"Literally False" Advertising Under the Lanham Act

by Eric H. Singer

Materiality is basic to the common law tort of deceit or fraud. A misrepresented “matter is material if a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question…” Restatement (Second) of Torts §538. Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a), in no way codified the common law of deceit or false advertising; rather, it “created a new statutory tort of false representation of goods in commerce.” See PPX Enterprises, Inc. v. Audiofidelity, Inc., 746 F.2d 120, 124 (2d Cir. 1984). However, materiality has long been a core element of a false advertising cause of action under Section 43(a). See, e.g., Skil Corp. v. Rockwell International Corp., 375 F.Supp. 777, 783 (N.D.Ill. 1974).
To sustain a false advertising cause of action, the plaintiff must prove—whether by direct testimony, consumer survey data, or more liberally by a showing that the falsity relates to an “inherent quality or characteristic” of the good at issue—that the misrepresentation likely influences the purchasing decisions of a substantial portion of the target audience. Id.; National Basketball Association v. Motorola, Inc., 105 F.3d 841, 855 (2d Cir. 1997).

The element of materiality appears to have partially eroded, however, in the context of Lanham Act actions involving advertisements deemed “literally false,” and it has done so for no apparent reason.

Background Legal Framework

Section 43(a) of the Lanham Act imposes liability on “any person who… uses in commerce any… false or misleading representation of fact, which… in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, service, or commercial activities.” 15 U.S.C. §1125(a)(1)(B). Traditionally, to prevail on a claim for false advertising liability under this section, a plaintiff must establish five elements:

1) The defendant has made false or misleading statements of fact concerning its or another firm’s product;
2) The false or misleading statement actually deceived or tended to deceive a substantial portion of the intended audience;
3) The statement is material in that it will likely influence the deceived customer’s purchasing decisions;
4) The challenged statements caused harm to the plaintiff; and
5) The advertisements were introduced into interstate commerce.


Within the first of the five elements listed above, section 43(a)(1)(B) of the Lanham Act covers two types of statements or claims. The first includes statements that are facially or “literally false”—statements that have an unambiguous meaning in the context of the advertisement and are shown to be false. An advertisement that states that certain coats contain 50 percent cashmere, when they do not contain any cashmere, is literally false. See Camel Hair and Cashmere Institute of America v. Associated Dry Goods Corp., 799 F.2d 1 (1st Cir. 1986). Where an over-the-counter heartburn medication calls itself “Night Time Strength” and yet no evidence substantiates that the product is specially formulated to prevent or relieve nighttime heartburn, the claim is likely literally false. See Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharmaceuticals Co., 290 F.3d 578, 589-90 (3d Cir. 2002).

“Literally true but misleading” claims are the other type of statements covered by section 43(a)(1)(B). Such claims may prove misleading because, in the overall context of the advertisement, they convey a false impression or they may fail to disclose important qualifying information. For example, a commercial touting Anacin’s superiority over Tylenol in reducing inflammation faster may prove misleading inasmuch as consumers are led to believe that Anacin is superior in reducing actual pain or providing pain relief faster than Tylenol. See American Home Products Corp. v. Johnson & Johnson, 577 F.2d 160, 162-67 (2d Cir. 1978).

Where a literally true but misleading advertising claim is at issue, the plaintiff maintains the heavy burden of producing evidence to show that, in fact, the challenged statement tends to deceive a substantial portion of the intended audience. Sometimes the evidence takes the form of direct testimony of members of the purchasing public. More often, it consists of consumer perception survey data that must reliably show that a significant percentage of the respondents, usually 15 percent or above, was misled by the challenged claim. See Novartis Consumer Health v. Johnson & Johnson, supra, 290 F.3d at 590-94.

That is not what happens with claims that are shown to be literally false. There, a plaintiff need not prove that the audience is actually deceived or would likely be deceived by the literally false representation. The law presumes that a literally false advertisement deceives the intended audience. See Avis Rent-a-Car System, Inc. v. Hertz Corp., 782 F.2d 381, 386 (2d Cir. 1986). Because of this presumption, plaintiffs have a strong incentive to try to make a case, in the first instance, that a challenged statement is both unambiguous in meaning or message and also untrue, and hence literally false.

May a plaintiff who can show that a claim is literally false skirt not just the second element of a section 43(a)(1)(B) case—actual or likely deception—but also the third element—materiality? I.e., may he get around the requirement that the falsity have a measurable impact on the purchasing decisions of the presumably deceived audience?

The Traditional View: Materiality is Required

In confronting the question of whether a plaintiff must show that the false or misleading statement has had a material impact, in that it will likely influence the deceived customer’s purchasing decision, the majority of courts have consistently answered “Yes.” To establish liability, a plaintiff must prove that the claim is material, notwithstanding that it is also literally false. In William H. Morris Co. v. Group W., Inc., 66 F.3d 255 (9th Cir. 1995), for example, the district court held that the
one manufacturer’s notice to retailers that it had filed three lawsuits charging unfair trade practices against a rival that was selling an alleged substitute product was literally false, because only two, not three, of the lawsuits involved the product at issue; the court ruled that the manufacturer violated section 43(a). The Ninth Circuit, however, reversed on the grounds that the literal falsity had no marginal impact on the retailer’s purchasing decisions. Id. at 257.

In Cincinnati Sub-Zero Products, Inc. v. Augustine Medical, Inc., 800 F. Supp. 1549 (S.D. Ohio 1992), the district court made sure to determine that both parties’ literally false statements, at least some of which involved express comparisons to each other’s medical products, were likely to be material to the hospitals buying the products. Id. at 1558-59.

When Abbott Laboratories claimed that Ortho Diagnostic Systems had secured a contract to supply blood screening tests to the American Red Cross by falsely telling Red Cross that it expected FDA approval for a blood screening test by a certain date, the court scrutinized whether such a literal falsity about the dates of FDA approval was even a factor in the Red Cross’s decision to award Ortho the contract. See Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc., 920 F. Supp. 455, 475-76 (S.D.N.Y. 1996).

In Derby Industries, Inc. v. Chestnut Ridge Foam, 202 F. Supp. 2d 818 (N.D. Ind. 2002), a mattress producer alleged that a competitor’s videotape comparing the flammability test performance of the two firms’ mattresses was literally false. The court ruled that, even assuming the videotape were literally false, the plaintiff had utterly failed to show that the videotape influenced any potential customer’s purchasing decisions. Id. at 826.

The traditional view embodied in Derby Industries and these other decisions seems sensible and shows a healthy respect for causation. The decisions recognize, explicitly or implicitly, that regardless of the falsity of the representation, no claim lies if the plaintiff does not show that the representation affects the audience’s decisions with respect to the product. Suppose Black and Decker’s competitor advertises that its mitre saw has a motor speed of 4,000 rpm, when in fact it has a motor speed of 3,650 rpm, and suppose, therefore, that this advertisement is deemed literally false. Under the traditional view, Black & Decker cannot establish liability for the false statement unless the 350 rpm difference in motor speed actually influences consumers’ purchasing behavior, just as Black & Decker cannot prove damages absent a showing that its competitor’s increased sales resulted from those falsehoods. See Black & Decker (U.S.) Inc. v. Pro-

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Tech Power Inc., 26 F. Supp. 2d 834, 863-64 (E.D. Va. 1998). If a plaintiff can present no evidence that customers in part based, or would likely base, their purchasing decisions on the alleged literally false statement, where is the harm?

Further, suppose that seller A labels sweaters as 40 percent cashmere and 60 percent silk, but in fact the contents are 40 percent cashmere, 40 percent silk, and 20 percent merino. Does it automatically follow that having 20 percent less silk (and 20 percent more mero- rino) is material to a substantial percentage of the intended consumers? Consumers may be unaware of the label; they may not believe it; they may not be influenced by it; or they may have made their purchases in the same way, for other reasons. The question, it seems, should be resolved by resort to empirical evidence presented by the plaintiff, not by the say-so or intuition of a court.

New View I: Materiality is Presumed

Nevertheless, enough courts have decided that literally false statements are presumed material that one treatise states categorically: “False statements are presumed to be material.” 1 McKenney & Long, Federal Unfair Competition, “Lanham Act §43(a)” §6.03[1], at 6-22 and n.26.1 (West 2000).

Perhaps the most salient decision to adopt this view is that of a panel of the United States Court of Appeals for the Fifth Circuit in Pizza Hut, Inc. v. Papa John’s International, Inc., 227 F. 3d 489 (5th Cir. 2000). There, Pizza Hut had sued Papa John’s under section 43(a)(1)(B) of the Lanham Act over the latter’s use of the slogan, “Better Ingredients, Better Pizza.” The slogan was the tag line at the end of Papa John’s radio and television advertisements. These advertisements included ones that asserted that Papa John’s sauce was made from “fresh, vine-ripened tomatoes,” whereas its competitors’ was made from remanufactured tomato paste, and its dough used “clear, filtered water,” whereas its competitors used tap water.

The district court concluded that standing alone, the slogan, “Better Ingredients, Better Pizza,” was what is known as non-actionable puffery; that is, an example of non-quantifiable exaggeration or boasting upon which no consumer would reasonably rely. However, the court concluded that the slogan was misleading in view of the fact that the fact-based comparative claims regarding sauce and dough that preceded the slogan were misleading. The court permanently enjoined Papa John’s from using the slogan or a recognizable variant and awarded Pizza Hut almost a half a million dollars for having had to run corrective advertisements.

The Fifth Circuit agreed that the slogan was misleading in the context of the misleading dough and sauce claims. However, the court reversed for lack of materiality. Pizza Hut, the court ruled, “has failed to adduce any evidence demonstrating that the facts conveyed by the slogan were material to the purchasing decisions of the consumers to which the slogan was directed.” Id. at 491.

In discussing Lanham Act doctrine, the Fifth Circuit panel drew a sharp distinction between materiality in the context of literally false statements and materiality in the context of misleading statements. It stated (id. at 497):

With respect to materiality, when the statements of fact at issue are shown to be liter-
ally false, the plaintiff need not introduce evidence on the issue of the impact the statements had on consumers… In such circumstances, the court will assume that the statements actually misled consumers.

In making this statement, it appeared that the Pizza Hut court was inadvertently confusing the term “materiality” with that of “deception.” All the authorities cited by the court stand for the well-settled proposition that if advertising is literally false, no evidence of consumer deception is required; literally false statements generate a presumption of deception, not materiality. However, if the panel was really conflating terminology only by accident, it should be noted that it repeated this “error” consistently. The Fifth Circuit panel could not have been much clearer that, in its view, literally false statements are presumed to be not just deceptive, but also material, whereas misleading statements required evidence of both deception and materiality. It stated (id. at 502):

As previously discussed, none of the underlying facts supporting Papa John’s claims of ingredient superiority made in connection with the slogan (“Better Ingredients, Better Pizza”) were literally false. Consequently, in order to satisfy its prima facie case, Pizza Hut was required to submit evidence establishing that the impliedly false or misleading statements were material to, that is, they had a tendency to influence the purchasing decisions of the consumers to which they were directed.

Pizza Hut provides no rationale for its view that, in order to establish liability, a Lanham Act plaintiff must prove that misleading statements are material, and that he need not provide such proof when the statements are literally false.

The Fifth Circuit explicitly faulted two of Pizza Hut’s consumer perception surveys for altogether failing to address whether the slogan, “Better Ingredients, Better Pizza,” was material. Id. at 503. However, according to the court’s logic, if Pizza Hut had shown, for example, that Papa John’s underlying claim that its dough was made from “clear filtered water” was literally false (as opposed to misleading), then, somehow, its inability to show that the slogan or the claim even mattered to consumers would be suddenly irrelevant. That distinction is not compelling. It would not be followed by, at a minimum, the First, Second, or Eleventh Circuit, all of which have concluded that “the plaintiff must establish materiality even when a defendant’s advertisement has been found literally false.” See Johnson & Johnson Vision Care, Inc. v. 1800 Contacts, Inc., 299 F.3d 1242, 1250-51 (11th Cir. 2002), following Cashmere & Camel Hair Manufacturers Institute v. Saks Fifth Avenue, 284 F.3d 302, 312 n.10, and S.C. Johnson & Son, Inc. v. Clorox Co., 241 F.3d 232, 238 (2d Cir. 2001).

**New View II: Materiality Does Not Matter**

At least one case has decided that materiality does not matter at all for purposes of liability under the Lanham Act where the challenged statements are literally false. The case is Edmark Industries SDN.BHD. v. South Asia International (H.K.) Ltd., 89 F.Supp.2d 840 (E.D.Tex. 2000). There the court pronounced: “Materiality is not an element under section 1125 when a false statement is made—at best, it is a damage issue for the jury.” Id. at 846.

In Edmark, a manufacturer of certain vegetable slicers sued the importer for placing the phrase “Features fine german [sic] surgical steel blades” on the slicers’ boxes. In fact, the slicers used Japanese, not German, steel, as the defendant conceded.

The importer offered three defenses against being held liable for the erroneous phrase, each of which the court rejected. First, it contended that it sold the slicer only to two distributors, both of whom already knew that the knives were made of Japanese steel. The court stated that the two distributors already knew was irrelevant; consumers in retail shops where the slicer would be sold would not know this; they “would see and presumably read the box in making their purchasing decisions.” Id. at 846.

Second, the importer contended the phrase on the box was inconspicuous. The court ruled that argument went to damages, not liability; section 43 made no distinction between conspicuous and inconspicuous false statements for liability purposes. Id.

Third, the importer argued that the phrase was not material. Here, as noted above, the court stated that when a false statement is made, materiality is not an element of liability; rather, it is, at best, a damage issue for the jury. Id.

**Edmark** stands traditional Lanham Act jurisprudence on materiality on its head. Perhaps the court was correct to suppose that consumers “would see and presumably read the box in making their purchasing decisions.” Id. (emphasis added). However, the court assumed, with no evidentiary basis, that consumers would read the phrase “features fine german [sic] surgical steel blades” in particular and that the representation of “German” would affect their purchasing behavior. How did the court know this particular falsity made it appreciably more likely that consumers would buy, or not buy, the product than if the box omitted any reference to “German,” or if it contained the correct reference to “Japanese”? What if a consumer perception study showed that the false reference to German steel blades made a difference for fewer than two percent of the respondents? What if a consumer perception study showed that an overwhelming majority of respondents failed to notice the word “German” or to have any association with it?

Under Edmark, these questions do not matter. Because an advertiser has made a claim that is shown to be literally false, the claim must ipso facto be material. Empirical research as to what consumers believe about the claim or how it affects their purchasing behavior is of no import. The plaintiff carries no burden as to materiality; he skips over liability, and goes directly to damages.

**Origins of the New Views**

What are the origins, if any, of the new views on materiality under the Lanham Act? There appear to be two, both court decisions.

One is ALPO Petfoods, Inc. v. Ralston Purina Co., 720 F.Supp. 194 (D.D.C. 1989), aff’d in part vac’d on other grounds, 913 F.2d 958 (D.C.Cir. 1990). Several cases cite to ALPO for the proposition that materiality is presumed when there is a literally false statement. See, e.g., Telebrands Corp. v. E. Mishan continued on page 59
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One such statement would be “jumpsuit” as in 

“that is a misleading statement. The court found that the term ‘jumpsuit’ was not self-explanatory and did not have a common meaning in the context in which it was used. Therefore, the plaintiff was entitled to damages.” See FTD-0306-12-jump.p65, supra, at 273. It was enough that the advertising was false on its face and the plaintiff had evidence that the intended public relied on the literally false statements, just as they must prove past or potential injury for injunctive relief where promotions were literally false. See supra at 581-82 (plaintiff must still prove past or potential injury for injunctive relief where promotions were literally false).

Conclusion

Where potential negligence for premises liability accidents arguably extends beyond just the non-governmental premises owner, municipality entities will remain viable targets of litigation. In light of the recent, devastating club fire and trampling tragedies in Rhode Island and Chicago, where the combined death toll has exceeded 100 patrons, the plaintiff’s bar will undoubtedly strive to maintain claims against state and local authorities. Therefore, municipalities will continue to be the focus of liability actions due to the perceived “deep pockets” of such potential defendants.

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increase their use of outside law firms, 19 percent plan to decrease and 50 percent will remain the same.

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Full results of both surveys are posted on Altman Weil’s website, www.altmanweil.com.

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one, much less the local law enforcement or state ABC authorities. The town and state were grossly remiss in their licensing and inspecting duties. The town and state’s renewal of and/or failure to revoke Train’s package liquor license and failure to inspect his retail outlet led to the free-wheeling, wild west operation of the Ebony Club and the shooting of the plaintiff. Not only should the town and state authorities have recognized the danger involved, they in fact did. Neither, however, acted, but continued to drive by with “a wink and a smile.”

Conclusion

Does materiality still matter in the face of literally false statements? Demonstrating materiality is not onerous. The requirement is still meaningful in the eyes of most courts in most federal circuits. Notwithstanding some case law in apparent support of his or her view, one’s opponent will be hard-pressed to find good reasons why materiality no longer does or should matter.

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