

Defending False Advertising Claims

Understanding the Lanham False Advertising Act:

- The act is the federal statute that governs trademarks, service marks and unfair competition, and applies to statements an advertiser makes regarding their own products/services or the products/services of a competitor.

What are some important factors of the Lanham False Advertising Act?

- The statute applies only to an advertisement or promotional material used prior to sale.
- Plaintiffs typically are large, well-capitalized companies with significant budgets for litigation. They often are highly motivated to protect products, market share, consumers and public perception.
- Lawsuits are typically highly contentious, and defendant can suffer devastating damages, such as being prevented from advertising effectively.
- There are specific provisions of the Lanham Act that have to do with false advertising and not trademarks.
 - o “Any person who...uses in commerce any...false or misleading description of fact, or false or misleading representation of fact, which...in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities...shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”

What Should You Know to Protect Against False Advertising Claims?

- The Lanham Act has been interpreted broadly by courts but has key elements regarding false advertising:
 1. A false or misleading statement of facts made in a commercial advertisement, which deceives or tends to deceive consumers.
 2. The claim affects interstate commerce and has a likelihood to harm the plaintiff.



Common False Statements and Deceptions that Trigger Litigation:

- Literally false statements
- Statements that are literally true, but are misleading
- Puffery: statements that are sufficiently vague, subjective or exaggerated and cannot be categorized as “true” or “false.”
- Establishment claims: claims stating or implying that advertiser has proof of a claim.
- Literally false by necessary implication: implicit statement unambiguously sends false message.
- Deceptive comparisons, descriptions, measurements or quantities, pricing or guarantees/warranties
- Materiality: a false statement is material if it is “likely to influence the purchasing decision” and “actually deceives or has the tendency to deceive a substantial segment of the intended audience.”

After a Violation Occurs, What are Common Damages?

- Damages often include: (1) defendant’s profits, (2) any damages sustained by the plaintiff and (3) the costs of the action.
 - o Lost profits/goodwill
 - o Injunctive relief: presumption of irreparable harm