



THINK FORWARD

Eleventh Circuit Solidifies Viability of Contributory Liability for False Advertising Claims

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August 31, 2015

On August 7, 2015, an Eleventh Circuit panel in *Duty Free Americas, Inc. v. The Estee Lauder Companies, Inc.*, No. 14-11853, affirmed the dismissal of a false advertising claim under section 43(a) of the Lanham Act. Duty Free alleged that the beauty products company Estee Lauder was contributorily liable for false statements made by Duty Free's competitors that prevented Duty Free from being awarded retail leases in certain U.S. airports. Despite affirming dismissal, the court accepted Duty Free's theory that a defendant could be held contributorily liable for false advertising under section 43(a), becoming the first federal court of appeals to explicitly accept the viability of such a claim.

Duty Free operates duty free stores in several airports throughout the U.S. where departing international passengers can purchase luxury goods at discounted prices. Duty Free competes for limited retail space within airports by responding to those airports' requests for proposals (RFPs). Duty Free alleged that during the process of responding to four separate airports' RFPs, two competitors made statements to the effect that Duty Free's inability to sell Estee Lauder products made their bids unviable and uncompetitive. Duty Free's relationship with Estee Lauder had, in fact, deteriorated, and Estee Lauder confirmed in writing to the airports that Duty Free could not sell its products. Duty Free sued Estee Lauder, claiming it was contributorily liable for false advertising under section 43(a) the Lanham Act for its role in causing Duty Free to lose the bids to lease retail space at those airports. Duty Free also alleged antitrust violations under the Sherman Act and tortious interference with prospective business relationships under Florida state law.

The district court dismissed all three claims, noting that Duty Free failed to allege that Estee Lauder or any of the bidding competitors made a false or misleading statement about Duty Free. The Eleventh Circuit agreed, but took the opportunity to clarify that a defendant can theoretically be contributorily liable for false advertising.

The court pointed to the established doctrine of contributory liability for trademark infringement and the fact that section 43(a) encompasses both trademark infringement and false advertising. Further support came from citation to several district courts that have approved of such claims. The court stated that to state a contributory false advertising claim, a plaintiff must (1) show that a third party in fact directly engaged in false advertising that injured the plaintiff, and (2) allege that the defendant contributed to that conduct either by knowingly inducing or causing the conduct, or by materially participating in it. The court explained that the plaintiff must allege the defendant had the necessary state of mind that it intended to participate or actually knew about the false advertising. The court also stated that the plaintiff must allege that the defendant actively and materially furthered the unlawful conduct and gave analogous examples from the trademark infringement context. These included situations where the defendant "directly controlled or monitored" the false advertising or provided a "necessary product or

service” in creating the false advertising.

The court held that Duty Free did not state a claim because the mere fact that Estee Lauder sold its products to Duty Free’s competitors but not Duty Free could not justify a finding that Estee Lauder induced, encouraged, or brought about false advertising.

The decision is noteworthy because it provides appellate approval and a solidified legal framework for contributory false advertising claims.

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If you have any questions or wish to discuss how this decision impacts your business, please contact one of our Brinks Attorneys.