False Advertising Claim Over Statements In Billing Letter To Patients Not Sufficiently Pled Under Lanham Act

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Ameritox is "the nation's leader in pain medication monitoring, offering urine drug testing services to help physicians assess medication adherence of patients on chronic opioid therapy." Millennium Laboratories is "a national, research-based medication monitoring company whose test offering, technology, customer support, educational resources and experts are specifically focused on clinicians who treat chronic pain." Essentially, the companies are urine testing labs that compete in the market for monitoring drug levels in patients who complain of chronic pain because such drugs are very susceptible to abuse. Ameritox sued Millennium over an alleged scheme to provide improper inducements to physicians to use Millennium's testing services over those of other companies. The claims included false advertising under the Lanham Act and a related claim of common law unfair competition.[1] Millennium moved to dismiss these claims and prevailed (with leave to amend). *See Ameritox Ltd. v. Millennium Laboratories, Inc.*, 8:11-cv-775 (M.D. Fla. Jan. 6, 2012).[2]

As part of this alleged scheme, Ameritox claimed that Millennium provided an "advertisement" to its physician customers that informed patients that they would not be responsible for any additional charges beyond those billed to the patients' insurance companies or Medicare. The court identified this "advertisement" as a billing letter, *i.e.*, the letter a patient receives that shows the amounts charged, covered by insurance/Medicare, and owed by the patient. Ameritox asserted that this letter was misleading because "patients enrolled in Medicare, by law, are not subject to any deductible or co-payments for clinical laboratory services, thus any benefit to a Medicare patient is, in fact illusory." It was this letter primarily at issue under the Lanham Act and common law unfair competition claims.

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[1] Ameritox also asserted claims under the Florida Deceptive and Unfair Trade Practices Act that are not at issue here.

[2] Available here: http://www.pattishall.com/pdf/Ameritox_v_Millennium.pdf.

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Millennium argued that the letter was not "commercial advertising or promotion," as required under 15 U.S.C. § 1125(a), because it was sent to patients while the relevant consumers were physicians. Ameritox countered that: a) the letter was distributed both to patients and physicians; and b) patients also were potential customers. The court rejected Ameritox's argument because Ameritox "failed to allege that the Millennium Billing Letter was sufficiently disseminated to the relevant purchasing public." Specifically, the court noted that Ameritox's amended complaint was not clear about who actually was the relevant purchasing public and "how many consumers in the relevant purchasing public Millennium contacted."[3]

The Court found Ameritox's factual allegations that the letter was misleading to be sufficient, but at the same time Ameritox had not plausibly pled that the billing letter was likely to deceive potential customers. The Court did not explain these seemingly contradictory findings beyond stating that Ameritox's allegation that "Millennium's statements are…likely to deceive a substantial portion of the targeted customers," was nothing more than a naked assertion devoid of further factual enhancement – the type of pleading prohibited by the Supreme Court's decisions in *Iqbal* and *Tombly*. It is not clear what factual enhancement the Court would accept as sufficient to support an allegation of likelihood of deception. Professor Tushnet wonders whether Ameritox may have to plead that it has a survey in hand. *See* http://tushnet.blogspot.com/2012/01/pleading-standard-dooms-misleadingness.html. It seems to this author that explaining how an advertisement is misleading usually would be sufficient to underpin how it is likely to deceive potential consumers. For example, here (assuming what Ameritox states turns out to be true, as one must on a motion to dismiss), it seems that Ameritox is claiming that patient-consumers are likely to be deceived into believing they are receiving a benefit by having their tests conducted by Millennium because of Millennium's statements about patients not having to make co-pays, etc. Perhaps Ameritox needs to be explicit on this point when it amends its complaint, even if such pleading seems above and beyond the notice pleading required by the Federal Rules.

Finally, the Court found insufficient to plead materiality to the purchasing decision Ameritox's allegation that "Millennium's false or misleading statements have already, and will continue to, influence materially purchasing decisions to the extent that customers choose Millennium's services instead of those offered by Ameritox." This author sees a pretty direct connection between conveying to a consumer that they don't have to pay as much when using one company's service over a competitor's and the likelihood that the consumer will go with the cheaper provider (essentially, Ameritox alleges that Millennium's statements convey this type of message). That is, deception over a price difference seems very material to a consumer's purchase decision, but maybe that's just me. Again, the court may be looking for Ameritox to be more explicit when it re-pleads, but it provided no guidance.

Ultimately, this Court appears to have taken a strict view of the requirements enunciated in *Iqbal/Twombly* regarding facts that must be pled to support allegations of false advertising under the Lanham Act. Ameritox was given leave to amend, so we anticipate more specific allegations in the amended complaint. This decision underscores the need for plaintiffs to be explicit about the impact of an allegedly false advertisement on the target consumers which likely will require more

[3] According to the opinion, Ameritox alleged only that "Millennium's services are offered, advertised, and sold to customers throughout the country."

pre-complaint investigation and analysis, as well as artful pleading. Whether other courts follow this precedent remains to be seen.

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