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I. INTRODUCTION

In late 2013, a jury in the Eastern District of Texas, Marshall Division, which had been considering whether Becton-Dickinson should be held liable for attempted monopolization of the market for retractable safety syringes, concluded that Becton had engaged in exclusionary conduct against Retractable Technologies by means of deceptive advertising and awarded the plaintiff over $113 million in "Deception Damages."[2] It was a remarkable milestone in a long-running battle between the two competitors, which had been litigating patent infringement and antitrust allegations for several years as they battled for contracts in a rapidly consolidating medical provider market.

The case raises important questions regarding the relationship between false advertising and antitrust law, some of which will be litigated in post-trial motions and inevitable appeals. Most importantly, when can false advertising give rise to violations of the Sherman Act? Is the theory, while rarely invoked, gaining traction? Will *Rectractable Technologies* be a harbinger of more such litigation?

II. *RETRACTABLE TECHNOLOGIES V. BECTON-DICKINSON*

Retractable syringes are used in hospital settings to deliver injections while reducing the incidence of needle sticks to medical workers. Becton and Retractable compete in the market for such syringes and related injection devices, dealing with both medical providers and with a small number of large Group Purchasing Organizations ("GPOs"), which act as a sort of broker between providers and suppliers of medical products.

The main theme of Retractable's complaint against Becton was that Becton had either monopolized or attempted to monopolize the market for safety syringes, conventional syringes, and safety VI catheters. Tacked on to its lengthy complaint detailing the alleged anticompetitive conduct was a count for false advertising in violation of Section 43(A) of the Lanham Act. The advertising falsehoods, it was alleged, contributed to and were part of the defendant's alleged scheme to monopolize those markets. Specifically, Retractable claimed that Becton had made false claims that its needles were the thinnest and sharpest, and that they had the least "waste space," which is the dead space containing left over medication after the injection has been given.

Becton's exclusionary conduct manifested itself in several ways, according to the evidence presented by Retractable at trial. First, Becton allegedly entered into standard form contracts with providers that penalized providers with higher prices if they purchased competing products.

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[2] *Rectractable Techn., Inc. v. Becton Dickinson and Company, Inc.*, No. 2-08-CV-16 (E.D. Tx. 2013) (Davis, J.).

Second, Becton allegedly had obtained high market shares, ranging from 50-69 percent in markets with high barriers to entry, which were two to three times the sizes of their next largest rivals in those markets. Third, Becton allegedly charged prices ranging from 20-40 percent higher for certain syringe products than its rivals.

At trial, Retractable presented extensive evidence attempted to tie the alleged false claims to exclusionary conduct and anticompetitive effects. For example, it elicited testimony from Harvard Professor Einer Elhauge, who opined that the false advertising claims contributed to Becton's illegal attempted monopolization of the retractable syringe market in a few ways. First, said Professor Elhauge, false claims can directly harm competitors by reducing their market share relative to that of the false advertiser. Second, reducing market share tends to drive up costs for the smaller rival, because the smaller rival cannot achieve the same economies of scale as its monopolistic competitor. Third, false ad claims harm purchasers, because if they act on incorrect information, they make less efficient choices and pay higher prices due to weakened competition.

Retractable's trial strategy worked, because the jury form reveals the jury's finding that although Retractable had not proven its monopolization claims, contractual restraint of trade claims, or exclusive dealing claims, it had proven its case on attempted monopolization of the safety syringe market due to "deception" and should therefore be awarded damages. The verdict is peculiar, because the jury was not asked to assess damages for the Lanham Act violation, but solely for the attempted monopolization. Thus, a reasonable interpretation of the jury's actions is that the jury concluded that Becton had attempted to monopolize the market for these syringes by means of false advertising, and in so doing had injured its rival.

Becton's motion for judgment as a matter of law, or new trial poses a straightforward question: Can false advertising ever be so severe as to give rise to a violation of antitrust law? Its motion argues as follows:

> The claim that false advertising and product disparagement "would be sufficient to turn a nonmonopolist [like BD] into a monopolist" cannot succeed, except perhaps "in rare and gross cases."[3] Misleading ads and product comparisons are prevalent—indeed, they most often are found—in highly competitive markets. Exaggerating the virtues of one's own product or misrepresenting the features of a rival's may be unfair, but they do not indicate a lack of competition and do not threaten to "destroy competition itself."[4] That is why the Fifth Circuit has held that "the purposes of antitrust law and unfair competition law generally conflict."[5] An act of "unfair competition" like false advertising "is still competition" and, therefore, raises no antitrust issue unless used in an extreme case to gain monopoly power "by eliminating a rival concern from the market.[6]"[7]

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[3] 3B AREEDA & HOVENKAMP, ANTITRUST LAW, ¶ 782a at 321-22 (3d ed. 2008).

[4] *Id.*

[5] *Nw. Power Prods, Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 88 (5th Cir. 1978).

[6] *Id.* at 88-89 (emphasis added).

[7] Defendant Becton Dickinson and Company's Renewed Motion for Judgment as a Matter of Law, or Alternatively For New Trial or Remittitur, *Rectractable Techn., Inc. v. Becton Dickinson and Company, Inc.*, No. 02:08-cv-16, p. __

Stated differently, in a market lacking competition, Becton would have no incentive to advertise at all—much less to make false claims. Becton goes on to argue that even if it had engaged in false advertising, its conduct did not fall within the exceedingly narrow category of cases in which false advertising can be said to "destroy competition itself."

III. IMPLICATIONS

Becton's motion is certainly correct that false advertising very rarely gives rise to liability for antitrust violations under Sections 1 or 2 of the Sherman Act. However, this does not mean that the theory is altogether untenable. Although some Circuits are more hostile to these kinds of claims than others, there are a few cases stating that false advertising can cause antitrust injury—over and above the typical advertising injury that is remediable under the Lanham Act. These courts have recognized that, under certain conditions, false advertising campaigns can contribute to a defendant's anticompetitive conduct.

One published case provides a vivid illustration of the kind of false advertising allegation that might plausibly support a Sherman Act claim. In *Caribbean Broadcasting System,*[8] the D.C. Circuit partially reversed and remanded a decision of the District Court that had dismissed the plaintiff's antitrust claims, which were partly based on allegations that the defendant had engaged in pernicious false advertising. Although the decision primarily deals with the extraterritorial application of U.S. antitrust law and jurisdiction over foreign defendants, the Court did suggest that the underlying false advertising allegations could plausibly support a claim of antitrust injury.

The plaintiff and defendant owned competing FM radio stations in the eastern Caribbean, which includes Puerto Rico and the Virgin Islands. The defendant was the incumbent broadcaster. The plaintiff was a new entrant to the market, and having based its station in the British Virgin Islands, quickly realized that it was having great difficulty selling advertising. Plaintiff alleged that the defendant had prevented it from fairly competing for advertising dollars by falsely claiming that only the defendant's signal could reach the entire Eastern Caribbean, which would lead advertisers to believe that they could fulfill their advertising needs by contracting only with the defendant. The Court concluded that these allegations (along with other evidence of anticompetitive conduct) could contribute to an attempt to monopolize the market for English-language radio broadcast in the eastern Caribbean region.

A 1997 decision from the Ninth Circuit also injects a glimmer of hope for the false advertising-as-antitrust theory, but emphasizes its limited application. In *American Prof. Testing Serv.,*[9] the Court considered whether the defendant, sponsor of the market-dominant BAR/BRI bar review course, violated the Sherman Act through conduct that included distributing disparaging fliers about the plaintiff's competing course offering. The plaintiff alleged that Harcourt distributed anonymous fliers on campuses across the country alleging that the plaintiff's company was being investigated by the SEC and might not be able to sustain its review

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[8] *Caribbean Broadcasting System, Ltd. V. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998).

[9] *American Prof. Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal and Prof. Pubs., Inc.*, 108 F.3d 1147 (9th Cir. 1997).

courses through the summer as a result of the bankruptcy filing of its previous parent company. The allegations were clearly false, but allegedly had a devastating impact on enrollment in the plaintiff's programs.

At trial, a jury rendered a verdict for American on its §2 Sherman Act claims, the Lanham Act, tortious interference, and unfair competition, and assessed nearly $1 million in damages, before trebling. After trial, however, the district court granted Harcourt's motion for Judgment as a Matter of Law on the Sherman Act claim, concluding that there was insufficient evidence that Harcourt engaged in exclusionary conduct or possessed monopoly power in any market. American then appealed.

On appeal, the Ninth Circuit considered whether the district court erred by overturning the jury's finding that Harcourt's disparagement of American constituted exclusionary conduct under the Sherman Act. The Court began by noting that "[w]hile the disparagement of a rival or compromising a rival's employee may be unethical and even impair the opportunities of a rival, its harmful effects on competitors are *ordinarily* not significant enough to warrant recognition under §2 of the Sherman Act."[10] It reasoned that the competitor's actions must be so severe as to "destroy competition itself." After citing a passage from *Areeda & Hovenkamp* for the proposition that false advertising should "presumptively be ignored" under the Sherman Act, the Court went on to adopt a Second Circuit test for overcoming a presumption that false advertising has a *de minimis* effect on competition:

> [A] plaintiff may overcome the de minimis presumption 'by cumulative proof that the 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, and [6] not readily susceptible of neutralization or other offset by rivals.'"[11]

The Court concluded that the record did not demonstrate students were clearly likely to rely on the false fliers or that the false claims were not readily susceptible to neutralization through counter advertising. It thus affirmed the court's judgment.

The Seventh Circuit, by contrast, appears to have completely shut the door to these kinds of false advertising/antitrust claims. For example, the Court stated in *Sanderson*[12] "[s]ome other law may require judicial intervention in order to increase the portion of truth in advertising; the Sherman Act does not." This is because "antitrust law condemns practices that drive up prices by curtailing output . . . . False statements about a rival's goods do not curtail output in either the short or the long run. They just set the stage for competition in a different venue: the advertising market."[13]

[10] *Id.* at 1151 (emphasis added).
[11] *Id.* (citing *National Assn. of Pharmaceutical Mfrs. v. Ayerst Labs.*, 850 F.2d 904, 904, 916 (2d Cir. 1988)).
[12] *Sanderson v., Culligan Int'l Co.*, 415 F.3d 620, 624 (7th Cir. 2005).
[13] *Id.* at 623.

Similarly, *Schachar*,[14] another antitrust case based on a supposed commercial falsehood, observed:

> 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), there is not even the beginning of an antitrust case, no reason to investigate further to determine whether the restraint is "reasonable."

IV. IS THE FALSE ADVERTISING = ANTITRUST THEORY VIABLE?

It is well-established that the free flow of truthful advertising is important to the proper functioning of markets. For example, courts have intervened repeatedly to enjoin advertising restrictions that are deemed to unduly chill or prevent dissemination of non-deceptive pricing information.[15] The FTC has also acted under Section 5 to enjoin competitors that have attempted to settle litigation disputes by covenanting to refrain from comparative advertising about each other's products and services.[16]

The cases teach that allegations of false advertising are highly unlikely, in isolation, to carry the day on a claim of monopolization or attempted monopolization. However, such allegations can provide compelling ammunition in an otherwise well-grounded complaint alleging that they were part of a broader pattern of monopolistic, exclusionary conduct.

The circumstances giving rise to these possibilities generally involve markets with very few competitors (as is the case generally in almost all antitrust cases), high barriers to entry, allegations of attempts by an incumbent to exclude newer market entrants through an ongoing campaign of falsehoods, little ability for the smaller rival to fight back on equal terms in order to provide corrective advertising (perhaps due to superior access by the incumbent to purchasers), and false statements that go right to the heart of the suitability or performance of the newly introduced product. The verdict in *Retractable Technologies*, if it stands, may breathe new life into such claims—at least in the Fifth Circuit.

[14] *Schachar v. American Academy of Ophthalmology, Inc*., 870 F.2d 397 (7th Cir.1989).

[15] *See, e.g., National Society of Professional Engr's*., 435 U.S. 679 (1978) (concluding that engineering group's prohibition on advertising of fee schedules to prospective customers could constitute unreasonable restraint of competition under the Sherman Act under Rule of Reason analysis because the ban on competitive bidding prevents all customers from making price comparisons in the selection of engineers); *California Dental Association v. FTC*, 526 U.S. 756 (1999) (remanding decision enjoining a dental association's ban on advertising of discounts for a fuller analysis of whether the ban had pro-competitive or anticompetitive effects).

[16] *See, e.g., In the Matter of Sensormatic Electronics Corp*., File No. 951-0083 (FTC 1983).