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April 11, 2019

False Advertising: The Theory of Necessary Implication and the Presumption that Runs with It

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In writing this post, I had hoped to get back to basics and address the elements of a false advertising claim. But when doing so, the proverbial onion layers started to unravel—one of those layers being the theory of necessary implication, being a theory to prove falsities against a competitor under the Lanham Act. And not all circuits have adopted it. See e.g. Eli Lilly & Co. v. Arla Foods, Inc., 893 F.3d 375, 383 n.3 (7th Cir. 2018) ("Because we agree with the judge that Elanco presented sufficient evidence of consumer confusion at this stage of the proceedings, we do not need to consider the alternative theory that the ads are false by necessary implication.").

In most circuits, a basic claim for false advertising is met when the following elements are satisfied:

1. that the defendant has made false or misleading statements as to his own product or another's (*i.e.* what I call the falsehood or falsity);

2. that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience;

3. that the deception is material in that it is likely to influence purchasing decisions;

4. that the advertised goods traveled in interstate commerce; and,

5. that there is a likelihood of injury to the plaintiff in terms of declining sales and loss of good will.

Id. at 382. The evidence "required to satisfy the first two elements of the claim varies according to the type of statement at issue"—*i.e.*, the falsity involved. *Id.*

Most circuits (if not all) allow for two types of falsity. The first includes statements that are false on their face—*i.e*., literal falsehoods. The "inquiry asks whether the defendant made an explicit representation of fact that on its face conflicts with reality." *Id.* at 382. Representing that product is certified, when it is not, is one example; another example is representing that a product is patented when it is awaiting issuance from the USPTO. *See Abdallah v. Pileggi*, 152 F.3d 948 (1998). Proving this form of falsehood places the plaintiff at a distinct advantage—providing a presumption that the statement has "the tendency to deceive a substantial segment of its audience." *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 820 (7th Cir. 1999). The second form of actionable statement—those that are literally true but misleading—requires more. Here, the plaintiff must produce evidence of actual consumer confusion in order to carry its burden to show—usually in the form of survey evidence. *Id.* at 819–20.

However, a third theory exists—*i.e.*, proving falsity by necessary implication. This theory does not depend on expensive survey evidence. Critically, only a minority of circuits have adopted this theory. See, *e.g.*, *Clorox Co. Puerto Rico v. Procter & Gamble Commercial Co.*, 228 F.3d 24 (1st Cir. 2000). Claims predicated on necessary implication arise "when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated." *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 589090 (3d Cir. 2002). And the *Novartis* case itself is a good illustration of the doctrine. There, the Court analyzed whether statements associated with the advertising of Mylanta Night Time Strength were literally false by necessary implication. Indeed, the Court held that the phrase "nighttime strength" necessarily "convey[ed] a message" that the product was "specially made to work at night"—yet there was no evidence to support that the product was "specially formulated for nighttime heartburn." *Id.* at 589.

Another example of the doctrine can be found in *Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 946-48 (3d Cir. 1993),where implications were made with respect to oil viscosity and engine performance. *Cf. Time Warner Cable, Inc. v. DirecTV, Inc.*, 497 F.3d 144 (2d Cir. 2007); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578 (3d Cir. 2002); *Scotts Co. v. United Indus. Corp*., 315 F.3d 264 (4th Cir. 2002); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997); *Zoller Labs., LLC v. NBTY, Inc*., 111 F. App'x 978 (10th Cir. 2004).

While these cases exist outside the Seventh Circuit, the question remains whether the doctrine will be adopted. Indeed, *Eli Lilly* did not reject it—merely stating that another theory provided the basis of the decision. 893 F.3d at 383 n.3. This incremental development is not insignificant and probably flags the Seventh Circuit's thinking when the right facts are presented. Should it be adopted, the theory allows plaintiff competitors to ultimately prove false claims through presumption, rather than wholesale survey evidence—saving much on the litigation costs associated with these claims.*

*Stay tuned with respect to this doctrine in the notable MillerCoors LLC v Anheuser-Busch 'corn syrup' litigation currently in the Seventh Circuit (Wisconsin).

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