

An Empirical Study of False Advertising Claims Under the Lanham Act

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Through an empirical study of federal false advertising claims, we aim to identify the factors affecting the outcomes of false advertising litigation since § 43(a) of the Lanham Act was amended in 1989 to provide expressly for a federal false advertising cause of action. Courts have erected standing barriers and other doctrinal hurdles that make winning these cases an uphill battle for many, if not most, plaintiffs. Our study was motivated by four questions. First, how frequently do plaintiffs win false advertising cases? Second, to what extent are prudential standing and materiality doctrines responsible for false advertising case outcomes? Third, what characteristics of the allegedly false statements or the advertisements in which they appear affect outcomes? Here we were particularly interested in the extent to which outcomes varied depending on whether the ads mentioned the parties products and whether the allegedly false statements were communicated using non-textual content. Fourth, are plaintiffs more likely to win cases in which the statement at issue is literally false than those in which the statement is literally true but misleading, deceptive or confusing?

To answer these questions, we are coding all 1380 federal district court opinions that decided Lanham Act claims between 1990 and 2010. For each judicial opinion in the relevant time period, we used a Qualtrics survey to code a wide array of information. We gathered basic information such as the citation, year of decision, federal circuit, identity of the judge, and procedural disposition and information relating to the threshold issue of standing. We also collected information about the ad at issue, including the media in which it appeared, and whether it was comparative, mentioned a party's product, or made a claim that could be verified. We also coded for evidentiary facts, such as whether each party offered a survey and an expert opinion. And we coded for a variety of legal conclusions, including whether the court found the statement to be false, literally false, deceptive, likely to cause confusion, material, or merely puffery or opinion.

Our initial results reveal some interesting divergence among the federal circuits and some surprises in the doctrinal tools courts are using to resolve false advertising claims.