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When is "Misunderstood" Not Misleading?

Smart phones and wireless coverage for them are becoming today's biggest technology battleground, as consumers increasingly rely on the devices to browse the Internet and perform other tasks. It is not surprising that intense comparative advertising—and lawsuits—have followed this development.

In fall 2009, it was hard to avoid promotion of "3G" coverage—which offers the highest bandwidth and is more useful to smart phone users than standard service—after Verizon launched a major advertising campaign comparing its 3G coverage to that offered by AT&T, which had advertised heavily that it had the fastest 3G network. Verizon's map campaign was designed to show that, even though AT&T's network might be fast, its coverage area was considerably smaller than Verizon's. A federal court case brought by AT&T illustrated the high stakes involved in comparative advertising campaigns and raised the question of just how far advertisers must go to avoid confusion among the public.

AT&T filed suit on Nov. 3, 2009, claiming that the 3G maps Verizon was showing in its "There's a Map for That" ads implied that all areas of the United States shown in white were without any AT&T cellular telephone service. *AT&T Mobility LLC v. Cellco Partnership d/b/a Verizon Wireless*, No. 09-CV-3057-TCB (N.D. Ga.). However, Verizon argued that the white areas on the map represented only those areas that have no AT&T 3G service.

AT&T said that it had commissioned a study that showed that the map deceived 23.5 percent of viewers into believing that AT&T had no coverage at all, even though many of those regions did have AT&T cellular service under older network standards, but did not have 3G. Verizon argued that "the mere fact that some customers may misunderstand the advertisement does not make it misleading" and noted that there were labels on the advertisement's AT&T coverage maps indicating that areas shown in blue had 3G coverage and everything else in white did not. Verizon's brief began with a stinging assertion: "AT&T did not file this lawsuit because Verizon's 'There's A Map For That' advertisements are untrue; AT&T sued because Verizon's ads are true and the truth hurts."

There was no dispute about one thing: the maps accurately showed the competitors' 3G coverage areas. So how could AT&T possibly win? First, AT&T claimed that the ads were "false by necessary implication"—an extension of the concept of literal falsity, which has been adopted by some jurisdictions and which allows a plaintiff to prevail without introducing proof of actual consumer confusion. The "false by necessary implication" doctrine is available when, looked at in the context of the entire advertisement, the words or images unavoidably and unambiguously imply only one plausible message, and that message is false. *Time Warner Cable Inc. v. DIRECTV Inc.*, 497 F.3d 144, 158 (2d Cir. 2007). (For an interesting critique of the doctrine, *see* Sarah Samuelson, *True or False: The Expanding "False by Necessary Implication" Doctrine in Lanham Act False Advertising, and How a Revitalized Puffery Defense Can Solve this Problem*, 30 Cardoza L. Rev. 317 (2008).)

AT&T also had a more traditional and more widely accepted argument: Even if the advertisements were not false, literally or by necessary implication, a plaintiff may prevail if it presents persuasive evidence that the consumer was deceived in order to demonstrate that the ads are "misleading." *See Hickson Corp. v. Northern Crossarm Co.*, 357 F.3d 1256, 1261 (11th Cir. 2004). AT&T's proof was relatively simple: when some consumers saw white spaces on a coverage map, they believed that AT&T had *no* coverage in those areas, as opposed to just no 3G coverage, despite the fact that the map's legend referred only to 3G coverage.

The dispute between AT&T and Verizon raises interesting questions about how far courts should go in restricting truthful advertising. Verizon argued that AT&T had been less than forthcoming about the extent of AT&T's 3G coverage, asserting that the "There's a Map for That" campaign was merely setting the record straight:

> AT&T does not readily provide consumers with national 3G coverage maps or comparable information showing the geographic scope of its 3G coverage, even when such a map is requested at an AT&T store. … In iPhone brochures available at AT&T retail stores, AT&T heralds its network as the "Nation's Fastest Growing 3G Network." … But in this very brochure, AT&T includes a

> nationwide "Coverage Area Map" that depicts its *entire* combined and overlapping data and voice network (2G, 2.5G, and 3G), without showing where 3G is available. … Instead, in small print under its "Coverage Area Map" the brochure states: "3G not available in all areas."

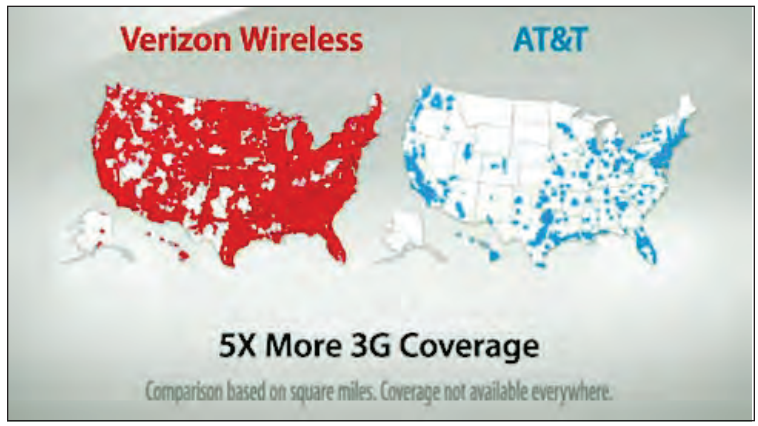
Defendant's Memorandum of Law in Opposition to Motion for Temporary Restraining Order at 12 (emphasis in original).

AT&T disputed that claim and contended that its survey evidence left no doubt that some consumers had been misled by the advertisements. But when should survey evidence be enough to enjoin a business from running comparative advertising that is literally true? Since 1989, § 43(a) of the Lanham Act has prohibited a "false or misleading" description or representation of a fact that "misrepresents the nature, characteristics, qualities or geographic origin of his or another person's goods, services, or commercial activities." 15 U.S.C. § 1125(a). Many cases hold that survey evidence can be used to show that a literally true statement is misleading and actionable. *See, e.g., American Home Products Corp. v. Johnson & Johnson*, 577 F.2d 160 (2d Cir. 1978). But what if the advertisement is clear on its face, but surveys show that some consumers misunderstand the factual claims? The Seventh Circuit had problems with a case based on those facts 10 years ago:

> Section 43(a)(1) forbids misleading as well as false claims, but interpreting "misleading" to include factual propositions that are susceptible to misunderstanding would make consumers as a whole worse off by suppressing truthful statements that will help many of them find superior products. … "Misleading" is not a synonym for "misunderstood," and this record does not support a conclusion that Abbott's statements implied falsehoods about Similac. Reducing ads and packaging to meaningless puffery can't be the objective of the Lanham Act—though it is a logical (and likely) outcome of Mead Johnson's approach, given the normal level of confusion and misunderstanding reflected in consumer surveys.

Mead Johnson & Co, v. Abbott Laboratories, 201 F.3d 883 (7th Cir. 2000), opinion amended on denial of reh'g, 209 F.3d 1032 (7th Cir. 2000), cert denied, 531 U.S. 917 (2000). The Seventh Circuit refused to enjoin Abbott's advertising claim of "1st Choice of Doctors," even though survey evidence showed that most consumers believed this claim to mean that a *majority* of doctors preferred the product, whereas other evidence demonstrated that only a *plurality* of doctors ranked the product number one. *Id.*

Concerns similar to those expressed by the Seventh Circuit proved fatal to AT&T. Following a two-hour



hearing in November, Judge Timothy C. Batten Sr. denied AT&T's motion for a temporary restraining order, issuing an oral ruling that Verizon's advertisements were "literally true." Echoing the Seventh Circuit's decision in *Mead Johnson*, media reports quoted Judge Batten as saying, "The fact that people misunderstand the ads does not always mean the ads are misleading." At that time, AT&T vowed to continue the fight, but a stipulation of dismissal was filed two weeks later—just one month after the complaint was filed.

Cases involving comparative advertising appear to be on the upswing, as companies fight harder for market share and more of them turn to the courts for relief. The case dealing with Verizon's "There's a Map for That" campaign didn't result in a reported decision, but it raised interesting issues: Just how active should the courts be in limiting commercial speech that is true but that a portion of the public gets wrong, and how do you draw the line between an advertisement that is misleading and one that is misunderstood? **TFL**

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