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False Advertising and Antitrust Law: Sometimes the Twain Should Meet

Bruce Colbath & Nadezhda Nikonova[1]

I. INTRODUCTION

Imagine that a drug manufacturer figured out how to compete with a blockbuster drug by making a cheaper and more effective alternative. The pharmaceutical company that makes the blockbuster drug starts flooding the market with false advertisements about the safety of the alternative drug before it is even available to consumers, effectively taking away the new drug's ability to compete. In this hypothetical, there are two potential victims: the new manufacturer that could have competed on the merits and the consumers (and possibly third-party payors) that lost the ability to choose a potentially better product or benefit from the price decrease of the blockbuster drug. Should antitrust law remedy this situation?

Typically, consumer protection laws safeguard consumer victims of false advertising and the Federal Lanham Act is a remedy to protect parties with reasonable commercial interests affected by the conduct. But in some instances, when the conduct is significantly exclusionary, false advertising may come under the purview of the antitrust laws, specifically Section 2 of the Sherman Act.[2]

In the United States, the circumstances under which a false advertising claim can form the basis of a Section 2 violation are unclear. As detailed below, there are three competing theories: the Seventh Circuit prohibits such claims unless the false advertising is accompanied by a "coercive enforcement mechanism," while the Second, Sixth, and Ninth Circuits allow material false advertising to constitute a monopolization claim if it is significantly exclusionary. This stands in contrast to how false advertising is treated in Canada, where the Competition Act allows for civil as well as criminal punishment of false and misleading advertising without a showing of anticompetitive effect.

The disparity in the law can be thought of as a continuum, with American law at one side and Canadian law at the other. The significant debate in U.S. law, highlighted by the Canadian approach, is deeply rooted in policy. Questions of whether competition and consumer protection law should overlap tend to drive the diverging opinions. At least one academic proposal attempts to balance the diverging approaches and suggests an intermediate position.

II. UNITED STATES LAW

No Court of Appeal has explicitly barred basing an antitrust claim on false or misleading advertising, but some Circuits have imposed an almost insurmountable showing. The underlying

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[2] Sherman Antitrust Act, 15 U.S.C § 2 (2000).

policy concern is whether the conduct results in harm to competition and not just to a competitor—a hallmark purpose of the Sherman Act. To answer this question, courts ask who was harmed and the extent of the injury. But the interpretation of this policy, specifically whether it is possible for a false advertising claim to ever harm competition, drives the differences in the rulings.

A. The Seventh Circuit

The Seventh Circuit sets the highest bar. No monopolization claim has succeeded there on appeal based solely on false advertising. This Circuit reasons that deceptive advertising should not constitute an antitrust claim because (1) advertising can be pro-competitive even if it is false and (2) false advertising cannot preclude competition absent a coercive enforcement mechanism. According to Judge Easterbrook, "[f]alse statements about a rival's goods do not curtail output in either the short or long run. They just set the stage for competition in a different venue: the advertising market."[3] Judge Hamilton agrees, noting that the "genuine anticompetitive effects of false and misleading statements about a competitor are minimal, at best."[4] Accordingly, "the remedy is not antitrust litigation but more speech—the marketplace of ideas."[5] Most recently, Judge Hamilton held that deception did not constitute an antitrust violation because "absent an accompanying coercive enforcement mechanism of some kind, even demonstrably false commercial speech is not actionable under antitrust laws."[6] Other Circuits also follow this almost categorical approach.[7]

The Seventh Circuit's view is based on an early Areeda & Turner treatise that argues claims based on one competitor's disparagement of another "should presumptively be ignored" because it is difficult to identify those "false statements on which buyers do, or ought reasonably to, rely."[8] Areeda & Turner contended that consumers will "recognize disparagement as nonobjective and highly biased" and warn courts to exercise "caution ... against attaching much weight to isolated examples of disparagement."[9]

To sum up, the Seventh Circuit's view is that false advertising is incongruent with the basic principle that antitrust protects competition and not competitors. Warfare among suppliers and their different products **is** competition. Antitrust law does not compel your competitor to praise your product or sponsor your work. To require cooperation or friendliness among rivals is to undercut the intellectual foundations of antitrust law. Unless one group of suppliers diminishes another's ability to peddle its wares (technically, reduces rivals' elasticity of supply),

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[3] *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 623 (7th Cir. 2005) (Easterbrook, J.) (citing *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989)).

[4] *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 852 (7th Cir. 2011) (Hamilton, J).

[5] *Mercatus Grp.*, 641 F.3d at 852; *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 400 (7th Cir. 1989) (Easterbrook, J.).

[6] *Mercatus Grp.*, 641 F.3d 834, 852.

[7] *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 132 (3d Cir. 2005) ("deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned."); *Covad Commc'ns Co. v. Bell Atl. Corp.*, 398 F.3d 666, 674-75 (D.C. Cir. 2005) (bait-and-switch pre-announcement of DSL service enhanced competition by encouraging plaintiff to increase own advertising).

[8] 3 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW, ¶ 737b at 280–81 (1978).

[9] *Id.*

there is not even the beginning of an antitrust case and no reason to investigate further to determine whether the restraint is "reasonable."[10]

B. The Second, Ninth, and Sixth Circuits

On the other end of the spectrum in the United States, the Second and Ninth Circuits presume that antitrust harm from false advertising is *de minimus*. A plaintiff must overcome this presumption in order to bring a Section 2 claim based on false or deceptive advertising. These Courts have announced a six-part test that requires showing the advertising or representations were:

1. clearly false,
2. clearly material,
3. clearly likely to induce reasonable reliance,
4. made to buyers without knowledge of the subject matter,
5. continued for prolonged periods of time, and
6. not readily susceptible to neutralization or other offset by rivals.[11]

For example, in *National Association of Pharmaceutical Manufacturers*, the Second Circuit permitted a monopolization claim to proceed because the defendant's false advertising about safety concerns was "likely to induce reasonable reliance" and was "not readily susceptible of neutralization or other offset."[12]

A somewhat more lenient standard is enunciated by the Sixth Circuit, which does not require all six of the above elements to be satisfied. A Sixth Circuit plaintiff must show that the clearly false advertising would be difficult or costly to counter.[13] The court reasoned that false advertising "would not damage competition and hence be a violation of the Sherman Act unless it was so difficult for the plaintiff to counter that it could potentially exclude competition."[14] The Fifth Circuit also employed a variation of the Second, Sixth, and Ninth Circuit tests.[15]

To sum these opinions up, the judicial approach outside the Seventh Circuit is that "[f]alse advertising cannot help consumers, and hence cannot be defended as beneficial to competition."[16] Thus, if a plaintiff can show that the alleged false advertising decreased competition, it can form the basis of an antitrust claim.

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[10] *Schachar*, 870 F.2d at 399.

[11] *Nat'l Ass'n of Pharm. Mfrs. v. Ayerst Labs.*, 850 F.2d 904, 916 (2d Cir. 1988); *Am. Prof'l Testing Serv. v. Harcourt Brace Jovanovich Legal & Prof'l Publs.*, 108 F.3d 1147, 1152 (9th Cir. 1997) (citing *Nat'l Ass'n of Pharm. Mfrs.* 850 F.2d at 916).

[12] *Nat'l Ass'n of Pharm. Mfrs.*, 850 F.2d at 916-17.

[13] *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 323 F.3d 366, 371 (6th Cir. 2003); *Innovation Ventures, LLC v. N.V.E., Inc.*, 694 F.3d 723, 741 (6th Cir. 2012); *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 786-88 (6th Cir. 2002) (deceptive statements made in role of "category manager" were anticompetitive).

[14] *Id.* at 371-72.

[15] *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 100 (5th Cir. 1988) ("A monopolist is not forbidden to publicize its product unless the extent of this activity is so unwarranted by competitive exigencies as to constitute an entry barrier.").

[16] *Am. Council of Certified Podiatric Physicians & Surgeons*, 323 F.3d at 371.

C. District Court Decisions

District Court decisions have also run the gamut, from allowing plaintiffs to bring monopolization claims based on false advertising[17] to uniformly rejecting them based on the Seventh Circuit's reasoning.[18] Notably, one district court in the Seventh Circuit allowed an antitrust claim to survive, though it was based partially on denigrating commercial speech, because the plaintiff presented evidence that the alleged false advertising was part of a greater "course of conduct" showing the defendant possessed the intent to monopolize a certain market.[19]

In a Texas district court, a jury recently awarded $113.5 million in "deception damages" where a defendant made false claims about its competitor's safety syringe products. The jury found that the statements regarding the syringe product violated both the Lanham Act and the Sherman Act, but awarded no antitrust damages.[20] The case is ongoing and will likely be appealed. It will be interesting to see where on the spectrum the Fifth Circuit will ultimately land in a case that squarely confronts the issue—whether the more recent Seventh Circuit reasoning will be persuasive, or if it will revert to the Second and Ninth Circuit approaches as it did in *Phototron Corp*.[21]

What all of the courts have in common is that they ask whether the false advertising is so significant that it either precludes entry, or so severely harms the perception of the product in the market that the competitive place of the product is significantly diminished, *i.e.*, exclusionary.

D. Lanham Act

If false advertising violates the Lanham Act, is a remedy under the antitrust laws even necessary?

Section 43(a) of the Lanham Act prohibits false or misleading statements that are likely to deceive consumers and cause injury to the plaintiff.[22] Standard civil remedies are available under

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[17] *In re Apple iPod iTunes Antitrust Litig.*, 796 F. Supp. 2d 1137, 1145-46 (N.D. Cal. 2011) (dismissing a claim because there was insufficient evidence to overcome the *de minimus* presumption); *Avery Dennison Corp. v. Acco Brands, Inc.*, 2000 WL 986995, at *21 (C.D. Cal. Feb. 22, 2000) (triable issues exist with whether plaintiff overcame the *de minimus* presumption to establish that sales campaign was anticompetitive).

[18] *Int'l Equip. Trading, Ltd. v. AB SCIEX LLC*, 2013 WL 4599903, at *7-8 (N.D. Ill. Aug. 29, 2013); *Briggs & Stratton Corp. v. Kohler Co.*, 405 F. Supp. 2d 986, 990 (W.D. Wis. 2005) ("In the absence of facts connecting plaintiff's allegedly deceptive practices to bona fide violations of antitrust law, *Sanderson* remains on point.").

[19] *Nexstar Bd., Inc. v. Granite Bd. Corp.*, 2012 WL 2838547, at *7-8 (N.D. Ind. July 9, 2012).

[20] *Retractable Technologies, Inc., et al., v. Becton, Dickson & Company*, No. 2:08-cv-16, Dkt. 577, at 4 (E.D. Tex., Sept. 19, 2013).

[21] *Supra note* 15; *cf. Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 527 (5th Cir. 1999) ("Ultimately, Stearns does not and cannot claim that it has been excluded from competing on the merits. Every sales pitch and every suggestion that FMC made was evaluated by independent municipal actors who were concerned solely with the merits of the product they were charged with evaluating … this Court is ill-suited to attempt to judge the relative merits of electromechanical bridges versus hydraulic bridges. That decision is left in the hands of the consumer.").

[22] Lanham (Trademark) Act, 15 USC § 1125(a) (1946) (established a federal cause of action for false advertising).

the Lanham Act, including damages, injunctive relief, and attorneys' fees.[23] Treble damages are only available if the conduct was willful.

Although it is easier to bring a false advertising claim under the Lanham Act than under the Sherman Act, the Lanham Act's available remedies are not as robust. The Sherman Act allows for the injunction of anticompetitive conduct (to everyone injured) and automatic treble damages. In contrast, Lanham Act standing is limited to "any person who believes that he or she is or is likely to be damaged by [the unfair competition]."[24] Consumers lack standing to sue under the Lanham Act for false advertising.[25] Thus, the Lanham Act's focus is on protecting the "competitor," not competition. It is consequently more limited with respect to remedy and standing because it does not purport to remedy the potential anticompetitive effects of the false advertising.

Though the Lanham Act provides less in the way of remedies than the Sherman Act, the availability of alternative redress is one reason underlying the Seventh Circuit's rule disfavoring monopolization cases based solely on false advertising. The Court noted, "[t]o the extent that a falsehood results in some harm a competitor, that matter is better suited for the laws against unfair competition or false advertising, not the antitrust laws, which are concerned with the protection of competition, not competitors."[26] The Second and Ninth Circuits, on the other hand, do not rely on the availability of other remedies in determining what claims should proceed.

III. CANADIAN LAW

Canadian law contrasts sharply with the U.S. tests detailed above. In Canada, false advertising is codified within the Competition Act and there are criminal as well as civil penalties for false and misleading advertising.[27] Private parties can bring actions under Section 36,[28] but those claims are not entitled to treble damages.[29] Moreover, the Canadian Competition Bureau has the ability to pursue criminal remedies for deceptive marketing practices if willful conduct is involved and it would be in the public interest.[30]

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[23] *Id.* at §§ (a), (c), (bb)(3).

[24] *Id.* at § (a).

[25] *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014) ("A consumer who is hoodwinked . . . may well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act — a conclusion reached by every Circuit to consider the question."); *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1383, n.5 (5th Cir. 1996); *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686, 692 (2d Cir. 1971).

[26] *See, e.g.*, *Mercatus Grp.*, 641 F.3d at 852 (internal quotations omitted).

[27] *See* Jennifer Hefler, Denes Rothschild, & Robert S. Russell, *Canada: Private Antitrust Litigation*, *in* THE ANTITRUST REVIEW OF THE AMERICAS, at § 3.2 (2014); *see also* Yves Bériault & Oliver Borgers, *Overview of Canadian Antitrust Law*, in THE ANTITRUST REVIEW OF THE AMERICAS, 76 (2004).

[28] Competition Act, R.S.C. 1985, cC-34, §§ 36, 52 (Can.).

[29] *Id.* at § 36.

[30] *Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the Competition Act*, COMPETITION BUREAU 1 (Sept. 22, 1999), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/ct01181e.pdf/$file/ct01181e.pdf. But the Competition Bureau typically resorts to pursuing civil remedies. Competition Act, R.S.C. 1985, cC-34, § 74.

The Canadian Competition Act covers false advertising that injures a competitor regardless of whether the advertising had an adverse effect on competition. This demonstrates Canada's broader view of competition, as reflected in the purpose of the Competition Act:

The purpose of this Act is to maintain and encourage competition in Canada in order to: (i) promote the efficiency and adaptability of the Canadian economy, (ii) expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, (iii) ensure that small- and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and (iv) provide consumers with competitive prices and product choices.[31]

Any activity that decreases a consumer's product choice or removes the opportunity for a firm to participate in the economy (*i.e.*, compete), is subject to the Act. This includes antitrust and consumer protection violations since Canadian law sees both as necessary to promote competition.

IV. A MODEST PROPOSAL FROM ACADEMIA

The academic suggestions of where the law should stand also run the gamut. As stated above, Areeda & Turner contended that false advertising should almost never be a basis of a Section 2 offense.[32] In due course, Areeda and Hovenkamp included the Second and Ninth Circuits' six-factor test in their seminal treatise.[33] On the other side, academics like Maurice Stucke argue that false advertising should almost always be actionable under Section 2 after a "quick look."[34]

A recent a Harvard Law Note proposed a middle ground between the Areeda/U.S. Courts approach on one side and the Stucke/Canadian approach on the other. The Harvard test would allow a plaintiff to bring a false advertising monopolization claim when "the deception was reasonably capable of contributing significantly to the defendant's monopoly power … [and] a defendant would be able to rebut this prima facie case by demonstrating that the deception did not contribute to its monopoly power."[35]

According to the Note, this test would deter plaintiffs from bringing meritless claims, while targeting the type of deception that antitrust laws ought to be concerned with.[36] The test would require more work from the parties and the court at the beginning of a case to analyze the competitive effects of the false advertisement, but would balance the issue of false negatives with over-deterrence. This approach is premised on the claim that "deception sometimes has anticompetitive effects and never has pro-competitive effects"[37] It therefore dismisses the Seventh Circuit's presumption (that false advertising can never harm competition) as having no empirical foundation. Assuming that false advertising may be detrimental to competition and analyzing

[31] *Id.* at § 1.1 (Can.).

[32] AREEDA & TURNER, *supra note* 8, at ¶ 737b at 280-81.

[33] PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 787b at 327 (3d ed. 2008).

[34] Maurice E. Stucke, *When a Monopolist Deceives*, 76 ANTITRUST L. J. 823, 841 (2010) ("if a monopolist's deceit reasonably appears capable of making a significant contribution to its attaining or maintaining monopoly power, then a prima facie violation of Section 2 of the Sherman Act has been established.").

[35] *Note: Deception as an Antitrust Violation*, 125 HARVARD L. REV. 1235, 1237 (2012).

[36] *Id.* at 1237, 1247-1251.

[37] *Id.* at 1247.

actual competitive effects seek to harmonize the antitrust and consumer protection bodies of law, rather than pit them against each other.

V. CONCLUSION

We have now seen the restrictive Seventh Circuit test, the less restrictive Second and Ninth Circuit tests, the pared-down Sixth Circuit approach, and decisions by the district courts. We have also seen diverse academic proposals, focusing on actual anticompetitive effects. Each approach incorporates a filter—not all false advertising is anticompetitive and subject to Section 2 scrutiny and remedies. At the same time, enough courts and academics (and, certainly, the Canadians) agree that not every false advertising claim should be rejected outright because there is a potential for anticompetitive harm. The question of where to stop along the continuum remains.

It is also undisputed that false advertising can be part of a larger scheme to monopolize a relevant market. Indeed, the only district court in the Seventh Circuit to allow an antitrust claim partially based on false advertising did so because the disparagement was part of a greater "course of conduct" to show that defendant possessed the intent to monopolize a certain market.[38] It is thus not surprising that it is difficult to bring an antitrust claim based solely on false advertising.

The resolution of this issue should be deeply rooted in policy. In a 2002 speech, Timothy Muris, then Chairman of the Federal Trade Commission and former Director of both the Bureaus of Competition and Consumer Protection, addressed the divide between competition and consumer protection law and policy. He argued, "[w]e need to work together to make sure that these natural allies [competition and fairness] are complementing, not undercutting, each other."[39] If false advertisement is in fact exclusionary, then fairness may dictate that competition be protected by the antitrust laws; the Lanham Act will not suffice to remedy the anticompetitive effects of the false advertising. Failing to afford consumers relief by not providing an antitrust remedy seems to confound antitrust policy that these laws were designed to protect consumers.

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[38] *Nexstar Bd., Inc.*, 2012 WL 2838547, at *7-8.

[39] Timothy J. Muris, Chairman of the Fed. Trade Comm'n, Prepared Remarks at the Fordham Corporate Law Institute's Twenty Ninth Annual Conference on International Antitrust Law and Policy 2002: The Interface of Competition and Consumer Protection (Oct. 31, 2002), *available at* http://www.ftc.gov/public-statements/2002/10/interface-competition-and-consumer-protection.