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**FALSE ADVERTISING CLAIMS**

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**A PRIMER ON THE LAW**

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David C. Bohrer  
dbohrer@morganlewis.com

Morgan, Lewis & Bockius LLP  
Two Palo Alto Square  
3000 El Camino Real, Suite 700  
Palo Alto, California 94306

Telephone: 650.843.7514  
Facsimile: 650.843.4001  
www.morganlewis.com

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*Topic 1:*      **Look To The Lanham Act.**

Your competitor engages in what you believe may be false advertising. Alternatively, you seek to reduce your own exposure to a false advertising challenge. In either case, your best reference point is a federal statute called the Lanham Act, which essentially prohibits commercial advertising that misrepresents the characteristics of the advertiser's or a competitor's goods and services. Both direct and indirect competitors of a party engaged in false advertising may bring a false advertising lawsuit under the Lanham Act. The remedies which they may seek to recover include injunctive relief (e.g., a court order prohibiting further use of the advertising), and in the appropriate cases, monetary awards for lost profits, defendant's ill-gotten gain, enhanced damages, costs of the action and attorney's fees.

*Topic 2:*      **The Advertisement Must Be False Or Misleading.**

To succeed under the Lanham Act, a plaintiff (i.e., the party bringing the claim) must demonstrate that an advertisement is either *literally false* or that the advertisement, *though literally true, is likely to mislead and confuse consumers*. These alternate theories of recovery are usually referred to as “false” statements and “misleading” statements. As discussed below, whether advertising falls within one or the other category has a significant effect on what the plaintiff must prove in order to succeed.

*Topic 3:*      **Threshold Considerations.**

Before the truth or falsity of an advertisement can be assessed, there are some key questions that need to be asked:

**a.      What Is the Message?**

The determination whether there is false advertising under the Lanham Act is based upon the overall message conveyed by the advertising. Several principles guide the interpretation of the message:

- Separate statements should be viewed in the *context* of the entire advertisement. Courts are required to view the “entire mosaic” of the advertisement rather than “each tile separately.”
- *Visual images* are part of the message. For example, the visual component of an ad for pasteurized orange juice depicted juice from freshly squeezed oranges being poured directly into the carton -- the message conveyed by the visual image was deemed false advertising under the Lanham Act. Similarly, a television ad falsely depicting one plastic food storage bag leaking water faster than the other is making a literally false representation.
- The message should be viewed from the perspective of the *target audience*. The target audience's sophistication, or lack thereof, affects whether the advertisement is false or misleading. For example, Avis ran print advertisements in airline in-flight magazines, whose audience was more likely to be car renters than buyers. Thus, the failure to use the

words “for rent” in the advertisement did not establish that the advertisement was false.

- The “**headline**” or featured statement in an advertisement will be most influential in the determination of the message. Most persons take their sole impression from the “headline” as opposed to any subsequent qualifying statements. Accordingly, disclosures or explanations incorporated in the body of an advertisement are often insufficient to change the advertisement's overall impression upon consumers.
- A related point is that when the overall impression of an advertisement is misleading, it will not be cured by a *disclaimer* that is smaller in size or not as prominently displayed as the deceptive material.

**b. Mere Sales Talk, Or “Puffing,” Is Not Actionable.**

Nonactionable sales rhetoric, or “puffing,” has been defined as an exaggeration or overstatement expressed in broad, vague and commendatory language. Courts are more inclined to characterize an advertisement as puffing if it has some or all of the following characteristics: the relevant purchasers could not reasonably be expected to rely on the claims made in the advertisement; the advertisement does not purport to compare a competitor's product to that of another, nor does it purport to disparage another competitor's product; a general claim of superiority that is so vague that it can be understood as nothing more than the mere expression of opinion; or the advertisement consists of subjective claims that cannot be proven true or false, i.e., claims that do not imply independent corroboration and do not suggest to consumers the existence of quantitative or other substantial support.

Some examples of nonactionable sales rhetoric or puffery:

- When viewed in isolation, statement by detergent manufacturer that “**whiter is not possible.**” *Clorox Co. v. Procter & Gamble Commercial Co.*, 228 F.3d 39 (1st Cir. 2000)
- Standing alone, pizza maker's slogan “**Better Ingredients. Better Pizza.**” *Pizza Hut, Inc. v. Papa John's Int'l Inc.*, 227 F.3d 489, 498-499 (5th Cir. 2000) *cert. denied*, 121 S. Ct. 1335 (2001).
- “**Anything Closer Could Be Too Close For Comfort.**” *Gillette Co. v. Norelco Consumer Prods. Co.*, 946 F.Supp. 115, 131 (D. Mass. 1996).
- Insect repellent is “**100 times better**” than competitor's product. *Avon Products, Inc. v. S.C. Johnson & Son, Inc.*, 32 U.S.P.Q.2d 1001, 1994 WL 267836, \*7 (S.D.N.Y. 1994).
- Statements that defendants' exercise devices were “**the best exercising machines of their type.**” *Marcyan v. Nissen Corp.*, 578 F. Supp. 485, 507 (N.D. Ind. 1982), *aff'd sub nom. Marcyan v. Marcy Gymnasium Equip. Co.*, 725 F.2d 687 (7th Cir. 1983).

- Statement that party's "**TECH- TEX fabric is breathable... sweat vapors pass through quickly.**" *W.L. Gore & Associates, Inc. v. Totes, Inc.*, 788 F. Supp. 800, 808 (D. Del. 1992) (“[B]reathability' is a relative term, a word meaning different things to different people, and this Court notes the absence of a commonly accepted definition of quality or a minimum industry standard.”)

**c. There Must Be Commercial Advertising Or Promotion.**

The advertising statements must be disseminated sufficiently to the relevant purchasing public to constitute “advertising” or promotion within the industry. Thus, advertisements or promotions that are limited to distribution within the company, as opposed to third parties outside the company, are not actionable commercial advertising. Likewise, dissemination to a single customer is generally not sufficient. In addition, statements in package inserts or manuals -- materials generally not available until after a purchasing decision is made -- are not commercial advertising within the meaning of the Lanham Act.

*Topic 4:*      **Proving That A Statement Is False.**

There are significant differences between the way in which courts analyze false (i.e., “literally false” or “false on their face”) statements and statements deemed to be misleading. Accordingly, false statements are discussed separately in this section and misleading statements are discussed separately in the next section.

**a. “Establishment” vs. “Non-establishment” Claims.**

Proof of literal falsity varies depending upon which of two categories the challenged advertising falls. Where the advertisement explicitly or implicitly represents that tests or studies prove its product superior (often referred to as an “establishment” or “tests prove” claim) the plaintiff satisfies its burden of proving actionable false advertising by *demonstrating that the tests did not establish the proposition for which they were cited*. In comparison, where the advertisement claims superiority, but without purporting to be based on any form of testing (often referred to as a “non-establishment” or “general efficacy” claim), plaintiff satisfies its burden by *proving that the advertising is false*. Plaintiff's burden of proof is therefore more demanding with respect to non-establishment claims (plaintiff must prove the claim is false) than it is for establishment claims (plaintiff must prove the supporting tests are inadequate).

**b. How To Identify Establishment Claims.**

The presence of statements such as “tests prove,” “studies show,” “clinically proven,” “laboratory tested” or other similar statements is usually a strong indication that a claim is an establishment claim. Moreover, as discussed above, courts are required to analyze the message conveyed in full context. A practical consequence of this approach is that advertising which, standing alone, would qualify as a non-establishment claim, is deemed an establishment claim and analyzed accordingly. For example, an advertisement for turfgrass seed and sod included bar charts comparing growth rates for different grasses as well as such general claims as “less is more,” “less mowing,” and “reduced costs” -- the proximity and apparent connection of the general claims to the bar chart qualified the general claims for analysis under the Lanham Act as establishment claims.

Some other examples of establishment claims:

- **“[Defendant's electric razor] is clinically proven to shave with less irritation than wet shavers.”** *Gillette Co.*, 946 F. Supp. at 119.
- **“Testing proves Combat SuperBait Kills up to 98% [of roaches]. The other guys, no more than 60%.”** *S.C. Johnson & Son, Inc.*, 930 F. Supp. at 780.
- **“Old World antifreeze meets auto manufacturer's specifications.”** (“Specifications,” a term of art within the industry, referred to compliance with a specific battery of ASTM tests.) *BASF Corp.*, 41 F.3d at 1084.
- **“Tests prove Quaker State's IOW-30 motor oil provides better protection against engine wear at start-up.”** *Castrol, Inc.*, 977 F.2d at 59.
- **“[I]n doctor supervised clinical studies ... Excedrin was shown to provide greater headache relief than E.S. Tylenol... It works better”** *McNeil-P.C.C., Inc. v. Bristol-Myers Squibb Co.*, 938 F.2d 1544, 154 (2d Cir. 1991).

For purposes of comparison, some examples of advertisements deemed to be non-establishment claims:

- **“Skin-So-Soft' bath oil is an effective insect repellent.”** *Avon Products, Inc.*, 984 F. Supp. at 796-797 (the court rejected the plaintiffs argument that this claim implied both that the product met EPA standards for efficacy and that defendant had test data supporting the claim, stating, “the law does not impute government approval or supporting test data in the absence of explicit claims -- accordingly, plaintiff could prove the claim was false within the meaning of the Lanham Act only by producing evidence that affirmatively shows the claim to be false.”)
- A rainsuit with a label stating that TECH-TEX fabric is the **“best waterproof suit available” and the “best way to keep dry.”** See *W.L. Gore & Assoc., Inc. v. Totes, Inc.*, 788 F. Supp. 800, 807 (D. Del. 1992).
- Title of taxi driver guide -- **“Official New York Taxi Driver's Guide.”** See *Nester's Map & Guide Corp. v. Hagstrom Map Co.*, 760 F. Supp 36, 37 (E.D.N.Y. 1991) (use of word “official” falsely indicates that some person or entity in authority has sanctioned the publication).

### c. **Challenging An Establishment Claim (Attack The Testing).**

As stated above, in order to prove that an establishment claim is literally false, a plaintiff must prove that the underlying tests did not establish the proposition for which they were cited. A plaintiff may satisfy this requirement in either of two ways.

### **1.) Are The Tests Valid?**

First, the plaintiff may challenge the validity of the tests. This inquiry encompasses a number of issues, including:

- state of the testing art (for example, compliance with previously established company test procedures or industry standards underscores the validity of the test)
- the existence and feasibility of superior test procedures (for example, if there are not enough participants in the test panel to achieve a statistically significant result, the test may be deemed invalid)
- the objectivity and skills of the persons conducting the tests (for example, some courts believe that using employees in a study that compares the employer's product to the product of a competitor is inherently biased and therefore unreliable)
- the accuracy of the reports, measurements and findings (for example, using a write-test machine to make “before” and “after” marks insures standardized angle, pressure and speed and therefore provides a more reliable reflection of the intervening wear testing)
- whether the test results are supported or contradicted by other test results (for example, if previously performed tests establish the write-length of a particular marker, and tests are then performed for purposes of judging the wear characteristics of the markers, the wear testing is not reliable if it does not require that the markers be used for a period of time commensurate with their write-length testing)

### **2.) Do The Test Results Establish The Proposition Cited In The Advertisement?**

A second way a plaintiff can meet its burden of challenging the falsity of an establishment claim is to show that the defendant's tests, even if valid, do not establish the proposition asserted in the defendant's advertisement. For example, a motor oil manufacturer claimed less engine wear with the use of its product. The claim was based upon testing that established that there was faster delivery of the oil to the engine. There was no recognized connection in the scientific literature between faster oil delivery and less engine wear. The motor oil manufacturer's establishment claim was therefore deemed false advertising.

### **3.) Salvaging An Establishment Claim That Lacks Sufficient Support.**

An establishment claim which lacks sufficient substantiation, when made, cannot be rehabilitated with after-the-fact clinical support. In other words, the defense that the establishment claim may ultimately be shown to be true will, in most cases, be unsuccessful so long as there was insufficient testing to support the claim at the time it was made.

Topic 5: **Proving That A Statement Is Misleading (Requires Proof That Consumers Were Deceived).**

“Misleading” statements are those which are literally true and grammatically correct, but which nevertheless have the tendency to mislead, confuse and deceive the consumer. Some examples of literally true, but allegedly misleading statements, are as follows:

- ***“[I]n shampoo tests with over nine hundred women like me, Body on Tap got higher ratings than Prell for body. Higher than Flex for conditioning. Higher than Sassoon for strong, healthy looking hair.”*** (Bristol-Myers Co. manufactured Body on Tap Shampoo. Its competitors alleged that Body on Tap's TV ad gave the wrong impression, namely, that the “nine hundred women” had done product to product comparisons. In fact, none of the women “tested” more than one of the shampoo products and not all of the women used the shampoo featured in the ad. The alleged misimpression was supported by consumer survey evidence, causing the court to hold that the advertisement was misleading under the Lanham Act.) *See Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 274 (2d Cir. 1981).
- ***“Anacin can reduce inflammation that comes with most pain. Tylenol cannot.”*** (The manufacturer of Tylenol objected on the grounds that the statement misled consumers to believe that Anacin was superior to Tylenol in all areas of pain relief, as distinguished from the more limited issue of inflammation. Based upon consumer surveys, the court agreed that the statement was misleading under the Lanham Act.) *See American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 164 (2d Cir. 1978).
- ***“NOW 2 mg. `tar' is lowest.”*** (The manufacturers of competing cigarettes objected on the grounds that the statement erroneously implied that no other cigarette, including 1 mg. or other `smaller' cigarettes, has only 2 mg. tar. The court held that the challenger failed to submit sufficient evidence that the statement was misleading.) *See American Brands, Inc. v. R.J Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1357 (S.D.N.Y. 1976).
- ***“Pediatric 44 begins to reduce cough as soon as it is swallowed.”*** (Manufacturer of competing cough medicine objected on the grounds that physicians were misled into believing that Pediatric 44's key ingredient was in fact an effective cough suppressant and that Pediatric 44 had been subjected to rigorous FDA testing. The court held that the plaintiff manufacturer failed to submit sufficient evidence that the statement was misleading.) *See Sandoz Pharmaceuticals v. Richardson-Vicks, Inc.*, 902 F.2d 222, 229 (3d Cir. 1992).
- ***“TUMS is aluminum free.”*** (Maker of MYLANTA objected on grounds that the statement links MYLANTA, which does contain aluminum, with alleged popular belief that aluminum is associated with Alzheimer's

disease. The court held that plaintiff failed to submit the evidence necessary to establish that the statement was misleading.) *See J&J\*Merck v. Smithkline Beacham*, 960 F.2d 294, 297-298 (2d Cir. 1992).

In order to prove that the advertisement is misleading, there must be evidence that a significant portion of the relevant consumers hold the false belief allegedly communicated by the advertisement. This evidence usually comes from consumer surveys, market research, direct consumer testimony or consumer comments received in the ordinary course of business reflecting the consumers' perception of the advertising at issue. *In comparison, where the advertisement is false on its face (literally false), proof of actual consumer deception is not required in order to show false advertising.*

## **Topic 6: Remedies For False Or Misleading Advertising.**

### **a. Injunctions.**

A significant Lanham Act remedy is injunctive relief, which is an order from the court prohibiting improper conduct (such as continued use of a false or misleading advertisement) or requiring the liable party to take some specific action in the future (such as running corrective advertising).

There are two related types of injunctive relief: *a preliminary injunction*, which is entered early in the case and is intended to protect against irreparable harm that might otherwise result if the if the defendant's alleged false advertising was allowed to continue up through a final decision on the merits; and *a permanent injunction*, which is entered at the conclusion of the case and governs the parties' conduct for all time following entry of final judgment.

Some basic guidelines regarding the ability to obtain injunctive relief are as follows:

- In cases involving *literally false* (as opposed to misleading) advertising that *directly compares* the plaintiff's and defendant's products, all that need be proved is that the claim is false (non-establishment claim) or that tests do not support the claim (establishment claim).
- In cases involving *literally false* advertising that does *not* make a *direct comparison* between competing products, the requirements are most likely the same, although in some cases the party seeking the injunction may also be required to show that the subject claim was likely to deceive the relevant purchasers, was material to the purchasing decision and caused injury to the plaintiff.
- In cases involving *misleading* (as opposed to literally false) advertising the party seeking the injunction, in addition to proving that the advertising was misleading, will also need to show that the advertising was likely to deceive the relevant purchasers, was material to the purchasing decision and caused injury to the plaintiff. Plus, plaintiff will

also need to show that the entry of the injunction is necessary to prevent irreparable harm (unlike above, where irreparable harm is presumed).

**b. Monetary Awards.**

**1.) Threshold Requirement - Proof of Actual Injury.**

Unlike most of the injunction remedies, recovery of money will require proof that the statements at issue have in fact caused injury, i.e., that the statements caused plaintiff to lose at least some sales or resulted in a quantifiable lessening of goodwill. This can be a difficult threshold burden to meet. (As discussed below, an exception to having to prove causation and injury is damage control costs.)

**2.) “Marketplace” Injuries.**

Assuming proof that the false advertising caused actual injury (see above), monetary damages are available to compensate plaintiff's lost sales or loss of goodwill.

**3.) Damage Control Costs.**

Damage control costs are the costs of responding to defendant's false advertising. Recovery is contingent upon proving the falsity of the advertising (literal or misleading) and that the false advertising had the tendency to deceive the relevant purchasers. Contrary to the general rule, recovery of damage control costs does not require proof either actual deception or actual injury resulting from the false advertising.

**4.) Equitable Remedy - “Disgorgement.”**

A plaintiff may recover defendant's profits where plaintiff's actual damages are nominal and defendant acted willfully or in bad faith.

**5.) Equitable Remedy - “Enhancement.”**

The court has broad discretion in determining what damages are appropriate for a false advertising violation and may adjust the damage award upward to as much as three times actual damages (and possibly higher) if it finds that actual damages are insufficient, there is evidence that the subject advertising was made notwithstanding knowledge that it was false, and so long as the enhanced damages are imposed for purposes of deterring future violations and not as a penalty.

**6.) Attorney's Fees.**

Attorney's fees may be recovered by the prevailing party in exceptional cases involving malicious, fraudulent, deliberate or willful false advertising.

## 7.) **Costs of the Action.**

Prevailing plaintiffs usually recover “costs,” which may include any cost item that an attorney would typically bill separately such as expenses incurred for expert witnesses, paralegals, case assistants, law clerks, secretarial overtime, travel expenses, court reporter, and long distance phone calls.

### *Topic 7:*      **Other Private Rights Of Action.**

The Lanham Act is by no means the only source of a private right of action for false advertising. Private rights of action predicated upon false advertising may also be brought under state laws prohibiting unfair competition and deceptive business practices. As a practical matter, however, the likelihood of success on the state law claims is ultimately dependent upon the resolution of the Lanham Act claim.

### *Topic 8:*      **Self-Regulation Through The National Advertising Division.**

Advertisers also are subject to *self-regulation* through the National Council of Better Business Bureaus (“BBB”) and its National Advertising Division (“NAD”) which deals with interstate advertising issues. BBB has published a detailed *Code of Advertising* which states general principles and specific rules regarding such regular advertising practices as price comparisons, use of terms like “free,” “factory direct,” “distress sale” and “easy credit,” warranty statements, superiority claims, testimonials and “puffery.”

NAD is responsible for receiving (usually) or initiating, evaluating, investigating, analyzing and deciding claims of false or misleading advertising. NAD thus performs a largely judicial function, albeit one that is voluntary and that moves much faster than most judicial proceedings. Although voluntary, the vast majority of advertisers participate in NAD proceedings and comply with NAD decisions because there is much industry pressure to do so, and because NAD has close working relationships with the Federal Trade Commission (“FTC”) and other law enforcement agencies which strongly encourage cooperation with NAD. NAD refers cases to such agencies that appear to involve (i) promotion of an unlawful product or service; or (ii) false, deceptive or misleading advertising where the advertiser will not participate in a NAD proceeding or comply with a NAD decision.

Most NAD proceedings start with a complaint made by a competitor, and the competitor usually functions like a plaintiff in a lawsuit. The investigative and decision-making process is very quick, generally taking less than 90 days from the filing of a complaint to NAD rendering a decision. NAD decisions are published. If a decision is adverse to an advertiser, the advertiser can comply with NAD's recommendations, appeal to the National Advertising Review Board (“NARB”) (also a prompt process), or refuse to comply, thus risking a law enforcement action or private litigation.

The following chart compares the relative benefits of filing a complaint with NAD as opposed to bringing a false advertising lawsuit under the Lanham Act.

<u>Positive Features of NAD</u>	Limitations of NAD
<ul style="list-style-type: none"><li>• Standing is much broader with actions brought under NAD. Consumers can bring actions and there is no requirement that complainants show that they would be “commercially injured” as required under Section 43(a) of the Lanham Act.</li><li>• More timely decision -- maximum of 90 days to reach a decision in NAD proceeding.</li><li>• Informal exchange of information and possibility of meeting as opposed to adversarial proceedings.</li><li>• Appeals are available to the NARB.</li><li>• Expertise—NAD professionals have expertise in advertising that judges typically do not have.</li></ul>	<ul style="list-style-type: none"><li>• No subpoena power or other mandatory discovery Procedures. Thus, NAD must rely on information voluntarily submitted by the parties.</li><li>• Except for NARB hearings (appeal) there is no hearing where both sides appear and present arguments.</li><li>• No monetary damages are permitted and sanctions are limited. The ultimate sanction is to refer the matter to the FTC or other law enforcement agency.</li></ul>

*Topic 9:*      **Government Regulation**

**a.      Federal Trade Commission.**

There is substantial regulation of advertising practice by the federal government. The main federal regulatory body is the Federal Trade Commission (“FTC”), which is charged with enforcing the Federal Trade Commission Act's prohibition of unfair or deceptive trade practices.

The FTC can investigate (with broad subpoena power) the actions of either a single company or an industry, issue cease and desist orders, and seek a variety of court-imposed civil and criminal sanctions including civil penalties, fines and imprisonment. The publicity resulting from an FTC investigation and/or cease and desist order can be devastating to any business.

There is no private right of action or recovery under the Federal Trade Commission Act (or through the FTC). A private party may file a complaint with the FTC, which may, in certain instances, choose to investigate and impose the order and penalties described above. Not only does the FTC pursue only a small percentage of the complaints that it receives, it also has a policy of not involving itself in private disputes between competitors.

**b. Other Federal Regulation.**

The FTC's jurisdiction over advertising matters is closely related to the jurisdiction of other federal agencies over labeling claims. As a result, it is important to carefully consider all relevant federal regulations when determining advertising and product claims. For example, claims regarding health, safety or environmental benefits may trigger *both* the regulatory jurisdiction of the agency responsible for regulating the product in question (for example the Food and Drug Administration, Consumer Product Safety Commission or Environmental Protection Agency), and the FTC's powers to the extent such claims may be inadequately substantiated or otherwise considered deceptive. Further, if a product has been imported into the U.S., additional advertising and labeling regulations may apply, such as the Made-in-USA and country-of-origin marking requirements enforced by both the FTC and U.S. Customs Service.

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*False Advertising Claims, A Primer On The Law*, is of a general nature and is subject to continued change as the law changes. As a result, readers should not act in reliance on the foregoing without also obtaining specific legal consultation relative to their specific situation.

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