Contributory False Advertising Liability Is Officially a Thing in the Eleventh Circuit

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On August 7, the Eleventh Circuit Court of Appeals, ruling on a question that the Court determined to be one of first impression, has ruled that a cause of action for contributory false advertising can be maintained under Section 43(a) of the Lanham Act.

In *Duty Free Americas, Inc. v. Estée Lauder Companies, Inc.*, No. 14–11853 (11th Cir. Aug. 7, 2015) (opinion available here), Duty Free Americas (DFA), an operator of airport duty-free shops that had ceased doing carrying Estée Lauder products, contended that Estée Lauder supported false and disparaging representations by DFA's competitors about the consequences of DFA's non-carriage of Estée Lauder for DFA's likely performance as a shop operator in competitive bidding to airports. Among Estée Lauder's defenses was that no "derivative" cause of action for false advertising exists. The Court rejected this argument, although it affirmed dismissal of the count for insufficiently pled supporting allegations.

Key to the Court's reasoning was that contributory liability is well established under the Lanham Act as applied to trademark infringement, where manufacturers and distributors are routinely held liable for intentionally inducing infringement by others, including by continuing to supply product to customers that they know or should know to be infringers. This doctrine has no precise boundary and has been defined as covering anyone who "knowingly participates in furthering" infringement. *Bauer Lamp Co. v. Shaffer*, 941 F.2d 1165, 1171 (11th Cir. 1991). The causes of action for trademark infringement and for false advertising are physically close neighbors in the Lanham Act, located in Sections 43(a)(1)(A) and 43(a)(1)(B) respectively, and the Court saw this statutory structure as supporting the suggestion that they were intended to have similar scope. The Court also cited cases suggesting that the two Lanham Act theories were "motivated by a unitary purpose" to protect businesses against two strains of "unfair competition." Contributory liability also struck the Court as consistent with the Supreme Court's rationale in recognizing the doctrine in trademark cases in *Inwood Labs., Inc. v. Ives Labs.*, Inc., 456 U.S. 844 (1982). The Eleventh Circuit concluded, "It would be odd indeed for us to narrow the scope of the false advertising provision -- a cause of action plainly intended to encompass a broader spectrum of protection -- and hold that it could be enforced only against a smaller class of defendants."

Having established the existence of the cause of action, the Court went on to consider the sufficiency of DFA's allegations in support of its theory, providing useful guidance into how contributory false advertising would be analyzed. It ruled that a plaintiff alleging contributory Section 43(a) false advertising liability must show

(1) "a third party … directly engaged in false advertising that injured the plaintiff" and (2) "the defendant contributed to that conduct either by knowingly inducing or causing the conduct, or by materially participating in it."

In the first prong, all elements that would have enabled the plaintiff to sue the actual advertiser must be established. In the second, the defendant must be shown to have intended to participate in or actually know of the false advertising (including that it was false), and "actively and materially furthered the unlawful conduct -- either by inducing it, causing it, or in some other way working to bring it about." Analogizing from contributory trademark liability theories that have been successful in the past, the Court suggested that such activities might include directly controlling or "monitoring" the third party's false advertising or providing a product or service necessary to support the false advertising.

These standards may seem disconcertingly vague and broad, but it was here that DFA's case actually failed. It alleged that Estée Lauder made it possible for DFA's competitors to misrepresent their advantage in carrying Estée Lauder products simply by continuing to supply them with Estée Lauder products, while refusing to re-enter a business relationship with DFA. The Court found this activity too attenuated to amount to providing a product or service necessary to support the false advertising. There was no allegation that Estée Lauder monitored or controlled the advertising of its customers to airports.

The *Duty Free Americas* decision may not expand the scope of false advertising liability beyond what existed previously, for the Court noted that "district courts routinely assume that contributory liability claims are available," citing past opinions in several districts and that one Second Circuit decision, *Societé des Hotels Meridien v. LaSalle Operation P'ship, L.P.*, 380 F.3d 126 (2d Cir. 2004), "recognized the possibility." This decision, however, as the first federal appellate decision to have "explicitly considered and resolved the question," solidifies and clarifies the doctrine and should serve as a wake-up call to occupants of various links in the marketing chain that have some level of involvement with the development and dissemination of advertising claims. This is especially true in the era of online advertising and social media campaigns, where many hands can touch an advertisement before it reaches consumers.