Tenth Circuit Rules that False Advertising Plaintiffs Must Allege Evidence of Implied Falsity and Quantify Damages at Pleading Stage

September 9, 2015

In a Lanham Act false advertising action by cosmetic surgeons against plastic surgeons – yes, those are two different things – the Tenth Circuit Court of Appeals, in an August 31 opinion, affirmed dismissal of Lanham Act false advertising claims. The Court of Appeals held that the plaintiffs failed to plead a Lanham Act claim that "has facial plausibility." *Drake Vincent v. Utah Plastic Surgery Society*, No. 13-4146 (10th Cir. Aug. 31, 2015), on appeal from No. 2-12-CV-01048-TS (D. Utah).

Specifically, the court found that the eleven paragraphs of plaintiffs' complaint that "identify the challenged statements made by Defendants and describe Plaintiffs' characterization of those statements," including such allegations as, "Defendants' false and misleading statements have created confusion among Plaintiffs' clients, potential clients, and will continue to do so if permitted to do so," did not meet the *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), standard for the pleading of adequate supporting facts. The court observed that extrinsic evidence, generally in the form of a consumer survey, is needed to support a claim of implied falsity and that therefore a plaintiff must plead the existence of evidence that "a statistically significant part of the commercial audience holds the false belief allegedly communicated by the challenged advertisement" (quoting *Johnson & Johnson-Merck Consumer Pharm. Co. v. SmithKline Beecham Corp.*, 960 F.2d 294, 297-98 (2d Cir. 1992)). The court found the plaintiffs' complaint deficient because "Plaintiffs have not indicated that they possess any such surveys," adding that "While Plaintiffs' complaint need not contain sufficient evidence to prove their claim, they cannot file an inadequate complaint and then use the discovery process to develop a factual basis for their claims in the first instance."

The court's ruling on the plaintiffs' damages allegations was similar. The complaint contained the typical Lanham Act allegation that "Plaintiffs have been and will continue to be damaged as a result of Defendants' false statements by the resultant market confusion, by disruption of Plaintiffs' relationship with its customers, loss of potential customers, by diversion of Plaintiffs' customers to Defendants, any by damage to Plaintiffs' goodwill and reputations as competent and reliable cosmetic surgeons." The court dismissed these allegations as "labels and conclusions" and criticized the complaint inasmuch as "it does not indicate how much Plaintiffs' profits have decreased since Defendants began their advertising campaign; it does not quantify or estimate the decrease in goodwill; it does not quantify the number of potential customers who allegedly have been lost because of Defendants' statements or how that number would be measured."

This is a notable opinion because it seems to require, before the complaint is filed, the development of expert evidence by consumer perception researchers and by economists that traditionally is not

completed until well into discovery. Economic evidence of damages often requires access to the defendant’s confidential financial data which is not available until discovery, and would be an especially tall order if the plaintiff has challenged the advertising very quickly after the start of the campaign, as is often done in the hope of securing a preliminary injunction. Perhaps something short of full-blown surveys and econometric analyses would be adequate to support a Lanham Act advertising complaint in the Tenth Circuit, but if so, the court did not state what that would be.