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FEATURES

COLUMNS

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Praxis

Advertising

Barry M. Benjamin

The Law of False Advertising: True Can be False, and False Can Be True

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things." – Lewis Carroll, Through the Looking Glass

Lewis Carroll's Humpty Dumpty may insist that his words mean only what he intends them to mean, and your advertising clients may insist the same about their advertising claims. Unfortunately for both Humpty Dumpty and your clients, the law evaluates the meaning of claims from the audience's perspective, not the speaker's. The practical effect is that advertisers are responsible for all claims that their advertisements could reasonably be interpreted to make, whether express or implied, as viewed from the consumer's perspective—not whatever their professed intention may be. Thus, even if a claim is literally true, it can be held as false advertising if the impression it leaves with the audience is false. Conversely, even if a claim is literally false, it may not be actionable as false advertising if the audience fully understands the meaning.

Anheuser-Busch recently walked this line with its attacks on MillerCoors. Anheuser-Busch ran an advertising campaign highlighting the fact that MillerCoors uses corn syrup during the brewing process to make Miller Lite and Coors Lite. Anheuser-Busch was clearly playing on current fears among consumers generally about high-fructose corn syrup. However, high-fructose corn syrup and corn syrup are molecularly different, and moreover, even the corn syrup MillerCoors used during the brewing process is burned off and no longer present in the final product the consumer drinks. Notwithstanding the truthfulness of the claim that corn syrup is used during the brewing process, MillerCoors sued arguing that the advertisements leave the false impression (in a sufficient proportion of the consuming public) that Miller Lite and Coors Lite beers contain corn syrup or high fructose corn syrup.

The district court hearing the case issued a decision, now on appeal, finely slicing and dicing among truthful and non-truthful statements, ordering some to stop and that others may continue. Whatever the ultimate outcome after appeal, the point is that the legal process evaluates alleged false advertising from the perspective of whether it makes enough consumers believe that Miller Lite and Coors Lite beer contain corn syrup or high fructose corn syrup, not whether the statements are literally true.

Given the corn syrup example, we know that literally true statements can be false advertising if they leave a false impression on the consumer. The same applies to the converse situation, where a false claim is not considered false because the relevant audience knows the truth about what is meant. In two separate 2017 proposed class action suits, retailers Home Depot and Menard's were sued for selling standard 4x4 inch lumber without explaining that the actual measurements were 3.5×3.5. The retailers did not dispute the truthfulness of the allegation—they did, in fact, sell lumber labeled as 4×4 inches, that is actually only 3.5×3.5 in size. The label was admittedly false.

The judge was not buying what the plaintiff was selling, however, and agreed with the retailers' "everybody knows" defense. It is common knowledge and longstanding industry practice, agreed the court, that buyers are well aware that lumber sold with labels such as 2×4 or 4×4 do not accurately describe the width and thickness of those pieces of lumber. The court held that the reasonable consumer buying lumber knew what the term "4×4" means, and dismissed the claim holding that a statement is misleading only if it has a tendency to deceive a substantial portion of the intended audience. Without such evidence of deception, the plaintiff could not demonstrate genuine injury, even where the statement was admittedly false.

Advertisers need to know that literally true claims may still be false advertising, and that admittedly false claims may not be actionable. Advertising claims must be evaluated from the perspective of the relevant target audience. The point is to determine what claims are received by the viewer, whether express or implied. Of course, claims must be true and the focus of all advertising legal review should be to ensure the substantiation of truthful claims (and if an advertiser willfully communicated false claims it could be forced to disgorge its associated profits on top of paying for an opponent's lost sales). The key, though, is to remember that advertisers are responsible for substantiating all claims received by a reasonable proportion of the target audience, not just those claims that were specifically intended. If your client insists that only a very limited meaning be ascribed to an advertising claim that nevertheless leaves a false impression with the reader or viewer, it too, just like Humpty Dumpty, may suffer a great fall.

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