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Advertise Your Strengths Without Disparaging Your Competitors

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Economic downturns tend to produce an increase in comparative advertising campaigns. Meager sales revenues make it tempting to aggressively target the competitor's business. Consumers enjoy watching advertisers take potshots at each other. But a competitor whose weaknesses are targeted — not so much. A competitor can choose to respond in kind or legally challenge the ad. If the ad message is truthful and does not mislead or deceive consumers, then the challenge is generally not difficult to rebuff. A recent court opinion suggests that advertisers whose ads are challenged by competitors should look to commercial liability policies for advertising injury coverage. It may be possible to cover legal fees for defending ads challenged by competitors.

This recession has produced several memorable comparative ad campaigns. Apple's ad campaign personifying Microsoft and Apple computers was answered by Microsoft's "I'm a PC" spot, to which Apple responded with its "Bean Counter" spot. A soup war is raging between Campbell's and Progresso as to who has the healthiest soups. The opening salvo in the soup war began with a Campbell's print ad depicting a can of Progresso Chicken Noodle under the label "Made With MSG" soup next to a can of Campbell's Select Harvest Chicken Noodle soup under the label "made with TLC." Progresso responded with an ad depicting numerous Campbell's soup cans under the headline "Campbell's has 95 soups made with MSG." Neither the Apple-PC ads nor the Soup War ads have resulted in court action — possibly because these advertisers skillfully employ truthful statements mixed with puffery.

However, if a comparative ad is false or misleading, the consequences can be very expensive. An advertiser might be forced to halt and correct false advertising, pay monetary damages for injuries incurred from the advertising, and respond to administrative actions brought by state and federal consumer protection agencies such as the Federal Trade Commission (FTC). Administrative actions can spur parallel class action lawsuits, as demonstrated by the last fall's $30 million settlement of FTC and state attorneys general administrative actions and related class action lawsuits arising from the false and deceptive advertising published by the makers of Airborne® effervescent tablets that promised to ward off common colds and the flu. When pressed, Airborne was unable to back up these claims with scientific evidence.

A California court recently found that allegedly false comparative ads trigger a duty

by insurers to defend an advertiser under commercial liability policies in *E.piphany v. St. Paul Fire & Marine*. Advertising injury provisions typically exclude coverage of claims that arise from the failure of the insured's product to match its advertised quality. E.piphany, the insured, advertised that it was the "only producer of all Java fully J2EE software solutions." The competitor, Sigma, viewed this superiority claim as disparaging its product but the qualities of E.piphany's services were not at issue. This is good precedent for seeking coverage for legal challenges of competitive advertising; but unfortunately also hints that California courts may recognize implied disparagement claims arising from comparative advertising.

Advertising messages that are ambiguous or subjective may be identified as "mere puffery." Puffery or "puffing" describes statements, often opinions, made by the advertiser about the superiority of its own products or services. Campbell's "Made with TLC" is a prime example. However if puffery contains or implies a factual basis for its claim, it better be truthful and not at all misleading or deceptive. Misleading claims of superiority give a competitor incentive to claim it's disparaged by the negative implication.

For example, last Spring, Tyson Foods sold fresh chicken under the slogan "Raised Without Antibiotics." Tyson's ads were immediately challenged in a Maryland court by its competitors Perdue and Sanderson Farms. They maintained that Tyson's slogan is false because Tyson raises its chickens on feed containing ionophores, an antibiotic-like additive routinely used by nearly all chicken farms to combat a common chicken disease.

Perdue's Harvestland brand of chicken is raised entirely antibiotic-free but it costs significantly more than Tyson's. Through its ads, Tyson falsely appeared to be providing a less expensive antibiotic-free chicken. Sales went through the chicken shed roof. Tyson's multi-million dollar national ad campaign effectively targeted consumer fears that antibiotic-resistant microbes are encouraged by the use of antibiotics in raising meat. Perdue and Sanderson Farms produced surveys showing that consumers overwhelmingly believe that no antibiotics are given to Tyson chickens; and further believed that therefore Tyson's chicken is safer and healthier to eat than its competitors' chicken.

Tyson argued that technically USDA approval of "Raised Without Antibiotics" for use on packaging permitted use of the slogan in advertising its chicken. The court dismissed this argument. The USDA has jurisdiction over claims made in food packaging, but if the message deceives consumers, USDA approval "will not insulate what is plainly an advertisement intended to induce consumers to purchase Defendant's product." In July, the USDA pulled its approval of the packaging because Tyson neglected to disclose that it vaccinates eggs with another antibiotic, gentamicin, to prevent illness and death in chicks. The USDA said it could no longer consider Tyson's labeling truthful and accurate. Tyson was forced to settle the multimillion dollar lawsuit for an undisclosed sum.

A recent showdown between bridal shows in Texas illustrates a safe puffery statement. In *Bridal Expo, Inc. v. Van Florestein*, false advertising made by rival bridal show Wedding Showcase ended when the court found that a Google ad touting the rival as "Houston's #1 Bridal Show" was not, as plaintiff Bridal Expo alleged, literally false. Instead the court found that the claim is too ambiguous to determine truth or falsity. If there is no reference or context that tells the consumer why the advertiser is "Number One," there is no statement to test. In reviewing the potential for falsity or deceptiveness of an advertising statement, the entirety of the ad must be considered. There could be visual or auditory references in an ad that lend an additional implied meaning that affects the ambiguity, truth or falsity of the ad's message.

Context matters when reviewing the potential for falsity or deceptiveness in an advertising statement. Images, other text, voiceovers or video adjacent to the advertising can transform an ad that appears to be truthful into a misleading, or even literally false message, even if the statement made by the ad is not literally false on its face. For example, if behind Wedding Showcases' slogan "Houston's #1 Bridal Show," text rotated in the background stating: "More Vendors!" and "More Wedding and Honeymoon Giveaways!" The added messages contain

factual superiority claims that imply the rival bridal show has less vendors and giveaways which could be found false.

The Second Circuit recently adopted, in *Time Warner Cable v. DIRECTV*, a doctrine known as "False by Necessary Implication." It provides that if the context of a literally true or ambiguous ad implies a false message, the ad is considered to be literally false and no evidence of consumer confusion or deception is required to prove consumer deception. DIRECTV had aired a television spot starring Captain Kirk (William Shatner) and Mr. Spock (Leonard Nimoy).

> Captain Kirk:...just relax and enjoy the amazing picture clarity of the DIRECTV HD we just hooked up.
>
> With what Starfleet just ponied up for this big screen TV, settling for cable would be illogical.
>
> Mr. Spock: [clears throat]
>
> Captain Kirk: What — I can't use that line?
>
> Narrator: For picture quality that beats cable, you've got to get DIRECTV.

After Time Warner challenged the Shatner ad, DIRECTV revised the narrator's tagline the to:

> For an HD picture that can't be beat, get DIRECTV.

DIRECTV attempted to argue that the only portion of the ad to mention cable, "settling for cable would be illogical" is a subjective statement and not actionable. The Second Circuit disagreed because, in the context of Shatner's comment about the "amazing picture clarity of DIRECTV HD" and the narrator's unbeatable DIRECTV picture quality tagline, the statement unambiguously made the false claim that cable TV picture quality is inferior to DIRECTV picture quality.

The False by Necessary Implication Doctrine makes it much easier for competitors to challenge misleading ads. Ordinarily, the challenger of a misleading ad must prove that a reasonable consumer is confused or deceived by the ad. Proof generally takes the form of consumer testimony or a consumer survey. Courts see testimonials as less persuasive than surveys. Surveys are expensive to design and execute in an effective manner, so proving consumer deception or confusion can be difficult. However, if the ad is literally false on its face, or literally false according to the False by Necessary Implication Doctrine, the plaintiff is able to skip that difficult step and even in some cases, an injunction or damages may be awarded by the court without proof of consumer confusion or deception.

The bottom line is, in order to protect your bottom line, keep an eye on the marketing messages your business projects. Ensure that the message is truthful and non-misleading in the broadest possible context. Consider whether the message is disparaging from your competitor's point of view. What would your reaction be if your competitor was touting a similar message? If you would object — then it might be time to change your message and check your insurance policy for advertising injury coverage.