Class 23: False Advertising
Class Outline

• False Advertising
  • Literal falsity
  • Misleading
  • Materiality
False Advertising

Lanham Act §43(a) forbids false designation of origin or false or misleading factual description or representation…
Trademark Infringement (43(a)(1)(A))

v.

False Advertising (43(a)(1)(B))

• §43(a) forbids false designation of origin or false or misleading factual description or representation:
  – Subpart (1)(A) applies if that falsehood deceives as to “affiliation, connection or association of such person with another person, or as to the origin of . . . goods” – A TRADEMARK INFRINGEMENT CLAIM
  – Subpart (1)(B) applies if that falsehood is in advertising and it misrepresents the nature, characteristics, qualities or geographic origin of . . . goods – A FALSE ADVERTISING CLAIM
Lanham Act Section 43(a)(1)(B)

- §43(a)(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
  - (B) 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 believe that he or she is or is likely to be damaged by such act.
Statements that may trigger 43(a)(1)(B):

• A literally false statement (*Clorox*)
• A literally false by necessary implication statement (*Time Warner*)
• A merely misleading (i.e., impliedly false) statement (*Papa John’s*)
To make a prima facie case of false advertising, P must establish:

1. A false or misleading statement of fact about a product;
2. Such statement either deceived, or had the capacity to deceive a substantial segment of potential consumers;
3. The deception is material, in that it is likely to influence the consumer’s purchasing decision;
4. The product is in interstate commerce; and
5. The plaintiff has been or is likely to be injured as a result of the statement at issue.
Elements of a §43(a)(1)(B) False Advertising Claim

1. **Falsity**: Advertisement makes a false statement
2. **Believability**: Falsehood deceives a substantial segment of the audience
3. **Materiality**: The falsehood is material to the purchasing decision
4. **Commerce**: Interstate Commerce
5. **Injury**: Likely injury to the plaintiff
“Yikes! My Ziploc® Slide-Loc® is dripping!”

“Get Glad.™

Don’t Get Mad.

Only Glad has the Double-Lock™ green seal. That’s why you’ll be glad you got Glad. Especially if you’re a goldfish.

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Tropicana

"Only One Can Be The Best - Sprinters"

30 Seconds

BRUCE JENNER: Hi! I'm Bruce Jenner for Tropicana.

You're looking at five of the top hurdlers in America.

They're all good. But only one can be the best.

The same holds true for our All-American Drink, Orange Juice.

They're all good, but only one can be the best.

Tropicana Premium Pack.

For me, it tastes fresh.

It's our pasteurized juice as it comes from the orange.

It's the only leading brand not made with concentrate and water.

Only one can be the best.

For me, it's Tropicana Premium Pack.

MCA ADVERTISING, INC.
**Tropicana** on how Falsity relates to Believability and Materiality:

“When a merchandising statement or representation is literally or explicitly false, the court may grant relief without reference to the advertisement’s impact on the buying public.”

“When the challenged advertisement is implicitly rather than explicitly false, its tendency to violate the Lanham Act by misleading, confusing or deceiving should be tested by public reaction.”