Advertising Compliance Service™

CHICKEN "RAISED WITHOUT ANTIBIOTICS": THE LATEST LANHAM ACT DECEPTION CASE TO BRING DOWN A NATIONAL ADVERTISING CAMPAIGN

By

Randall K. Miller*

INTRODUCTION

In April 2008, a Baltimore federal court enjoined Tyson Foods' national advertising campaign asserting that its chicken was "raised without antibiotics." The U.S. Department of Agriculture (USDA) expressly approved Tyson's advertising slogan for the product label, but Tyson was nevertheless enjoined. The case (described below), is the latest in a series of recent federal court decisions demonstrating that the Lanham Act is serious business and deserves significant consideration by all advertisers, regardless of industry.

BACKGROUND

I. Deceptive Advertising Under The Lanham Act

The Lanham Act allows a company to bring a private lawsuit against any competitor that has engaged in deceptive advertising. Section 43(a) of the Lanham Act prohibits an advertiser from making any promotional statement that "misrepresents the nature, characteristics [or] qualities" of its own or competitor's products or services.

II. Increased Exposure Under the Lanham Act

Advertisers who defend claims in these cases face higher stakes in recent years, including money damages, follow-on consumer class action lawsuits, and public embarrassment. A critical mass of law has developed that now gives courts comfort to issue broad injunctions.

A. Money Damages Are Easier to Obtain and More Commonly Sought. Recent cases have made it easier for a successful plaintiff in a Lanham Act false advertising case to obtain money damages. Older cases imposed hurdles (*e.g.*, requiring a plaintiff to prove willfulness and/or actual diversion of sales caused by false advertising). Plaintiffs no longer face such hurdles–merely showing false advertising and introducing evidence of the defendant's sales are now enough to shift the burden to the defendant to explain why it should not disgorge its "ill gotten gains."[1]

B. Burden (and Embarrassment) of Tearing Down A National Advertising Campaign. Advertisers who run afoul of the Lanham Act risk significant embarrassment. Due to the integrated nature of multimedia advertising programs, injunctions can go beyond simply stopping the advertisements. For example, in the Listerine case, the court ordered Pfizer to halt its national television campaign, and to go into stores across the country and remove point-of-sale materials, a costly and embarrassing endeavor.

---

*Randall K. Miller is a Partner at the law firm of Arnold & Porter LLP. His practice focuses on complex business litigation, and he has litigated Lanham Act false advertising cases for both defendants and plaintiffs. Mr. Miller served as lead counsel for plaintiffs in *Sanderson Farms, Inc. v. Tyson Foods, Inc.* (D. Md. 2008) and in the parallel USDA proceeding, described in this article.

Volume XXVIII
Issue 14
July 21, 2008
Page 17

Subscription and Editorial Inquiries:
JLCom Publishing Co., L.L.C., 26 Hawthorn Drive, Roxbury, NJ 07876-2112. **Phone** (Toll free): (888) 235-2997. **Internet**: http://www.lawpublish.com. **E-mail**: advertise@lawyer.com.
This publication is not intended to provide legal advice. Persons who need legal services should contact a duly licensed professional.

Advertising Compliance Service™

Likewise, in *Schick Mfg., Inc. v. Gillette Co.*,[2] the defendant was ordered to go into stores nationwide and "remove or cover by sticker" all misleading packaging on its products and "remove all displays, including in-store displays" that carried the false and misleading claims. In the "Mylanta Night Time Strength" case, the plaintiff successfully argued that the product name was false and misleading,[3] so the injunction effectively stopped all sales of the product. DirecTV said that its slogan "for picture quality that beats cable" was puffing; the court disagreed and enjoined it.[4]

C. Consumer Class Action Lawyers Are Watching. The loser in Lanham Act false advertising cases now faces the prospect of follow-on consumer class action cases.[5] Although the Lanham Act is not a "consumer protection act" (and consumers lack standing to sue under the Lanham Act), a successful Lanham Act false advertising case provides a roadmap for consumer class action lawyers. In recent years, a number of companies who have lost Lanham Act false advertising cases were hit with follow-on consumer class action lawsuits.

III. Tyson Case: Tyson Foods' "Raised Without Antibiotics"

The recent case involving Tyson's chicken advertising illustrates the high stakes nature of Lanham Act false advertising cases. At issue was Tyson's national advertising campaign that its chicken was "raised without antibiotics." Two of Tyson's competitors, Perdue Farms and Sanderson Farms, brought a lawsuit in a Baltimore federal court. Plaintiffs alleged that Tyson's claims were false because Tyson fed its chickens "ionophores," a feed additive considered by scientific and regulatory bodies to be a type of antibiotic. Therefore, Plaintiffs argued, Tyson's chicken was raised with–not without–antibiotics. Plaintiffs sought injunctive relief and disgorgement of Tyson's profits.

A. Immunity Defense Fails. Tyson defended the case by arguing that its advertising was "immune" from the Lanham Act because the USDA approved Tyson's slogan for the product label. The parties litigated the immunity issue and, in a 21-page opinion, the court sided with Plaintiffs, holding that because USDA lacked authority over advertising its labeling decisions could not immunize Tyson from Lanham Act liability.[6]

B. Plaintiffs' Successful Case Bolstered By Robust Survey. At a four-day trial, Plaintiffs proved that "ionophores" were antibiotics (and that Tyson also administered a second type of antibiotic via egg injections at the hatchery). Plaintiffs further demonstrated that the "raised without antibiotics" slogan allowed Tyson to "price up" its chicken products, penetrate into new retail markets, and capture market share. Significantly, Plaintiffs introduced a consumer survey conducted by American University Professor Michael B. Mazis. Professor Mazis surveyed 600 consumers in malls across the country and testified that consumers understood Tyson's slogan to imply a health and safety superiority claim. In other words, the slogan implied that Tyson's chicken was safer than chicken that did not have the "RWA" claim. Tyson

Subscription and Editorial Inquiries:
JLCom Publishing Co., L.L.C., 26 Hawthorn Drive, Roxbury, NJ 07876-2112. **Phone** (Toll free): (888) 235-2997. **Internet**: http://www.lawpublish.com. **E-mail**: advertise@lawyer.com.
This publication is not intended to provide legal advice. Persons who need legal services should contact a duly licensed professional.

did not offer rebuttal survey data but instead rested on a "critique" of Professor Mazis' survey. Tyson's strategy failed.

C. The Court Issues a Broad Injunction and Tyson's Emergency Motion to Appellate Court Fails. Based on Plaintiffs' evidence, the court issued a 31-page opinion and a sweeping injunction that required Tyson to take down all advertising, including television, radio, billboards, and–significantly–point-of-sale materials in thousands of stores around the country, all within 15 days.[7] Tyson filed an "emergency" motion with the Fourth Circuit arguing that the injunction would be catastrophic to Tyson's business and reputation, and that compliance with the injunction alone could cost more than $100 million. After an expedited briefing, the Fourth Circuit rejected Tyson's motion.[8]

D. Injunction Compels Parallel Regulatory Action. After scoring the litigation victory, Plaintiffs filed a formal petition at the USDA asking the agency to reverse its original ruling regarding the Tyson label. On the strength of the Baltimore court's opinion, USDA granted Plaintiffs' petition and revoked Tyson's label as false and misleading.[9]

E. Class Actions. Tyson is now defending a series of consumer class action lawsuits filed in the wake of the Lanham Act litigation, which are based on the same claims.

IV. Implications of Tyson Case

The Tyson case illustrates the high stakes in the nature of Lanham Act false advertising cases. A major national advertising campaign was brought to a halt. The company faced significant litigation costs and risks including from the subsequent consumer class action cases. Plaintiffs sought monetary damages and attorney fees (also authorized under the Lanham Act), which created substantial monetary exposure for Tyson.

Among the lessons to be learned from the Tyson case are the following:

A. Regulatory Approval Not A Defense. Advertisers should not assume that regulatory proceedings immunize or otherwise protect them from false advertising litigation. Tyson specifically received USDA label approval for the very advertising slogan found to be false and misleading under the Lanham Act.

This defense is not new. Companies defending Lanham Act cases argue primary jurisdiction, agency immunity, and related claims, but these arguments are rarely dispositive. Regulators have a whole host of considerations such as prosecutorial discretion and cannot always divert scarce public resources toward enforcement proceedings. The fact that a regulator does not expressly disapprove an advertising claim does not mean the regulator has endorsed that claim. While regulatory approval may be a silver bullet defense in lawsuits arising under state law, such as consumer class action litigation, it cannot defeat a Lanham Act case. Because the

Subscription and Editorial Inquiries:
JLCom Publishing Co., L.L.C., 26 Hawthorn Drive, Roxbury, NJ 07876-2112. **Phone** (Toll free): (888) 235-2997. **Internet**: http://www.lawpublish.com. **E-mail**: advertise@lawyer.com.

Lanham Act is a federal statute, considerations of federalism and the primacy of federal law over state law do not apply. Only Congress could "carve-out" an exception for regulatory approval. And it has not.

B. Take Surveys Seriously and Respond With Counter Surveys. Another lesson learned from the Tyson case is to take surveys seriously and respond with survey data, not with a critique. Any survey can be criticized, and it is relatively easy and inexpensive to offer an expert who merely critiques the plaintiff's survey. However, as tempting as this strategy may be, the long-term implications–as illustrated by the *Tyson* case–can be devastating. While a critique alone may be appropriate for a deeply flawed survey, presenting a counter survey is simply more effective. Without this evidence, courts are left with the plaintiff's survey–admissible scientific evidence of how consumers interpret the advertisement–and they have no conflicting data from which to draw a contrary conclusion.

LAWYER's REFERENCE SERVICE

Footnotes

1. For example, in the case involving Splenda, the makers of Equal sued the makers of Splenda over the slogan, "Tastes Like Sugar Because It's Made From Sugar," seeking $176 million in money damages. The case settled during jury deliberations. *Merisant Co. v. McNeil Nutritionals, LLC,* 515 F. Supp. 2d 509 (E.D. Pa. 2007).

2. 372 F. Supp. 2d 273 (D. Conn. 2005).

3. *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578 (3rd Cir. 2002).

4. *Time Warner Cable, Inc. v. DirecTV, Inc.*, 497 F.3d 144 (2d Cir. 2007).

5. For example, in a case involving Listerine, Pfizer lost a Lanham Act case and then faced a deluge of consumer class action lawsuits. *McNeil-PPC, Inc. v. Pfizer Inc.*, 351 F. Supp. 2d 226 (S.D.N.Y. 2005).

6. *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 549 F. Supp. 2d 708 (D. Md. 2008).

7. *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 547 F. Supp. 2d 491 (D. Md. 2008).

8. *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 4th Cir. No. 08-1461.

9. *See* Statement by Under Secretary for Food Safety Regarding the Tyson Foods, Inc. Raised Without Antibiotics Label Claim Withdrawal (June 3, 2008), available at http://www.fsis.usda.gov/News_&_Events/NR_060308_01/index.asp.

# # #

Volume XXVIII
Issue 14
July 21, 2008
Page 20

Subscription and Editorial Inquiries:
JLCom Publishing Co., L.L.C., 26 Hawthorn Drive, Roxbury, NJ 07876-2112. **Phone** (Toll free): (888) 235-2997. **Internet**: http://www.lawpublish.com. **E-mail**: advertise@lawyer.com.
This publication is not intended to provide legal advice. Persons who need legal services should contact a duly licensed professional.