



An Article by Peter H. Gunst

You've Got A Lot Riding on Your Ads

Today's consumers are bombarded with commercial messages and every advertiser strives to make its campaign a memorable one. This drive to be remembered often leads to edgy advertising campaigns, bold claims and harsh criticisms of competitors. Unfortunately, this desire for impact can also lead straight to the courthouse in the form of a false advertising lawsuit. A basic understanding of false advertising law can help retailers avoid some common advertising mistakes.

Most false advertising claims arise under the federal Lanham Act which prohibits any false or misleading statement of fact likely to misrepresent the goods or services being advertised. Competitors are entitled to sue under this statute, if they have been damaged by false advertising. In addition to federal statute, the Federal Trade Commission (FTC) is charged with regulating advertising and can challenge the accuracy of advertising claims in court.

The stakes are high. Alpo won \$10 million from Purina over its claim that Puppy Chow reduced hip dysplasia. Gillette won \$1 million from a competing razor manufacturer for an ad claiming the competitor's product gave a smoother shave. So what should retailers avoid? Here are some of the most common advertising pitfalls.

FALSE STATEMENTS

An advertisement containing a false statement of fact which deceives consumers and is material to the consumers' purchasing decision can be the subject of a false advertising suit. It is not necessary to prove that the advertiser intended to deceive the public; mistakes or innocent misstatements can be actionable.

A false statement of fact can be false on its face or literally true but misleading. If a competitor can show that the ad's claims are literally false, it does not have to show that consumers were misled by the statement. On the other hand, claims that an ad is literally true but misleading require proof concerning the ad's impact on consumers. This is usually done through consumer surveys designed to show that a significant percentage of consumers were deceived by the ad's message.

Consider an advertisement for razors which boasts a "blade that will never dull." What the ad doesn't mention is that the razor's blade was never sharp. A competitor charging that such a statement is literally true but misleading must prove that a significant portion of the consumer audience believed the statement meant the razor's blade was sharp and would remain sharp.

A key element of a false advertising claim is that the advertiser's misrepresentation was material to the consumer's purchasing decision, but this element is often implied. Imagine the economic impact on competitors of an ad that falsely declares "Our tires last 300,000 miles."

COMPARATIVE ADVERTISING

Comparative ads show the competitor's products as being inferior to those of the advertiser. While there is nothing inherently wrong or illegal about comparative advertising, these ads can be dangerous because they may disparage a competitor's product, or make comparative claims that may prove false. Even innuendo and ambiguity in a comparative ad can be grounds for a lawsuit, and it is not necessary that the competitor be directly named. As such, these ads are often fertile ground for false advertising lawsuits.

For example, several years ago, Goodyear Tires brought suit against Bridgestone-Firestone based on Bridgestone's claims that its tires had superior stopping performance. In one of the most famous comparative advertising cases, U-Haul successfully sued a competitor truck-rental company for claiming that its trucks got better gas mileage than U-Haul's and were therefore less expensive.

While it is perfectly acceptable to identify a competitor by name, and to use a competitor's trademark in comparative advertising, the alteration of a competitor's trademark can be actionable. When a competitor of tractor giant John Deere ran an ad depicting the famous yellow deer fleeing the competitor's new model of riding lawn mower, John Deere sued, alleging that this portrayal damaged its famous trademark. The court issued a permanent injunction against Deere's competitor.

PUFFERY

"Puffing," a very common element of advertising, is a boast that is vague or grossly exaggerated. Puffing is often categorized as subjective or objective. Subjective puffing is a statement that a product is "the best" or "the greatest," and is not actionable because no reasonable buyer would rely on it when making a purchasing decision. Objective puffing, although boastful, can be actionable if it asserts objective facts specific enough to be verified through research. Claims like "lowest prices in town" or "more tires sold" can be considered objective puffery.

TIPS TO AVOID TRAPS

Here are some tips to help you avoid the most common pitfalls in advertising. Before running an ad, make sure a reasonable basis exists – in the form of objective supporting evidence – for all claims made. Avoid making statements which tell only half the truth by leaving out an important fact or using unclear language. If your ad compares your business against a competitor, make certain all comparative statements are supported by independent tests or surveys, and don't tamper with your competitor's brand name or trademark. Finally, take care when using hyperbolic language, if it is possible to prove your claim false through factual research, you may be opening the door to a false advertising suit.

pgunst@agtlawyers.com

To access the latest articles by the Tire Industry Association's legal counsel, please visit the Astrachan Gunst & Thomas P.C. website at:
www.agtlawyers.com/resources/tire.html