

# Recent Trends in False Advertising Law

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## Key issues

- New FTC Blogger Guidelines
- “Green,” “natural,” and similar claims
- Application of the Supreme Court’s new pleading standards to false advertising claims
- Application of the Supreme Court’s *Dastar* preclusion doctrine to false advertising claims
- Comparative advertising claims and the continued importance of survey evidence
- What type of activity rises to “commercial advertising or promotion”
- Extraterritoriality of the Lanham Act

# False advertising liability

- For false advertising liability under the Lanham Act, 15 U.S.C. § 1125(a), courts have articulated a five-factor test:
  - (1) Defendant made a false or misleading statement;
  - (2) that actually deceives or is likely to deceive a substantial segment of the advertisement's audience;
  - (3) on a subject material to the decision to purchase the goods;
  - (4) touting goods entering interstate commerce; and
  - (5) that results in actual or probable injury to Plaintiff.
- Liability also arises under state statutory law and the FTC Act.

# FTC Blogger Guidelines

- The Federal Trade Commission adopted revisions to its *Guides Concerning the Use of Enforcements and Testimonials in Advertising*, which will be effective on December 1, 2009.
- A new provision applies to bloggers who have a “material connection” to an advertiser (via financial ties, freebies, etc.).
- An advertiser must advise the blogger that it must disclose the material connection, and it must monitor the conduct of its blogger.

# FTC Blogger Guidelines

- The blogger must “clearly and conspicuously disclose” the material connection.
- The Guidelines do not apply to consumers that buy a product themselves and write about their experience on their blog.
- A full copy of the revised Guides may be found at:  
<http://www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf>

## “Green” claims

- The FTC has recently increased enforcement efforts against false and misleading green claims.
  - For example, in June 2009, the FTC challenged the use of “biodegradable” claims by three companies, including K-Mart.
- The FTC is also considering revisions to its 1998 *Guides for the Use of Environmental Marketing Claims*, which predates terminology such as “renewable,” “sustainable,” and “carbon neutral.”
- Claim substantiation remains a key requirement to avoiding false advertising liability.

## “Natural” claims



In response to broadscale consumer demand, Tyson Foods is now producing all of its Tyson® brand fresh chicken from birds "Raised Without Antibiotics."

*Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 547 F. Supp. 2d 491 (D. Md. 2008)

## “Natural” claims

- Sanderson Farms and Perdue Farms, sellers of chicken products, sued their competitor Tyson Foods for allegedly false statements about its chicken being “raised without antibiotics.”
- Plaintiffs presented expert testimony that ionophores, a feed additive used by Tyson, were considered by scientific bodies to be an antibiotic.
- Plaintiffs also provided a consumer survey of 600 mall consumers, which supported the plaintiffs’ position that consumers relied on the ad claim (63% believed that the claim meant that Tyson used no antibiotics).
- Tyson argued that it had received USDA approval for the slogan.

## “Natural” claims

- The court granted plaintiffs’ motion for preliminary injunctive relief, requiring Tyson to remove all advertising materials that featured the slogan.
- The court stated the well-established position that regulatory approval is not a defense to a Lanham Act claim.
- The Fourth Circuit later rejected Tyson’s emergency motion for relief.

## “Natural” claims



*Wright v. General Mills, Inc.*, 2009 WL 3247148 (S.D. Cal. Sept. 30, 2009)



## “Natural” claims

- Plaintiff class representative alleged violations of California state law based on General Mills’ advertisements of its NATURE VALLEY® granola bar products
- Plaintiff asserted that the claim “100% Natural” is false and misleading because the granola bars contain, among other ingredients, high fructose corn syrup.
- General Mills moved to dismiss the complaint based on federal preemption by the FDA and on Rule 12(b)(6) grounds.

## “Natural” claims

- The district court held that the claims were not barred by field preemption, conflict preemption, or the primary jurisdiction doctrine.
- However, the court granted Defendant’s motion for failure to state a claim without prejudice, because the complaint was based on little more than “conclusory and speculative factual content,” citing *Twombly* and *Iqbal*.
- The court also held that plaintiff's California statutory claims failed to meet Rule 9(b)’s particularity standard for pleading fraud.

## *Twombly/Iqbal* pleading standard



*Chavez v. Blue Sky Natural Beverage Co.*, 2009 WL 1956225  
(9th Cir. June 23, 2009)

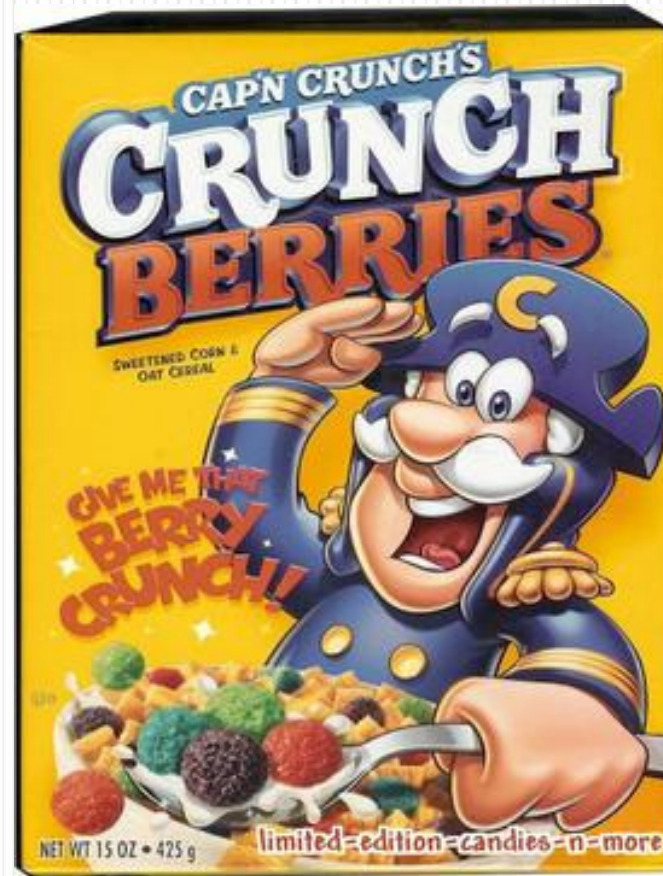
## *Twombly/Iqbal* pleading standard

- Chavez, as a class representative, sued Blue Sky for false advertising under California law because it continued to sell BLUE SKY® beverage products with various labels referencing Sante Fe, New Mexico, despite no longer producing the products in New Mexico.
- Blue Sky's claims on the beverage container included:
  - SANTE FE, NEW MEXICO
  - CANNED FOR THE BLUE SKY NATURAL BEVERAGE COMPANY, SANTE FE, NM 87501
- Blue Sky also used a Southwestern trade dress and used a forwarding service to route mail and telephone calls from Sante Fe, New Mexico to its Corona, California office.

## *Twombly/Iqbal* pleading standard

- The district court granted Blue Sky's 12(b)(6) motion to dismiss all claims because Chavez failed to allege an injury.
- The Ninth Circuit reversed, finding sufficient factual allegations in the complaint to support a cognizable injury:
  - Chavez purchased Blue Sky based on representations that BLUE SKY® was a New Mexico company, which misrepresented the origin and nature;
  - Chavez suffered personal monetary loss; and
  - Chavez had purchased BLUE SKY® to associate himself with New Mexico (he was a former NM resident).
- The court held that the pleadings met the *Twombly* standard.

## *Twombly/Iqbal* pleading standard



*Videtto v. Kellogg USA*, 2009 WL 1439086, and *Sugawara v. PepsiCo, Inc.*, 2009 WL 1439115 (E.D. Cal. May 21, 2009)

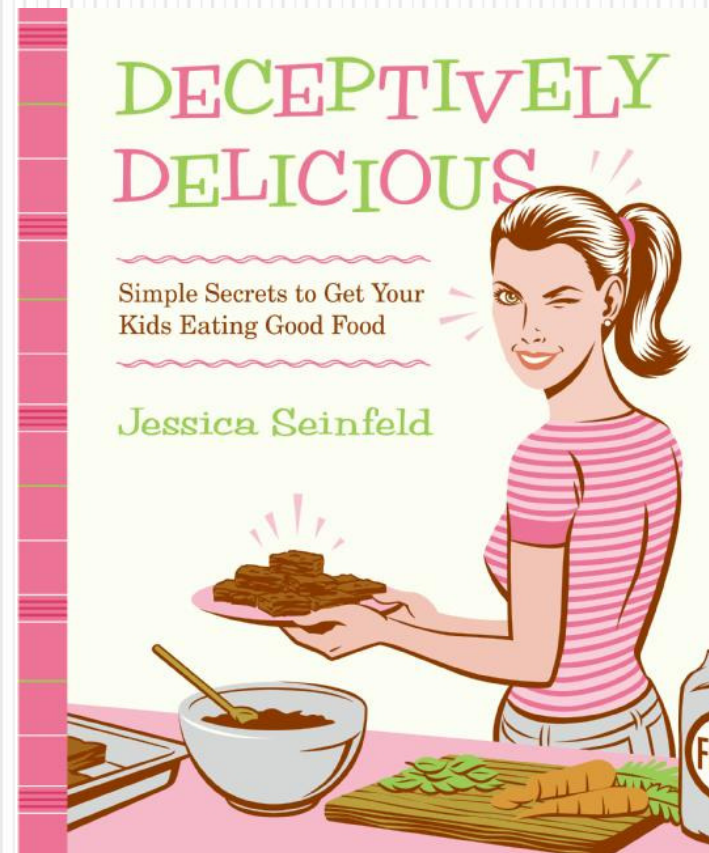
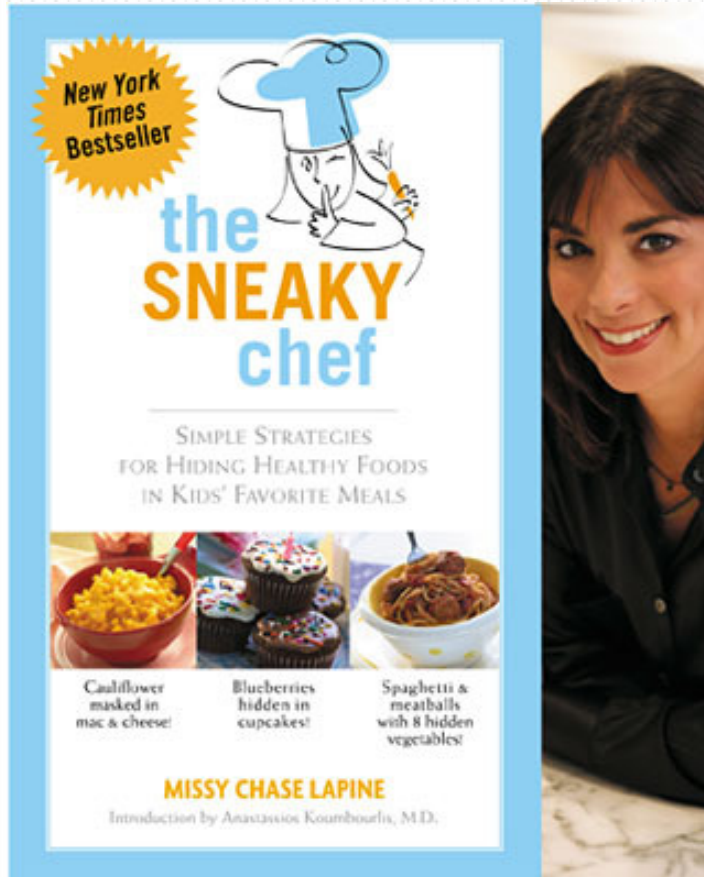
## *Twombly/Iqbal* pleading standard

- Each case was a class action alleging violations of California state false advertising law, intentional misrepresentation, and breach of implied warranty:
  - FROOT LOOPS® does not contain actual fruit.
  - CAP'N CRUNCH WITH CRUNCHBERRIES® does not include actual berries.
- Defendant cereal manufacturers moved to dismiss the actions.
- The court granted both motions to dismiss.

## *Twombly/Iqbal* pleading standard

- For FROOT LOOPS<sup>®</sup>, the packaging did not suggest fruit content. Only picture of fruit was on a small banner stating “natural fruit flavors.”
- For CAP’N CRUNCH<sup>®</sup>, the packaging doesn’t display any actual fruit and it explicitly states that the cereal is “sweetened corn & oat cereal,” thus no reasonable consumer would be deceived.
- Historical precedent: FROOT LOOPS<sup>®</sup> was originally known as “Fruit Loops”, but an early 1960s lawsuit produced a settlement whereby Kellogg’s rebranded the cereal.
- In late September 2009, Roy Werbel, a disgruntled consumer, filed new false advertising actions against these two defendants under the Lanham Act.

## Dastar preclusion doctrine



*Lapine v. Seinfeld*, 2009 WL 2902584 (S.D.N.Y. Sept. 10, 2009)

## *Dastar* preclusion doctrine

- Plaintiff Missy Chase Lapine authored “*The Sneaky Chef: Simple Strategies for Hiding Healthy Food in Kids’ Favorite Meals*,” a cookbook with recipes using thirteen methods of sneaking healthy food into children’s food.
- Lapine claimed that Seinfeld’s book “*Deceptively Delicious: Simple Secrets to Get Your Kids Eating Good Food*” infringed her copyright and trademark rights in the book and constituted false advertising under Section 43(a).
- Seinfeld moved for summary judgment on all claims.

## *Dastar* preclusion doctrine

- The court granted Seinfeld's motion for summary judgment on the copyright and trademark infringement claims, citing various differences between the books.
  - For example, Seinfeld's book only focused on purees, while Lapine's book included twelve additional methods.
  - Interestingly, the court found that the presence of the name "Seinfeld" on the defendant's book lessened any potential likelihood of confusion based on the fame of the name.
- The court held that the false advertising claim was precluded by *Dastar*, because Lapine's claim essentially dealt with a failure to attribute authorship, not to a misrepresentation as to the nature, characteristics, qualities, or geographic origin of Seinfeld's book.

## *Dastar* preclusion doctrine



*Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300 (Fed. Cir. 2009)

## *Dastar* preclusion doctrine

- Plaintiff Baden Sports, a basketball manufacturer, claimed that Defendant Molten USA was liable for patent infringement and false advertising.
- Molten’s allegedly false ad claims regarding its “dual-cushion technology”:
  - “**Proprietary**” and “**exclusive**”: Baden argued that these terms conveyed that Molten invented and owns this technology, which Baden claimed infringed its patent.
  - “**Innovative**”: Baden argued that this claim meant that dual-cushion technology was a Molten innovation, when Baden argued that it had created the technology.

## *Dastar* preclusion doctrine

- The district court granted Molten’s summary judgment motion on two claims, holding that the “proprietary” and “exclusive” claims were precluded from Lanham Act liability by U.S. Supreme Court’s *Dastar Corp.* decision, but that the “innovative” claim was not precluded because it referred to “the nature, characteristics, or qualities of the basketballs themselves.”
- A jury found Molten liable for patent infringement (\$38,000 in damages) and for false advertising (\$8 million in damages).
- Molten moved for Rule 50(b) JMOL, which the court denied.

## *Dastar* preclusion doctrine

- The Federal Circuit applied Ninth Circuit law in its review of the Rule 50(b) motion denial.
- The court held that the district court had erred by failing to dismiss the “innovative” claim.
- The court held that it was also precluded by *Dastar*, because the claim relates to claims of authorship, not to the origin of the goods or the nature, characteristics or qualities of the goods.
- To hold otherwise “could create overlap between the Lanham and Patent Acts.” *Id.* at 1307.

# Comparative advertising claims



Best in sun protection.

Ultra Sheer SPF 100+ with Helioplex<sup>®</sup>  
offers the highest combined UVA/UVB protection.

*Schering-Plough Healthcare Products, Inc. v. Neutrogena Corp.*, 2009 WL 2407207 (D. Del. Aug. 5, 2009)

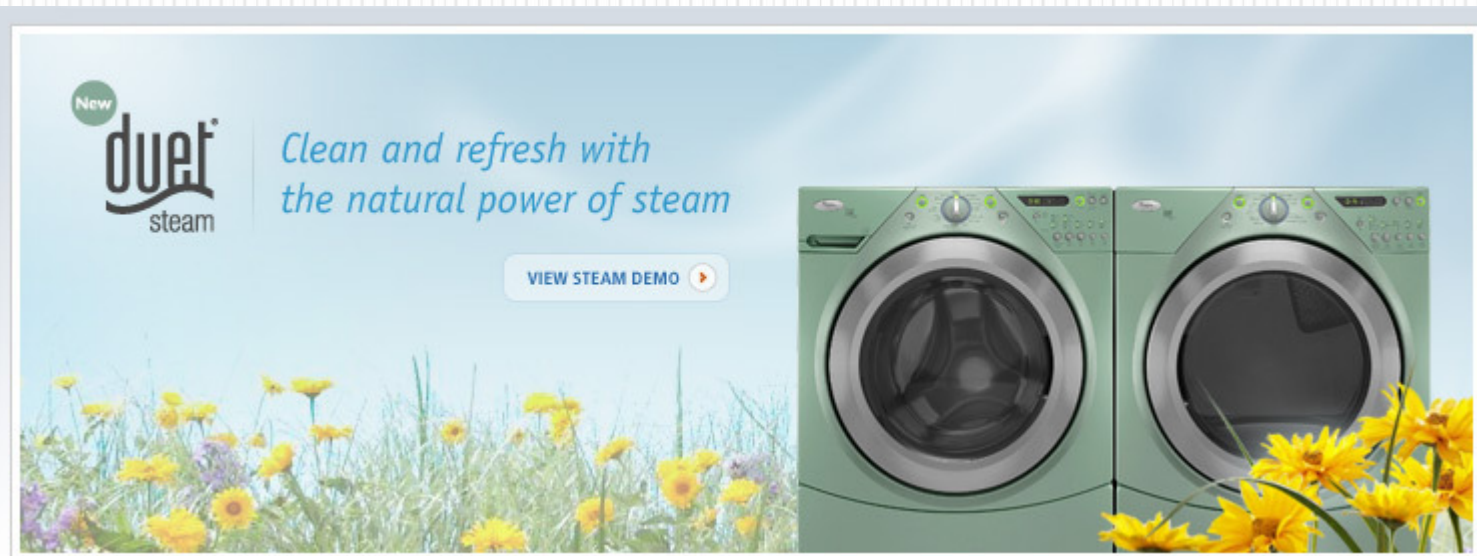
## Comparative advertising claims

- Schering-Plough, makers of COPPERTONE® sun protection products, sought injunctive relief against Neutrogena for allegedly literally false claims made in connection with NEUTROGENA® “with Helioplex™.”
- Neutrogena advertisements compared the effects of a layer of SPF with Helioplex™ and without Helioplex™, using a bar graph illustration.
- Schering-Plough also took issue with Neutrogena’s claim: “Best line of sports sun protection.”

## Comparative advertising claims

- The court denied preliminary injunctive relief.
- The court found the bar graph illustration to be ambiguous, stating there was empirical support for the UVA calculations (despite conflicting evidence).
- The court also held that the tag line “[b]est line of sports sun protection” was merely puffery.

## Comparative advertising claims



*LG Electronics USA, Inc. v. Whirlpool Corp.*, 2009 WL 3113246 (N.D. Ill. Sept. 28, 2009)

## Comparative advertising claims

- LG, a home laundry appliance manufacturer, brought a false advertising claim against Whirlpool based on its “steam” clothes dryer product.
- LG’s steam dryers contained a boiler unit outside the dryer drum, which created steam by boiling water and injecting or spraying the steam in the dryer drum as a vapor.
- Whirlpool’s dryers, on the other hand, did not contain a separate boiler unit but rather introduced a spray of cool water into the hot spinning drum, which dampened clothing and sped evaporation.

## Comparative advertising claims

- LG contended Whirlpool's dryers did not produce "steam," while Whirlpool provided multiple dictionary definitions for the term "steam," including:
  - (1) Vapor arising from a heated surface;
  - (2) Invisible vapor into which water is converted when heated to a boiling point;
  - (3) Mist formed by condensation on cooling of water vapor; and
  - (4) The vapor phase of water.
- Whirlpool contended that its steam dryers met definitions #1 and #4, and thus moved for summary judgment on LG's false advertising claim.

## Comparative advertising claims

- The court denied Whirlpool's motion.
- As to literal falsity, the court found that the definition of "steam" was a question of fact, precluding summary judgment.
- As to implied falsity, the court admitted LG's mall-intercept consumer survey, despite Whirlpool's objections, which tended to show that the ad was misleading.
- The court did exclude an opinion by LG's survey expert on the lay definition of steam, because the expert had no expertise in consumer perception.

# Comparative advertising claims

*Ad copy:* "YOU WOULDN'T SETTLE FOR AN INCOMPLETE COVER"



*Stokely-Van Camp, Inc. v. Coca-Cola Co.*, 2009 WL 2390245  
(S.D.N.Y. Aug. 4, 2009)



# Comparative advertising claims



## Comparative advertising claims

- Stokely-Van Camp, makers of GATORADE<sup>®</sup>, sought a preliminary injunction against Coca-Cola, makers of POWERADE<sup>®</sup>, for certain advertising claims about POWERADE<sup>®</sup> ION4.
- Coca-Cola's POWERADE claims:
  - The new formula for POWERADE<sup>®</sup> ION4 contained small amounts of calcium and magnesium that functioned as “sweat replacers.”
  - Coca-Cola's advertising campaign made thinly veiled comparisons to GATORADE<sup>®</sup>.

## Comparative advertising claims

- The court denied relief to SVC, finding that the claims were moot (Coca-Cola had already discontinued the campaign), the claims were mere puffery, and (assuming the claims were impliedly false) not supported by extrinsic evidence, such as a consumer survey.
- The court found that irreparable harm was unlikely, because Coca-Cola had retired the ads.
- The court also found that SVC had unclean hands that barred its claim, because SVC had made similar claims with its GATORADE® products.

## “Commercial advertising or promotion”

- *Metropolitan Life Insurance Co. v. O’M & Associates LLC*, 2009 WL 3015210 (N.D. Ill. Sept. 16, 2009).
  - Plaintiff MetLife had previously employed Michael O’Malley as an insurance director, and its Downers Grove, Illinois branch was known as O’Malley & Associates.
  - O’Malley left in 2005, joined a competitor, Guardian, and adopted the business name O’Malley & Associates.
  - MetLife had expressly deleted all references to its former name and sent communications to employees to stop all use of same.
  - O’Malley’s agents sent personalized announcements to former clients, stating that its Downers Grove office had moved, providing a new address, and requesting that customers sign forms to transfer service.

## “Commercial advertising or promotion”

- MetLife sued for trademark infringement and false advertising, Defendants moved for summary judgment.
- The court granted summary judgment to the Defendants on both counts.
- No false advertising because Section 43(a)(1)(B) requires “commercial advertising or promotion”: sending letters to customers on a client list does not qualify, because it is not anonymous.
- Additionally, there was no trademark infringement because MetLife expressly abandoned the O’Malley & Associates mark and had no intent to resume use.

## Extraterritoriality of the Lanham Act

- *NewMarkets Partners, LLC v. Oppenheim*, 2009 WL 2251311 (S.D.N.Y. July 28, 2009).
  - Plaintiff NewMarkets alleged that the defendants committed false advertising by improperly using its draft prospectus, falsely identifying Plaintiff and its principals as being involved in the management of defendant's funds, and misappropriating plaintiff's funding model.
  - One of the defendants, CAM GmbH, had entered a joint venture with Oppenheim, who later acquired a majority stake in the German company.
  - Oppenheim and CAM filed motions to dismiss under 12(b)(6).
  - Another defendant, a German investment firm, was dismissed for lack of personal jurisdiction.

## Extraterritoriality of the Lanham Act

- The court denied the motion as to Oppenheim, finding that the false advertising claim sufficient alleged facts to support plaintiff's literal falsity claim.
- As to the German company CAM, the court applied the *Vanity Fair* extraterritoriality test to deny its motion to dismiss:
  - Factor #1: CAM's conduct affected U.S. commerce because finance is global.
  - Factor #2: CAM had a U.S. presence based on its American subsidiary, its American joint venture, and its consent to jurisdiction.
  - Factor #3: There were not conflicts with trademark rights under foreign law.



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