

TO FLOSS OR NOT TO FLOSS

The Lanham Act was passed in 1946 pursuant to Congress' power to regulate commerce. Section 43 of the Act prohibits false and misleading advertising, stating that "any person who uses in commerce any false or misleading description of fact, or false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such an act." This section of the Act was at the center of a recent Listerine ad campaign.

In June 2004, Pfizer, Inc. ("Pfizer") launched a consumer advertising campaign for its mouthwash Listerine. The campaign included print ads and product tags that featured an image of a Listerine bottle balanced on a scale against a white container of dental floss. The campaign also featured a television commercial wherein the announcer stated "Listerine's as effective as floss at fighting plaque and gingivitis. Clinical studies prove it." Although the commercial cautioned that there is no replacement for flossing, the commercial repeated two more times the message that Listerine is as effective as flossing against plaque and gingivitis. It also showed a narrow stream of blue liquid flowing out of a Cool Mint Listerine bottle, then tracking a piece of dental floss being pulled by a white floss container and then swirling around in between teeth – bringing to mind an image of liquid floss.

McNeil-PPC, Inc., the market leader in the sale of string dental floss and other cleaning products, filed suit alleging that Pfizer had engaged in false advertising in violation of Section 43 of the Lanham Act. McNeil contended that Pfizer's literal or explicit claim that clinical studies prove that Listerine is as effective as floss against plaque and gingivitis is false. It also alleged that Pfizer's advertisements implicitly are claiming that Listerine is a replacement for floss and that all the benefits of flossing may be obtained by rinsing with Listerine, which is false and misleading.

The Court agreed with McNeil and on January 6, 2005 issued a preliminary injunction. The Court concluded that the two studies did not stand for the proposition that Listerine is as effective as floss against plaque and gingivitis. The studies only included individuals with mild to moderate gingivitis and excluded individuals with severe gingivitis or any degree of periodontitis. Thus, the literal claim in Pfizer's advertisement was overly broad and consumers could have been misled by the advertisement. Second, the claim was false because the studies only prove that Listerine was effective as improperly used floss. The studies were not sufficiently reliable to permit one to conclude with reasonable certainty that Listerine was as effective as floss in fighting plaque and gingivitis.

The Court also concluded there was implied falsity that Listerine was a replacement for floss; the benefits of flossing could be obtained by rinsing with Listerine; and that those consumers who did not have the time or desire to floss could switch to Listerine instead. The implied message was confirmed by words and images, namely a stream of blue liquid tracking floss as it is removed from a floss container and then swirling between and around teeth and a bottle of Listerine balanced equally on a scale against a container of floss. Although the ads stated floss daily, the few words in the disclaimer were lost when the ads were considered as a whole. Thus, the implicit message was false, contrary to Pfizer's argument that Listerine provided all the benefits of flossing.

The Court enjoined Pfizer from communicating these claims in its advertising materials, and ordered the parties to discuss a recall of the Listerine bottles that featured the hanging tags.

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MEMORY GAMES: UNDERSTANDING THE LIMITS OF TRADE SECRETS AND CONFIDENTIALITY AGREEMENTS

Parties often use a confidentiality agreement to protect against disclosure of trade secrets. Even without a confidentiality agreement, persons are prohibited from misappropriating other's trade secrets under Louisiana law. But how much protection does a confidentiality agreement or Louisiana law really afford? Louisiana courts have repeatedly held that despite a confidentiality agreement and statutory prohibitions against trade secret disclosure, information a former employee is able to recall from memory or based upon experience gained during the course of employment is not trade secret information.

In fact, while employees cannot misappropriate trade secrets, knowledge acquired during employment can be used by the former employee – even in competition against the former employer. Therefore, courts have consistently held that an employer cannot prevent an employee from using the skill and knowledge acquired through experience during the course of employment and the employee may use such skill and intelligence for the benefit of rivals in his former employer's line of business.

Claims of unfair trade practices for relying on memory or experience will likewise fall on deaf ears.

The courts have also held that customer solicitation by former employees is not an unfair trade practice, as long as the solicitation occurs based on their memory, experience, or personal contacts, rather than through the use of confidential information of the former employer.

Considering these limitations, reliance on a confidentiality agreement or Louisiana laws prohibiting trade secret misappropriation and unfair trade practices will not likely give employers the full scope of protection desired. Rather, employers should consider using, in tandem with confidentiality agreements, non-compete and non-solicitation agreements. Additionally, employee access to trade secret information should be kept as limited as possible to keep former employees from relying on their memories to the detriment of their former employers.



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