

# CORPORATE COUNSEL

## 9 Questions to Ask in Suing a Rival for False Advertising

### *From the Experts*

By Robert W. Lehrburger



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Advertising is a key ingredient to most companies' success. Potent advertising can give a rising company a lift and an established business staying power. When deployed by a competitor, advertising can threaten a rival's reputation, market share and bottom line. But when a competitor's advertising verges from truth to falsehood, marketing personnel and executives are likely to ask: "Should we sue those shameless liars for false advertising?"

Here are nine key factors to consider in answering that question.

### 1. Does The Claim Cut To The Core?

An important strategic consideration is whether the claim at issue is critical to the competitor's product or campaign. If so, a successful challenge can fundamentally affect the marketplace. For instance, "Breath Assure" (a breath freshener) and "Ricelyte" (an infant oral electrolyte solution) both owe their demise to successful false advertising actions that took direct aim at the product names.

In contrast, it may be preferable to forego a challenge to a peripheral claim that is likely to be short-lived and unlikely to affect consumer behavior. Relatedly, it is important to consider whether a false claim can be easily fixed in a way that makes little impact. If the competitor can render its claim true by a simple tweak but without changing the overall message, then litigation may not be worthwhile.

### 2. Do You Need Emergency Relief?

False advertising cases often are tailor-made for preliminary injunctive relief and sometimes even a temporary restraining order. These strong remedies require quick action and solid proof from the outset, as well as immediate and irreparable harm.

Sometimes entire cases are determined at the preliminary injunction stage. If a competitor's advertising is preliminarily enjoined at the outset, the competitor may not be inclined to pursue costly litigation in an attempt to resurrect the claim years later. Conversely, a challenger who loses at the preliminary injunction stage may well have little to gain by attempting to obtain a different result later on.

### 3. Can You Demonstrate Falsity?

False advertising is made actionable under federal law by the Lanham Act and can also be challenged under state law. The heart of any false advertising claim, by definition, is falsity. Whether a plaintiff can meet its burden of proving falsity depends on the type of claim at issue. For example, advertising that is exaggerated boasting or not capable of factual proof is deemed mere "puffery" that is not actionable. A classic example is "The Greatest Show On Earth."

One type of actionable claim is an "establishment" or "tests prove" claim (e.g., "clinically proven to relieve pain faster"). This type of claim can be proven false by showing that the competitor's data does not

support the claim. But in the absence of an establishment claim, a litigant generally must come forward with affirmative proof that the claim is in fact false; mere suspicion is not enough.

### 4. Do You Need A Survey?

An immediate question for any potential false advertising action is what specific advertising claim is being challenged. That determination turns on both the words and images used in the advertising and the context in which they appear. Often an advertisement's words are straightforward and convey a clear, literal message that can be proven false. Such a "literally" false claim is one that requires no interpretation.

In contrast, an "impliedly" false claim is one in which the words are literally true but the advertising conveys an implicit misleading message. For these types of claims, a litigant usually has to come forward with survey evidence as to what message consumers take away from the advertising. As a result, the litigants may find themselves entrenched in a battle of experts over "what message is conveyed" rather than "is the message true." At the same time, a well-conducted survey can strengthen a case where there is any doubt about the message being delivered.

### 5. Can You Prove Harm?

The end game in asserting a false advertising challenge usually is an injunction to stop the advertising, although damages, corrective advertising and other remedies may

also be available. To obtain an injunction, a plaintiff must demonstrate irreparable harm that cannot be compensated through money damages. In many jurisdictions, courts often have accepted a presumption of irreparable harm upon a showing of literal falsity, particularly where comparative claims are made.

But the continued vitality of that presumption may be open to question in the wake of the U.S. Supreme Court's landmark 2006 decision in *eBay v. MercExchange*. In that case, the Court determined that irreparable harm cannot be automatically presumed from patent infringement. Lower courts have since extended that ruling to other intellectual property realms such as trademark and copyright infringement cases. Whether and how *eBay* will be extended to false advertising cases remains unsettled. As a result, a false advertising plaintiff should be prepared to demonstrate, and not merely presume, irreparable harm.

## 6. Do You Have Skeletons In The Closet?

Before embarking on litigation to stop a competitor's overly aggressive advertising, a company needs to examine its own conduct. Has the company engaged in similar advertising? Is it vulnerable to a claim for false or misleading advertising of its own? If so, filing a false advertising suit may trigger a counterclaim and/or an unclean hands defense that bars relief to a company that has wrongfully instigated the challenged claim or engaged in similar misbehavior.

In such instances, a plaintiff can quickly find itself on the defensive. Accordingly, before suing a competitor, the company should take stock of its own advertising and make sure that it is proceeding with a clean slate—or that it is at least prepared to deal with a counter-attack.

## 7. Are You Up For The Publicity?

It's also important to think about the

attention a court challenge can bring. A lawsuit is a public proceeding. A competitor may well welcome a public forum to air out a challenge, particularly if they are a No. 2 or upstart looking to gain notice in the same breath as the market leader. When Pizza Hut, the No. 1 quick-serve pizza chain, sued Papa John's, then the No. 3 chain, over false comparative claims, Papa John's took out a full-page print ad portraying Papa John's as David to Pizza Hut's Goliath. That ad in turn generated its own publicity. Any time a company goes down the path of litigation, it should take steps to consider and manage how it will be spun by the adversary or perceived by the public.

## 8. Can You Make The Commitment?

Litigation takes time and money—usually a lot of both. When considering a false advertising challenge in court, it is essential to consider the range of potential costs. For example, front-loading cost for a well-developed case at the outset can be a good investment, particularly where a preliminary injunction is within reach. At the same time, the company must also be ready to devote the time of executives and key personnel to formulating the case, working with lawyers to marshal the facts, and preparing for and participating in depositions and hearings.

The company needs to make sure all those involved are committed to the cause and understand its importance to the company, and at the same time give personnel the support they need to manage the additional time commitment required on top of their normal business responsibilities.

## 9. Which Forum Should You Choose?

A court is not the only place in which a competitor's advertising can be challenged. The National Advertising Division (NAD) of the Council of Better Business Bureaus

provides an industry-sponsored forum for competitors' advertising disputes. A NAD proceeding is quicker than a full court proceeding (although not necessarily quicker than a prompt preliminary injunction strike), provides greater opportunity to maintain confidentiality, avoids invasive discovery, is less costly and has a lesser burden of proof than is required in court.

On the other hand, the remedies available through the NAD are far more limited. The NAD does not award monetary relief, and it does not have the power to enjoin conduct or require corrective advertising as a court can. Instead, when the NAD finds a problem, it recommends that the advertising cease or be modified. In most instances, participants abide by NAD's recommendations—if they do not, NAD will refer the matter to the Federal Trade Commission, which has authority to police deceptive advertising.

No company likes it when a competitor competes unfairly. And no company should have to abide false and misleading advertising. But before rushing to court with a lawsuit, the aggrieved company should consider the nature of the claims, the strength of its proof, its own advertising, the resources required, and the potential attention the case may bring. Approached thoughtfully with these factors in mind, a false advertising challenge can meet with success.

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