Not Just for "Consumers": Lanham Act Liability for Promotional Statements to Distributors and Other Business Customers

Randall K. Miller

Competitor false advertising remedies under the Lanham Act apply equally to "business-to-business" communications and traditional "consumer" advertising. A common misconception is that Lanham Act false advertising cases are limited to "classic" advertising campaigns that have widespread distribution to the general public. Reinforcing the misconception, many of the better known Lanham Act false advertising cases feature consumer products, such as mouthwash,[1] chicken,[2] sweeteners,[3] infant formula,[4] and diaper pails.[5] Yet there is a different, but equally important species of Lanham Act cases about promotional statements that the consuming public never sees: promotions to businesses.

Business-to-business (B2B) promotional statements arise in a variety of contexts, such as when a company sells raw material to a downstream manufacturer or when a company negotiates product placement on the shelves of national retailers like Wal-Mart or Target. Such statements are often made verbally or in PowerPoint slides and emails rather than through the use of billboards and television commercials. Although statements in business settings are not made to the general public, they are covered by the Lanham Act's prohibition against misleading promotional statements of fact.

Cases in the B2B setting have been sporadic and isolated, and commentators and jurists have not previously recognized or discussed these cases as a unique genre of Lanham Act cases. As illustrated by a pair of New York cases from 2011, one involving rodenticides (*Reckitt Benckiser, Inc. v. Motomco Ltd.*)[6] and the other involving ingredients for nutritional supplements (*Merck Eprova AG v. Gnosis S.P.A.*),[7] the number of B2B Lanham Act cases appears to be rising, and courts are increasingly willing to treat allegedly misleading statements in B2B letters, emails, and slides as actionable under the Lanham Act's false advertising provision.

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Randall K. Miller *is a partner at Arnold & Porter, LLP in McLean, Virginia. He served as lead counsel to Reckitt Benckiser Inc. in* Reckitt Benckiser Inc. v. Motomco Ltd. *discussed in this article.*

[1] McNeil-PPC, Inc. v. Pfizer, Inc., 351 F. Supp. 2d 226 (S.D.N.Y. 2005).

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

[3] Merisant Co. v. McNeil Nutritionals, LLC, 515 F. Supp. 2d 509 (E.D. Pa. 2007).

[4] PBM Prods., LLC v. Mead Johnson & Co., 639 F.3d 111 (4th Cir. 2011).

[5] Munchkin, Inc. v. Playtex Prods. LLC, Civil Action No. 11-cv-0503, 2011 WL 2174383 (C.D. Cal. Apr. 11, 2011).

[6] 760 F. Supp. 2d 446 (S.D.N.Y. 2011).

[7] No. 07 Civ. 5898, 2011 WL 1142929 (S.D.N.Y. Mar. 17, 2011). Other recent B2B cases include Suntree Tech., Inc. v. Ecosense Int'l, Inc., No. 6:09-cv-1945-Orl-28GJK, 2011 WL 2893623 (M.D. Fla. July 20, 2011); Boykin Anchor Co., Inc. v. AT&T Corp., No. 5:10-CV-591-FL, 2011 WL 1930629 (E.D.N.C. May 19, 2011); VG Innovations, Inc. v. Minsurg Corp., No. 8:10-cv-1726-T-33MAP, 2011 WL 1466181 (M.D. Fla. Apr. 18, 2011); VIP Prods., LLC v. Kong Co. LLC, No. CV10-0998-PHX-DGC, 2011 WL 98992 (D. Ariz. Jan. 12, 2011); Premier Comp Solutions, LLC v. Workwell Physical Med., Inc., No. 10cv1117, 2010 WL 4342247 (W.D. Pa. Oct. 27, 2010); Champion Labs., Inc. v. Parker-Hannifin Corp., 616 F. Supp. 2d 684 (E.D. Mich. 2009).

The Lanham Act Protects Competitors, Not Consumers

The Lanham Act authorizes companies to sue competitors whenever they have suffered competitive injuries caused by false or misleading promotional statements. A threshold requirement for a Lanham Act case is that the challenged statement qualify as "commercial advertising or promotion."[8] The statement at issue must comport with the generally accepted "Gordon & Breach" four-factor test for "commercial advertising or promotion," under which the statement must qualify as:

(1) commercial speech;

(2) by a defendant who is in commercial competition with plaintiff;

(3) for the purpose of influencing consumers to buy defendant's goods or services; and

(4) disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.[9]

Lanham Act litigants can battle over allegedly deceptive promotional statements regardless of the audience to which the promotional statements are directed.

Remedies for Lanham Act violations include injunctions, which can issue quickly (within days or weeks following suit), money damages for the competitive harm caused, and recovery of attorneys fees.[10]

Section 43(a) of the Lanham Act extends broadly to *any* "false or misleading description of fact, or false and misleading representation of fact" that "misrepresents the nature, characteristics, qualities, or geographic origin of [the advertiser's] or another person's goods, services, or commercial activities."[11] By these terms, the Lanham Act reaches false representations of fact as long as they are promotional in nature, that is, intended to induce a sale. This applies equally in the B2B setting.

The Lanham Act is not limited to "consumer" advertising. The courts have observed that the Lanham Act is not a "consumer protection act"; instead, the Act focuses solely on competition-related injuries. As one court noted:

> Congress' purpose in enacting Section 43(a) was to create a special and limited unfair competition remedy, virtually *without regard for the interests of consumers* generally and almost certainly *without any consideration of consumer rights* of action in particular. The Act's purpose . . . is exclusively to protect the interests of a purely commercial class against unscrupulous commercial conduct.[12]

Indeed, consumers are barred from filing Lanham Act cases.[13] "[T]he focus of the statute is on anti-competitive conduct in a commercial context," and "consumers" have "no competitive or commercial interests" to vindicate in a Lanham Act case.[14]

Lanham Act litigants can battle over allegedly deceptive promotional statements regardless of the audience to which the promotional statements are directed. There need not be a consumer protection element to the case, and the general public need not be involved at all in a Lanham Act false advertising case that is addressed to business promotions.

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[8] 15 U.S.C. § 1125(a)(1)(B).

[9] Gordon & Breach Sci. Publishers v. Am. Inst. of Physics, 859 F. Supp. 1521, 1535–36 (S.D.N.Y. 1994).

[10] *See* 11 U.S.C. § 1117(a).

[11] 15 U.S.C. § 1125(a)(1)(B).

[12] Crab House of Douglaston, Inc. v. Newsday, Inc., 418 F. Supp. 2d 193, 213 (E.D.N.Y. 2006) (quoting Colligan v. Activities Club of N.Y., Ltd., 442 F.2d 686, 692 (2d Cir. 1971)) (emphasis added).

[13] Made in the USA Found. v. Phillips Foods, Inc., 365 F.3d 278, 281 (4th Cir. 2004).

[14] Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 229 (3d Cir.1998).

B2B Lanham Act False Advertising Cases

The courts have found liability under the Lanham Act for statements made to various types of business purchasers, including downstream manufacturers and distributors, retailers, physicians and healthcare providers, and government purchasers.

Promotional statements made by makers of raw material to downstream manufacturers, including claims about the characteristics and performance of the raw ingredients, have been found to be actionable under the Lanham Act. For example, in *Merck Eprova AG v. Gnosis S.P.A.*,[15] the parties sold ingredients to manufacturers of nutritional supplements and the plaintiff alleged that the defendant misrepresented the "isomer" content of its raw ingredients. The court denied the cross motions for summary judgment on the Lanham Act claim.[16] Likewise, in *Seven-Up Co. v. Coca-Cola Co.*,[17] the parties sold soda syrup concentrate to bottling companies. The defendant gave a sales presentation to eleven bottlers urging them to switch their exclusive distributorships from Seven-Up to Sprite. The sales presentation contained allegedly misleading comparative sales statistics,[18] and the case went to the jury on the Lanham Act false advertising issue, although the defendant was able to prevail on the merits.[19]

Manufacturers often move products to the ultimate consumer through national retail chains. Interactions with these retailers typically involve not only the decision to carry an item but also complex negotiation over such issues as shelf space, store displays, pricing, discounts, profit margins, and payment to the retailer of "slotting fees" and other incentives. Competition is fierce and failure to persuade the retailer could result in exclusion from important retail outlets.[20] The courts have held that promotional statements made by companies in these negotiations are actionable under the Lanham Act. For example, in *Reckitt Benckiser, Inc. v. Motomco Ltd.*,[21] the parties made claims to large national retailers about competing rodenticide products sold under the d-CON and Tomcat brands. Among the claims at issue, the defendant made statements to retailers indicating that environmental restrictions adversely affecting the plaintiff's product had actually gone into effect when, in fact, the regulations were merely contemplated. The court found these statements actionable under the Lanham Act and issued injunctive relief.[22]

Statements to retailers also were found to be actionable in *Cashmere & Camel Hair Manufacturers Institute v. Saks Fifth Avenue*,[23] where garment manufacturers made presentations

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[15] No. 07 Clv. 5898, 2011 WL 1142929 (S.D.N.Y. Mar. 17, 2011).

[16] *Id.* at *4.

[17] 86 F.3d 1379 (5th Cir. 1996).

[18] *Id.* at 1386.

[19] *See* note 67, *infra*.

[20] The winner of the retail account sometimes will obtain significant additional benefits, such as obtaining category management contracts. For cases discussing the dynamics of negotiations with large national retailers, *see, e.g.*, Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002); Church & Dwight Co., Inc. v. Mayer Labs., Inc., No. C-10-4429 EMC, 2011 WL 1225912, at *3 (N.D. Cal. Apr. 1, 2011); El Aguila Food Prods. Inc. v. Gruma Corp., 301 F. Supp. 2d 612, 615 (S.D. Tex. 2003), *aff'd*, 131 Fed. App'x 450 (5th Cir. 2005).

[21] 760 F. Supp. 2d 446 (S.D.N.Y. 2011).

[22] *Id.* at 455. The court found that it was "literally false" for the defendant to state that the EPA "risk mitigation decision" at issue "is a law, regulation, or anything else having current legal force." Additionally, with regard to contemplated New York regulatory action, the court found that it was literally false for the defendant to make definitive statements suggesting that plaintiff's products were subject to "imminent" adverse regulatory action.

[23] 284 F.3d 302 (1st Cir. 2002).

to national department store chains like Saks Fifth Avenue, claiming that their garments contained "cashmere." In fact, the garments were actually made from "recycled" cashmere rather than "virgin" cashmere, the latter of which is superior in terms of softness and durability.[24] The court reversed summary judgment in favor of the defendant and held that plaintiff presented a triable issue that the unqualified "cashmere" label was false advertising.[25]

Promotional statements to retailers can have a significant market impact. One court noted that where competitors sell their products through nationwide retail chains, "making statements and sales presentations to representatives of only a few such chains could have a large impact in the industry."[26]

Several Lanham Act false advertising cases have focused on verbal statements made by pharmaceutical and medical device sales representatives when meeting with hospitals, physicians, or other healthcare providers.[27] For example, in *Zeneca Inc. v. Eli Lilly and Co.*,[28] Lilly was accused of engaging in off-label promotion of its osteoporosis product, Evista, for reduction of the risk of breast cancer. Sales representatives did not make the statements at issue to patients (the ultimate user of the product) but instead to prescribing physicians in "detail" sessions. The court found that "[s]ales representatives are an important source of information for physicians about prescription drugs, and physicians—who are the 'gatekeepers' for patients—often rely to some extent on the information they are given by sales representatives in determining what drugs to prescribe."[29] In many of these healthcare cases, the courts considered surveys of doctors who had been "detailed" by sales representatives and sales representative "call notes" to help determine the content of the verbal claims.[30]

Statements made to government contracting bodies, even in a single bid proposal to a single government agency, can be actionable under the Lanham Act.

Statements made to government contracting bodies, even in a single bid proposal to a single government agency, can be actionable under the Lanham Act. For example, *Tao v. Analytical Services and Materials, Inc.*[31] involved statements made in a bid proposal to NASA. The statements in question attributed Tao's work to the defendant and "misrepresent[ed] Tao as a venture or subsidiary of [the defendant]."[32] The defendant moved to dismiss, challenging whether these statements could constitute commercial advertising. The court denied the motion, holding that "[w]hile . . . the submission of a proposal in response to a NASA request is not advertising in the traditional sense of the term . . . it is reasonable to infer that in the aeronautical engineering industry, services are promoted through proposals to the relevant government agency."[33] In contrast,

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[24] *Id.* at 312.

[25] *Id.* at 315–20.

[26] Lampi Corp. v. Am. Power Prods., Inc., No. 93 C 1225, 1994 WL 501996, at *2 (N.D. Ill. 1994); *See also* Sanderson Farms, Inc. v. Tyson Foods, Inc., 547 F. Supp. 2d 491, 498 (D. Md. 2008) (discussing loss of three retail accounts based on a claim that chicken products were "raised without antibiotics").

[27] *See, e.g.*, Schering Corp. v. Pfizer Inc., 189 F.3d 218 (2d Cir. 1999) (statements to physicians about antihistamines Zyrtec and Claritin); VG Innovations, Inc., 2011 WL 1466181 (statements to distributors, surgeons, and hospitals regarding devices for treating joint disorders); Bracco Diagnostics, Inc. v. Amersham Health, Inc., 627 F. Supp. 2d 384 (D.N.J. 2009) (statements to physicians regarding x-ray equipment).

[28] No. 99 CIV 1452 (JGK), 1999 WL 509471 (S.D.N.Y. July 19, 1999).

[29] *Id.* at *8 (citation omitted).

[30] *Id.* at *33.

[31] 299 F. Supp. 2d 565 (E.D. Va. 2004).

[32] *Id.* at 569. In its bid proposal to NASA, the defendant allegedly "took credit for expertise and capabilities belonging to Tao." *Id.*

[33] *Id.* at 574.

in *Suntree Technologies, Inc. v. Ecosense International, Inc.*,[34] the court held that statements provided to government agencies in product brochures (and not in a bid) were made for "training" purposes, rather than to induce a commercial transaction, and therefore did not qualify as "commercial advertising or promotion."[35]

Unique Issues

Is It "Commercial Advertising or Promotion"? Because B2B promotion typically is communicated in an informal way and to a relatively small audience of business customers, one threshold defense is to assert that the communication is not "advertising" at all. To satisfy the "commercial advertising or promotion" test, plaintiffs must demonstrate that the statement at issue is not an isolated, informal, or personal communication, but rather is a promotional statement—made to induce a sale—and sufficiently disseminated to the target market. Plaintiffs also can bolster their case by demonstrating that the statement is part of a concerted, intentional, and organized campaign to induce a commercial transaction and to target the customers for which the plaintiff and defendant compete.[36]

There is no magic minimum level of dissemination. The courts have found that a "single letter" to a potential customer can constitute commercial advertising or promotion under the Lanham Act as long as the purpose of the statement at issue is to influence a commercial transaction. In *Mobius Management Systems, Inc. v. Fourth Dimension Software, Inc.*,[37] the court considered a letter written by a computer software manufacturer to a potential business customer that was intended to halt the impending purchase of a competitor's product. The business customer intended to customize and implement the software product onto its platform for processing of data for banks and other financial institutions. The defendant's letter made comparisons between the products and urged the potential purchaser not to consummate the transaction. The court concluded that "to label this behavior as anything but 'commercial advertising or promotion' would defeat the broader remedial purposes of the Lanham Act."[38]

"The level of circulation required to constitute advertising and promotion will undeniably vary from industry to industry and from case to case"[39] depending on the size of the market and other contextual factors. For example, when the target market consists of only a handful of potential customers, extensive dissemination is not necessary. In *Derby Industries, Inc. v. Chestnut Ridge Foam, Inc.*,[40] the parties were "competitors in the highly specialized business of prison mattress production and sales." At issue was a videotape that defendants distributed to seven different entities, which the court found to be "commercial advertising or promotion" under the Lanham Act.

The court noted that the "prison mattress industry is a highly specialized market consisting of a considerably smaller number of end-users than a product that is used by the general consum-

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[34] No. 6:09-cv-1945, 2011 WL 2893623 (M.D. Fla. 2011).

[35] *Id.* at *11.

[36] Reckitt Benckiser Inc. v. Motomco Ltd., 760 F. Supp. 2d 446, 452 (S.D.N.Y. 2011) (quoting Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 314 F.3d 48, 57 (2d Cir. 2002)).

[37] 880 F. Supp. 1005, 1019–21 (S.D.N.Y. 1994).

[38] *Id.* at 1020–21.

[39] Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1385 (5th Cir. 1996) (quoting American Needle & Novelty, Inc. v. Drew Pearson Marketing, Inc., 820 F. Supp. 1072, 1077 (N.D. Ill. 1993)).

[40] 202 F. Supp. 2d 818, 819 (N.D. Ind. 2002).

ing public such as antifreeze, motor oil or even certain pharmaceutical drugs."[41] The court also was persuaded by the fact that the videotape "constituted prefabricated promotional material intended for the purpose of generating sales."[42] Similarly, in *International Technologies Consultants, Inc. v. Stewart*,[43] the court held that a single letter about construction of a "float glass plant" was actionable where "the relevant market for services to design float glass facilities" was anywhere from 4–6 customers per year (as the plaintiff claimed) to 20–25 customers per year (as the defendant claimed).[44]

In cases involving "sophisticated" business purchasers, courts have held that the bar for proving deception may be higher than in consumer cases.

Courts have made clear that the "form" of the advertising does not matter—the Lanham Act is not limited to "traditional" or "classic" advertising that is disseminated widely through "traditional media channels"[45]:

> [T]he Act's reach is broader than merely the "classic advertising campaign" to which defendants would confine it. . . . Section 43(a) has been found applicable, for example, to the fundraising letters of a non-profit group . . . to the distribution of marketing information to retailers at a trade show . . . and even to an individual's 'bad-mouthing' of her former company over the telephone in calls made to colleagues and friends . . . .[46]

"Sophistication" of the Target Audience. In cases involving "sophisticated" business purchasers, courts have held that the bar for proving deception may be higher than in consumer cases. The rationale is that business purchasers are less gullible, more careful, and have the resources and experience to scrutinize promotional statements and evaluate the product itself prior to purchase. In *Suntree Technologies, Inc. v. Ecosense International, Inc.*,[47] for example, the "sophistication" of government purchasers was a factor that the court considered in awarding summary judgment to the defendant in a case involving an allegedly misleading product brochure.[48]

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41 *Id.* at 822.

42 *Id.* at 823. Other examples include *Champion Labs., Inc. v. Parker-Hannifin Corp.*, 616 F. Supp. 2d 684, 695 (E.D. Mich. 2009) (holding that whether a single presentation to GM by a fuel filter maker could be "commercial advertising" was a jury question and explaining that "[i]f the jury finds that the market is made up solely of GM, by showing the presentation to GM, Racor arguably sufficiently disseminated the presentation in the market."); Porous Media Corp. v. Pall Corp., 173 F.3d 1109, 1121 (8th Cir. 1999) (a document touting a medical device (ventilator filters) sent only to five companies was "commercial advertising or promotion" under the Lanham Act, where the "relevant purchasing public" was a small number of companies that dominate the "niche" market for the competing filter devices). *See also Seven-Up*, 86 F.3d at 1386–87 (applying the Act to a sales presentation given to eleven bottlers); Nat'l Artists Mgmt. Co. v. Weaving, 769 F. Supp. 1224 (S.D.N.Y. 1991) (phone calls made to customers of a booking agency by a former employee who was starting a competing business constitutes commercial advertising or promotion).

43 554 F. Supp. 2d 750, 757–60 (E.D. Mich. 2008).

44 *Id.* at 758. *See also* VIP Prods., LLC,, No. CV10-0998, 2011 WL 98992, at *3 (denying motion to dismiss where the alleged false statement was made at "trade shows [which] were attended by independent retailers and mass-market buyers" because the "issues that remain, including the breadth of dissemination and Defendant's purpose, are fact-intensive inquiries not suitable for resolution in a motion to dismiss."); Carpenter Tech. v. Allegheny Techs., 646 F. Supp. 2d 726, 737 (E.D. Pa. 2009) (in case involving competitors who sell nickel base alloy ingots to industrial purchasers, letters alleging patent violations stated a claim for false advertising under the Lanham Act; fact issues remained about "how many customers received letters," "what percent of the market those recipients comprise," and whether the defendants' motivation included solicited sales).

45 Radio Today, Inc. v. Westwood One, Inc., 684 F. Supp. 68, 74 (S.D.N.Y. 1988).

46 Gordon & Breach Sci. Publishers v. Am. Inst. of Physics, 859 F. Supp. 1521, 1534–35 (S.D.N.Y. 1994) (citations omitted).

47 No. 6:09-cv-1945, 2011 WL 2893623 (M.D. Fla. 2011).

48 "Context is particularly important where the targeted consumers are a well-informed and sophisticated audience because such an audience is less likely to be misled." Energy Four, Inc. v. Dornier Med. Sys., Inc., 765 F. Supp. 724, 731 n.2 (N.D. Ga. 1991) (citing Sandoz Pharm. Corp. v. Richardson-Vicks, Inc., 902 F.2d 222, 229 (3d Cir. 1990)).

The importance of the audience's sophistication varies based on a number of considerations. First, the courts have rejected the notion that business purchasers, no matter how sophisticated or knowledgeable, are "as a matter of law, incapable of being misled" by promotional statements under the Lanham Act.[49] Second, audience sophistication properly relates more to "implied falsity" than to "literal falsity."[50] Some courts have held that "when determining whether a claim is literally false, audience sophistication is irrelevant."[51] Third, arguments related to audience sophistication may be most persuasive when used to demonstrate how the business audience's understanding of particular terminology is different than that of the general public.

For example, in *Princeton Graphics Operating, L.P. v. NEC Home Electronics (U.S.A.), Inc.*,[52] the court determined that the use of the term "compatible" regarding computer monitors meant something different to the "retail channel" (distributors, wholesalers, retailers, retail chains, and corporate purchasing personnel) than it did to the general public. The court found that a consumer would understand "compatible" simply to mean that the monitor "works with" a computer, whereas the retail channel would expect "compatible" to denote performance "at or beyond the standard's requirements," a very precise concept.[53] Similarly, in *Bridal Expo, Inc. v. van Florestein*,[54] a case involving a "vendor brochure" in the wedding industry, the court held that the plaintiff was required to demonstrate deception from the perspective of "sophisticated audiences such as vendors, who have familiarity with the Houston wedding market."[55]

Proving Implied Claims Without Surveys. In Lanham Act cases involving consumer advertising, a claimant typically must present a well-designed survey in order to prove an implied claim.[56] However, in B2B cases, a survey may not be practical where there is only one customer (like a government agency) or a limited number of customers (like department store chains) because the sample size is too small. *Merck Eprova AG v. Gnosis S.P.A.*[57] addressed this issue and concluded that the unavailability of a survey is not fatal in such circumstances because a survey is not the only type of "extrinsic evidence" that can support an implied claim. *Merck Eprova* involved sales of raw ingredients to about a dozen large manufacturers of nutritional supplements and allegations that the defendant's promotional statements misrepresented the "isomer" content of defendant's product. The court held that five depositions were sufficient to create a jury issue on whether an

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[49] *Seven-Up Co.*, 86 F.3d at 1386 n.11.

[50] *See, e.g.*, LG Elecs. U.S.A., Inc. v. Whirlpool Corp., 661 F. Supp. 2d 940, 948 (N.D. Ill. 2009) ("Federal false advertising claims generally fall into two categories: literal falsity and implied falsity. Where a statement or claim made in advertising is literally false, 'the plaintiff need not show that the statement either actually deceived customers or was likely to do so.' Where a statement or claim is literally true or ambiguous, however, a plaintiff must prove that the statement 'implicitly convey[s] a false impression, [is] misleading in context, or likely to deceive consumers.'") (citations omitted).

[51] Bracco Diagnostics, Inc. v. Amersham Health, Inc., 627 F. Supp. 2d 384, 465 (D.N.J. 2009) (citing JR Tobacco of Am., Inc. v. Davidoff of Geneva (CT), Inc., 957 F. Supp. 426, 432 (S.D.N.Y. 1997)) (emphasis added).

[52] 732 F. Supp. 1258, 1261 (S.D.N.Y. 1990).

[53] *Id.* at 1261.

[54] Civil Action No. 4:08-cv-03777, 2009 WL 255862, at *8 (S.D. Tex. Feb. 3, 2009).

[55] *Id. See also* Utah Med. Prods., Inc. v. Clinical Innovations Assocs., 79 F. Supp. 2d 1290, 1309–10 (D. Utah 1999) (striking expert testimony of a biomedical engineer because "he had not done any research at all with respect to how a clinician in labor and delivery would understand the term sensor tip in conjunction with intrauterine catheters," and holding that the plaintiff bore the burden of determining falsity in light of the target audience, which involved a showing that the claims were "false as commonly understood by the consuming population of obstetric and gynecologic clinicians based on their knowledge and experience.").

[56] *See, e.g.*, McNeil-PPC, Inc. v. Pfizer Inc., 351 F. Supp. 2d 226, 249 (S.D.N.Y. 2005).

[57] Civil Action No. 07-cv-5898, 2011 WL 1142929, at *4 (S.D.N.Y. Mar. 17, 2011) (emphasis added).

implied claim was made. Although "surveys are certainly the regular method" of demonstrating implied claims, the court saw "no reason why this cannot be done in the form of depositions in a case like this where the number of potential direct consumers is arguably fairly small."[58]

Proving the Content of the Promotional Message. Unlike consumer advertising, where the actual advertisement at issue can be attached to a complaint, the content of B2B promotional statements themselves may not be so easy to identify, particularly at the beginning of a case.[59] Sometimes the messages are communicated verbally through a series of face-to-face meetings. Plaintiffs often may have to piece together indirect evidence of the advertising content from PowerPoint slides and emails, sales force "talking points" or "scripts," and "call notes."[60] Claimants should be prepared to marshal these different sources of proof in order to present a comprehensive and cohesive description of the advertising message communicated.

Notwithstanding the increasing number of cases recognizing B2B communications as actionable under the Lanham Act, defendants may still challenge whether the statements at issue in these cases truly are "advertising."

Defense Strategies

Notwithstanding the increasing number of cases recognizing B2B communications as actionable under the Lanham Act, defendants may still challenge whether the statements at issue in these cases truly are "advertising." At the pleading stage, defendants can consider arguing that the complaint lacks sufficient particularity[61] and plausibility[62] necessary to establish the "commercial advertising and promotion" element of a Lanham Act claim. Defendants had success with this strategy in the 2011 case, *Boykin Anchor Co., Inc. v. AT&T Corp.*,[63] where the court considered an AT&T e-mail raising performance concerns about plaintiff's "seismic anchors"—a product that holds telecommunication switching equipment in place during a seismic events like earthquakes. The court granted defendant's motion to dismiss on the basis that the email was not "commercial advertising" because it was not written for the purpose of proposing or influencing an actual product sale.[64]

At summary judgment, defendants also may demand evidence to support the claim that the statement falls within the ambit of the Lanham Act. For example, in *Suntree Technologies, Inc. v.*

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[58] *Id.*

[59] "Unlike advertisements to the general public which [the defendant] could obtain copies to include with its counterclaim, information concerning promotions directed toward [retail] customers would only be available second-hand and would need to be verified through discovery." Lampi Corp. v. Am. Power Prods., Inc., No. 93 C 1225, 1994 WL 501996, at *2 (N.D. Ill. 1994).

[60] Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6 (7th Cir.1992) (call notes); Bracco Diagnostics, Inc. v. Amersham Health, Inc., 627 F. Supp. 2d 384, 460 (D.N.J. 2009); Hearst Business Publ'g, Inc. v. W.G. Nichols, Inc., 76 F. Supp. 2d 459, 469 (S.D.N.Y. 1999) (sales scripts); Zeneca Inc., No. 99 Civ. 1452, 1999 WL 509471, at *9, 31.

[61] A growing number of courts have held that allegations of false advertising under the Lanham Act are "grounded in fraud," requiring plaintiffs to plead the claim with "particularity" under Federal Rule of Civil Procedure 9(b). *See, e.g.*, Southwest Windpower, Inc. v. Imperial Elec., Inc., No. CV-10-8200-SMM, 2011 WL 486089, at *4 (D. Ariz. Feb. 4, 2011). *But see* Trident Prods. and Servs., LLC v. Canadian Soiless Wholesale, Ltd., Civil Action No. 3:10CV877-HEH, 2011 WL 2938483, at *3 (E.D. Va. July 19, 2011) ("Although Defendants urge this Court to apply Rule 9(b) to count IV, they have not cited, and the Court is unaware of, any opinion from the Fourth Circuit Court of Appeals deciding whether false advertising claims under the Lanham Act are subject to this heightened standard").

[62] Even if a court is reluctant to apply Rule 9(b), defendants can avail themselves of the post-*Twombly-Iqbal* pleading standard, which requires plaintiffs to state facts that show that a complaint is not merely "possible" but is "plausible." *See, e.g.*, Busby v. Capital One, N.A., 772 F. Supp. 2d 268, 274 (D.D.C. 2011) (interpreting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009), and Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

[63] No. 5:10-cv-591, 2011 WL 1930629 (E.D.N.C. 2011).

[64] *Id.* at *4. *See also* Transcom Enhanced Servs., Inc. v. Qwest Corp., No. 4:09-CV-755-A, 2010 WL 2505606 (N.D. Tex. June 18, 2010) (granting motion to dismiss and noting that plaintiffs failed to show that alleged false statements made by defendant were for the purpose of inducing a sale).

Ecosense International, Inc.,[65] the parties sold competing "baffle boxes," which are "stormwater treatment structures that remove organic debris, trash, oil and other pollutants from stormwater before the stormwater reaches lakes, rivers and streams."[66] The baffle boxes were sold to cities and counties through a government contracting process. The plaintiff challenged the defendant's product brochure provided to government purchasers as "false advertising" because the materials contained pictures of the plaintiff's product and falsely suggested that the defendant's product had the same features and performance as the plaintiff's product. The *Suntree* court found at least two reasons why the product brochure at issue was not "advertising": (1) "the purpose of the maintenance presentation was not to influence consumers to purchase EcoSense's product but rather to provide training to those who had already done so"; and (2) the plaintiff "failed to present any evidence relating to the brochure's dissemination, and, due to the sophistication of the consumers, it is unlikely that a simple product brochure could influence them to purchase EcoSense's baffle boxes."[67]

As indicated by the *Suntree* case, to survive summary judgment, a plaintiff will have to affirmatively prove that the nature, purpose, and use of the statement qualifies it as advertising under the Lanham Act. Finally, even if a case makes it past summary judgment, at trial, issues of causation and damages can be tested directly by taking testimony of the business purchasers. This is in contrast to consumer advertising cases, where causation and damages often are debated with experts drawing statistical inferences from aggregate consumer data. In the B2B setting, the number of purchasers are often manageable enough to take direct testimony.[68]

Conclusion

A company does not have to market its products directly to the general public to face exposure for false advertising under the Lanham Act. A competitor's promotional statements to business customers must comply with the same basic requirement of truthfulness expected when statements are made to the general public. When a competitor crosses the line, a Lanham Act suit to stop the promotional statements is an option, particularly in light of recent cases on this topic.

Competitor false advertising cases involving promotions to business customers constitute an established and distinct type of Lanham Act case. When litigating this type of case, practitioners should be prepared to address the unique issues that arise in this context, such as determining the content of promotional claims with secondary evidence; proving implied claims through direct evidence rather than with surveys; and assessing how the purchasers' level of sophistication affects their understanding of the promotional claims. Defendants can hold plaintiffs to their burden of proving that the challenged statements truly should be considered "advertising," not only at the motion to dismiss stage but also at summary judgment, where the plaintiff will be required to adduce evidence that the statements were made for the purpose of influencing a product sale. ●

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[65] Civil Action No. 09-cv-1945, 2011 WL 2893623 (M.D. Fla. July 20, 2011).

[66] *Id.* at *2.

[67] *Id.* at *11.

[68] For example, in *Seven-Up*, the court set aside a jury verdict based on the distributors' testimony that although they were given the false sales presentation and considered it, it was not a "substantial" factor in the decision to switch from Seven-Up to Sprite. Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1382, 1387–88 (5th Cir. 1996) (noting that the plaintiff need not show that the false statements were the "only" or "predominant" cause of the purchase decision—only that they were a "substantial" cause).