Law and Disorder: Biggest False Advertising Cases of 2023

Kimberly M. Maynard

Frankfurt Kurnit Klein + Selz PC

Topics

- Record Breaking Jury Verdicts
- Deceptive Pricing
- Inaccurate Photographs
- Misleading Ingredients
- False Origin
- Different Claims for Identical Products
- Guidance from SCOTUS

Record Breaking Jury Verdicts

Frankfurt Kurnit Klein + Selz PC

Monster Energy v. Vital Pharmaceuticals

- Bang falsely claimed its energy drink contained "super creatine" and could cure various ailments
- $336 million awarded to Monster Energy
  - About $293 million in damages awarded by jury
    - $272 million for false advertising
    - $18 million for contractual interference
    - $3 million for theft of trade secrets
  - About $15 million in pre-judgment interest and $7 million in costs
  - About $21 million in attorneys' fees

CareDx Inc v. Natera Inc

- Natera falsely claimed its test for assessing risk associated with a kidney transplant was superior; relied on flawed clinical study
- $44.9 million in damages awarded by jury
  - $21.2 million in compensatory damages
  - $23.7 million in punitive damages
- After the verdict, Natera's stock fell, while CareDx's climbed
- Damages award overturned because CareDx did not prove actual deception or materiality
- Still an important lesson in jury trends

Deceptive Pricing

Khan v. Boohoo.com; Habberfield v. Boohoo.com

- Boohoo, on its Nasty Gal and PrettyLittleThing sites,
  - Rarely or never sells at "reference" or original prices
  - Falsely inflates value of product to trick shoppers into thinking they are getting a better deal
  - Induces shoppers to pay more and/or to buy when they otherwise would have passed
- >$200 million dollar combined settlement
  - $10 gift card plus shipping
  - Conspicuous disclosures

Khan v. Boohoo.com; Habberfield v. Boohoo.com

60% OFF Dresses, Tops & Co-Ords!*
It's now or never.

Download the app for an exclusive extra 20% OFF Everything*
Hurry ends soon!

*Discounts may not be based on former prices. See pricing policy

CLASS ACTION SETTLEMENT; CHECK YOUR EMAIL FOR $10 GIFT CARDS PLUS COMPLIMENTARY SHIPPING ON ANY PURCHASE. CLICK HERE FOR ADDITIONAL INFORMATION:
HTTP://WWW.BOOHOONATIONWIDEPRICINGSETTLEMENT.COM/

Frankfurt Kurnit Klein + Selz PC

Inaccurate Photographs

Chimienti v. Wendy's & McDonald's

- Photographs
  - do not accurately depict the burger as served
  - suggest the burger is more appetizing than reality
  - overstate the thickness of the burger and the amount of toppings

Chimienti v. Wendy's & McDonald's

- Motion to dismiss granted; leave to amend denied
- Images are not likely to mislead reasonable consumers
  - Attractive images are mere puffery and do not convey objective claims; consumers expect flattering depictions of products in ad campaigns
  - Size claim is objective but not misleading; the image and the actual burger have the same amount of meat, which is disclosed in the ad
  - Allegations about toppings are too conclusory and vague to stand
- Not the last of its kind
  - Beware of better written complaints
  - Substantiate any objective claims communicated by images
  - Consider how consumers will interpret the image
  - If consumers will think the image is real, it needs to be real

Misleading Ingredients

Kominis v. Starbucks

- Starbucks Refreshers drinks falsely advertised as containing real fruit for all the fruit listed, but some "fruits" are just flavoring
  - Mango is missing from Mango Dragonfruit Lemonade and Mango Dragonfruit
  - Açai is absent from the Strawberry Açaí Lemonade and Strawberry Açaí
  - Passionfruit is not present in the Pineapple Passionfruit Lemonade and Pineapple Passionfruit

- Suit focuses on menu items and images
- Starbucks moved to dismiss, arguing that consumers understand the names convey flavors (not ingredients) and that the images are accurate

Kominis v. Starbucks

- Starbucks Refreshers drinks falsely advertised as containing real fruit for all the fruit listed, but some "fruits" are just flavoring
  - Mango is missing from Mango Dragonfruit Lemonade and Mango Dragonfruit
  - Açai is absent from the Strawberry Açaí Lemonade and Strawberry Açaí
  - Passionfruit is not present in the Pineapple Passionfruit Lemonade and Pineapple Passionfruit
- Suit focuses on menu items and images
- Starbucks moved to dismiss, arguing that consumers understand the names convey flavors (not ingredients) and that the images are accurate
- **Motion to dismiss denied**; allegations are plausible
  - Full ingredient list is not disclosed
  - Advertising focuses on the ingredients (*e.g.*, lemonade and pineapple)
  - Some of the fruit depicted or mentioned is included as real fruit, suggesting that all of the fruit mentioned is real fruit
  - Images of products with real fruit reinforce this interpretation

Kominis v. Starbucks

- **Motion to dismiss denied**; allegations are plausible
  - Full ingredient list is not disclosed
  - Advertising focuses on the ingredients (*e.g.*, lemonade and pineapple)
  - Some of the fruit depicted or mentioned is included as real fruit, suggesting that all of the fruit mentioned is real fruit
  - Images of products with real fruit reinforce this interpretation

"Starbucks's position necessarily would entail that ***two of the three parts of each name refer to actual ingredients*** *(i.e., dragon fruit, strawberry, pineapple, and lemonade), yet that a reasonable consumer would* ***somehow know the third term*** *(i.e., mango, açaí, and passion fruit)* ***does not****."*

False Origin Claims

Suero v. NFL, et. al.

- The New York Giants and New York Jets falsely advertise themselves as New York teams, but they play in New Jersey
- Images of the NYC skyline in advertising for the MetLife stadium reinforces this falsehood
- Magistrate recommends dismissal
  - No reasonable football fan would understand the names to indicate that the teams play in New York

Identical Products, Different Claims

Akes v. Beiersdorf

- Beiersdorf, maker of Coppertone brand sunscreen, sells sunscreen and sunscreen labeled as specifically for the face
- Ingredients in both products are the same, but the face-screen costs more
- Plaintiff argues the claims that sunscreen is appropriate for use on the face + increased price = false suggestion that the face-screen is specially designed for the face
- Defendant: price comparison cannot be used to demonstrate deception, and the claims on the label are accurate
- Motion to dismiss denied
- Different labeling, plus the price difference, creates an allegedly false message that the face-screen was specifically formulated for the face

Developments from SCOTUS
(and Another Court)

Frankfurt Kurnit Klein + Selz PC

Jack Daniels v. VIP Products

- Trademark infringement and dilution claims
- Ninth Circuit dismissed under *Rogers* because use of Jack Daniels's IP was (1) artistically relevant and (2) not explicitly misleading
- SCOTUS held that the *Rogers* test does not apply when the defendant is using the trademark as a trademark
- What now?
  - Unclear whether *Rogers* still applies to non-trademark uses
  - Courts are struggling with what it means to use a trademark as a trademark
  - Cases that previously may have been dismissed at the motion to dismiss stage (or never filed), may have to be litigated further, especially in the Ninth Circuit
  - Likelihood of confusion analysis plays a bigger role
  - Impacts the risk assessment when evaluating advertising or other content

Jurisdiction Cases

- *Mallory v. Norfolk Southern Railway*
  - Some states have statutes or jurisprudence that treat corporate registration as consent to general personal jurisdiction
  - SCOTUS: Due Process Clause does not prohibit this practice
  - Companies may now be sued for any claim arising anywhere in any state where (1) they are registered to do business and (2) as part of that registration, they consented to jurisdiction
- *Impossible Foods v. Impossible X*
  - Impossible Foods sought a declaration of non-trademark infringement in its home court in California
  - Impossible X is currently located in Texas and sells products online
  - Ninth Circuit held that the Court had jurisdiction over Impossible X because it
    - Had a de facto headquarters or base in California for 2-3 years (several years before the suit)
    - Built its brand in California
    - Continued to promote the brand in California
  - Decisions suggests that brands may be subject to specific personal jurisdiction in states where they have or had a brand-related connection, including through advertising

Thanks!