS THERE A SUBSTITUTE?

The Sugar Plaintiffs claim McNeil tried to deceive even more consumers when, at one point, it dropped a disclosure that some of its ads previously had used, which had said: "Not sugar."

In addition, it appears—based on court filings—the Sugar Plaintiffs also intend to introduce expert consumer surveys into evidence, surveys that they contend will confirm the deceptiveness of the Splenda ads in conveying to people that there is sugar in Splenda, when actually it is sucralose not sugar, and/or that Splenda's sweetener, like sugar, is natural and not man-made.

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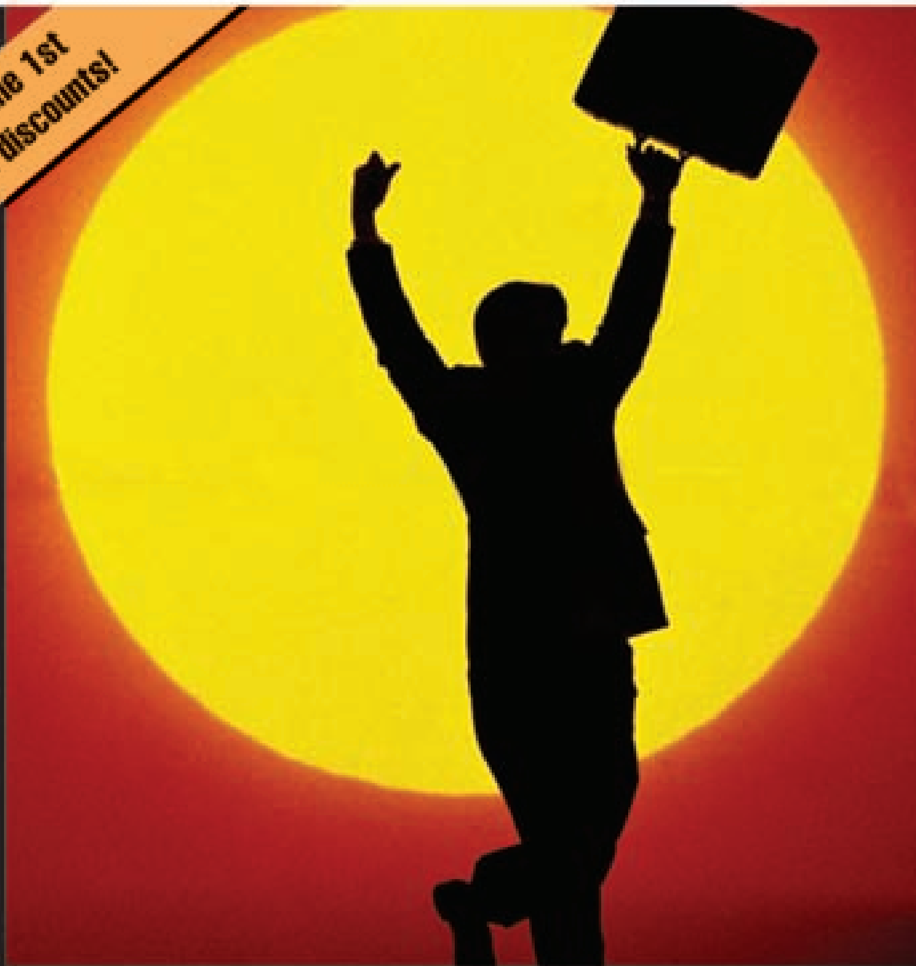

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Last, but not least, the Sugar Plaintiffs also claim that the "tastes like sugar" part of the Splenda ad also constitutes false advertising. They say Splenda is "600 times sweeter" and suffers from "a delayed onset of sweetness" and "a lingering aftertaste," so it is false of McNeil to advertise that it "tastes like sugar."

Claiming that Splenda's advertising campaign caused them harm in the form of declining sales of sugar, the Sugar Plaintiffs seek hundreds of millions of dollars in damages from McNeil, along with an injunction.

According to McNeil, it is perfectly true and accurate for its ads to state that Splenda is "made from sugar" because, in fact, Splenda's sweetening ingredient, sucralose, is "manufactured through a process that begins with sucrose—sugar—and replaces three of eight hydrogen-oxygen groups on the sugar molecule, with three chlorine atoms [resulting in a molecular structure which] closely resembles that of sugar."

Based on court filings, it also appears that McNeil intends to present consumer survey evidence indicating that, contrary to the survey results proffered by the Sugar Plaintiffs, "virtually no one exposed to Splenda advertising is led to believe that Splenda is natural sugar [or that it] contains real, natural sugar."

McNeil says its consumer surveys have found that very few consumers "take away a message that Splenda is 'natural'" and denies that it ever intended to pass Splenda off as "natural." (McNeil points out that it has contractually prohibited companies that use Splenda in their products from labeling them as "natural.") Rather, McNeil says, its surveys will show that people exposed to "Made from sugar, so it tastes like sugar" understand that Splenda is *not* sugar and does *not* contain sugar, but rather understand it to have "sugar-like properties" in the same way such consumers likely view other major sugar substitute products such as NutraSweet, which, McNeil says in its ads, has called itself "Today's Sugar," even though NutraSweet has aspartame, which is an artificial ingredient.

THE LANHAM ACT

Many people in our industry only think of the FTC when they think of false advertising litigation, but competitor-versus-competitor false advertising litigation also exists, and it is something to consider and to understand, as part of the federal Lanham Act. That statute, which is at 15 U.S.C. §1125(a)(1)(B), provides: 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, which…(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.

Basic elements of a Lanham Act false advertising claim are: "(1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products." *Southland Sod Farms v. Stover Seed Co.*

Literally false advertising statements are distinguished from literally true, but misleading advertising statements: There are two types of falsity under the Act: (1) claims that are literally false and (2) claims that are literally true but misleading. *Pizza Hut, Inc. v. Papa John's International, Inc.* ("'A plaintiff must demonstrate that the commercial advertisement…is either literally false, or that [if not, then] it is likely to mislead and confuse consumers.'" *Seven-Up Co. v. Coca-Cola Co.*

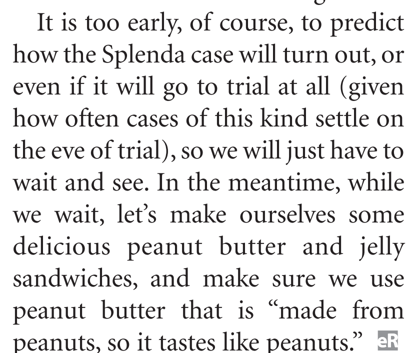
DIFFERENT BURDENS OF PROOF

It's important to understand that there are two types of burdens of proof.

Burden of proof, in context of a literally false advertisement. This is where a claim is literally false (as opposed to being true but deceptive), there is a *presumption* that it was deceptive and that it was relied upon by consumers.

Burden of proof, in the context of a literally true, but misleading advertisement. By comparison, "if the statements at issue are either ambiguous or true but misleading, the plaintiff must present evidence of actual [customer] deception." *Pizza Hut*, at 495. This means that plaintiffs who are attempting to prove deception based upon a literally *truthful* ad need to produce evidence of actual consumer *reaction* to the challenged ad.

It is too early, of course, to predict how the Splenda case will turn out, or even if it will go to trial at all (given how often cases of this kind settle on the eve of trial), so we will just have to wait and see. In the meantime, while we wait, let's make ourselves some delicious peanut butter and jelly sandwiches, and make sure we use peanut butter that is "made from peanuts, so it tastes like peanuts." eR



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