Why You Should Consider Keeping Your Case Out of the Courtroom: A Cautionary Tale From Coppertone vs. Neutrogena

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Litigation is expensive, time-consuming and fraught with risks. Why, then, would a company choose to repeatedly sue a competitor for false advertising? Despite the costs and consequences of litigation, it may be advantageous for a company to continuously attack its rival's advertising program. A successful false-advertising suit can result in an injunction against a competitor's advertising campaign, force it to spend millions of dollars in producing new or even corrective ads and possibly even provide damages awards to the plaintiff.

As recent rounds of false-advertising cases show, however, these potential rewards are extremely difficult to attain, and a plaintiff runs the very real risk of having its own advertising attacked and enjoined by a court. Are the competitive and marketplace advantages of challenging a rival's ad campaign worth the prospect of a vicious cycle of litigation? The annals of false-advertising litigation include an epic contest that sheds some light on this vexing question -- without providing a definitive answer. Battles like this, however, recast a familiar adage as follows: "People who live in glass houses should think twice before throwing stones."

The Lanham Act, a piece of legislation that contains the federal statutes of trademark law in the U.S., states that the elements of a false-advertising claim are as follows: (1) The defendant made a false or misleading description or representation of fact; (2) in interstate commerce; (3) in connection with goods and services; (4) in commercial advertising and promotion; (5) that misrepresented the nature, qualities or geographic origin of: (a) the defendant's goods, services or commercial activities, or (b) the goods, services or commercial activities of another person; (6) that caused actual or likely damage to the plaintiff. To prevail on a false-advertising claim, a plaintiff must demonstrate that the misrepresentation is a "misrepresentation of fact" by showing that the advertising is either literally false or misleading.

Advertising claims known as "puffery" -- overly inflated, grossly exaggerated statements such as "America's Best Pizza" or "No. 1 in the World" -- are not actionable under false-advertising law. If the defendant's statement in its ad is literally false, a court will presume that the statement misled consumers in their purchasing decisions. Injunctive relief and damages typically follow in cases involving literal falsehoods.

Cases involving impliedly false, or misleading, claims tend to be more complex. Impliedly false or misleading claims are statements that, although literally true, tend to mislead, confuse or deceive consumers -- for example, Company A claimed that its baby formula is the "No. 1 Choice of Doctors" when 2% of doctors preferred Company A's formula, 1% preferred Company B's and 97% had no preference. While perhaps technically defensible, such a claim implicitly misleads consumers into believing that doctors overwhelmingly prefer Company A's formula, when, in fact, only a tiny fraction had any preference at all. If the advertisement is misleading rather than explicitly false, the plaintiff must prove that the misleading statement materially influenced consumer purchasing decisions. A material misrepresentation is one that has some effect on consumers' purchasing decisions, and courts

are increasingly requiring proof of materiality in a false-advertising complaint. Consumer surveys are useful in proving a likelihood of consumer deception by an allegedly false advertisement.

Several pairs of companies in the U.S. have battled it out repeatedly over their respective advertising claims, with varying degrees of success over the period of litigation. Their courtroom confrontations provide a cautionary tale for advertisers contemplating aggressive legal action against a competitor's irksome ad campaign. One of those cautionary tales is Schering Plough Healthcare Products, the maker of Coppertone sunscreen, and Neutrogena Corp.

In 2009, Coppertone fired off two false-advertising suits against its rival Neutrogena in rapid succession. In its suit filed in April 2009, Coppertone claimed that Neutrogena's advertisements for its Ultimate Sport spray-method sunscreen falsely insinuated that the Ultimate Sport line better protected consumers from the sun than Coppertone's Sport line. Neutrogena's campaign featured a side-by-side comparison of combined "UVA" and "SPF" protection factors for Neutrogena Ultimate Sport and Coppertone Sport sunscreens, followed by the statement "Best average UVA/UVB protection vs. leading sport lines." Coppertone's Sport line featured sunscreens with an SPF of 15 to 70-plus, compared to Neutrogena's Sport line SPF range of 55 to 70-plus. Because Coppertone's line included lower-SPF products that Neutrogena's line did not include, the "average" protection of Coppertone's products was necessarily lower than Neutrogena's. So, according to Coppertone, Neutrogena's ad misled consumers because it did not disclose that Neutrogena was making a classic "apples-to-oranges" comparison.

On the theory that the best defense is a good offense, Neutrogena countersued, complaining about a commercial for Coppertone Sport which touted its "better coverage" than Neutrogena's spray-sunscreens. Neutrogena argued that this statement was literally false, because the sunscreen chemical testing in support of the commercial did not measure the sunscreens' degrees of coverage.

After a bench trial, the U.S. District Court for the District of Delaware held that both companies' advertisements violated the Lanham Act. In a sharply worded footnote, the court scolded both parties for their "essentially meaningless" advertisements and for misleading the consuming public "who, finally, is paying attention to the health concerns presented by overexposure to the sun." Both parties "failed in their efforts to walk that fine line between literal truthfulness and consumer deception in advertising. Sadly, it is the American consumer who ultimately ends up the real loser in these advertising wars."

Despite the inconclusive results from this false advertising litigation saga, competitors like Coppertone and Neutrogena continue to face off in court over the contents of their advertisements. For example, the maker of "Pom Wonderful" pomegranate juice is currently defending its packaging and advertisements over claims by a rival that Pom deceives consumers by masking the fact that its juice is made from concentrate. As 2011 kicked off the new decade, the district court denied cross motions for summary judgment, sending the case on for trial. Even more recently, two kitty-litter makers have squared off in a catfight over whether commercials for Clorox's Fresh Step litter claiming that "cats know what they like" and prefer that brand over Church & Dwight's Super Scoop product because it "is better at eliminating odors." According to the complaint, the commercial's express message that cats prefer Fresh Step because of its odor-eliminating prowess must be false because "cats do not talk." With the complaint filled with details of feline bathroom habits and scatology, the ensuing litigation promises to be anything but tame.

It remains to be seen whether repeated false-advertising cases between competitors is a wise business strategy.

One clear lesson emerges from cases like this: Companies irked or provoked by a competitor's advertising would be wise to think hard -- and consider alternatives, such as well-supported ads that set the record straight -- before suing. But if the decision is made to cross the litigation Rubicon, it is essential that a complaint for false advertising be supported by surveys and other reliable direct evidence that the offending advertisement is both false and materially misleading.

Otherwise, one likely will need plenty of sunscreen to withstand the heat of litigation.