

PUBLICATION

The (Sometimes Unethical) Reality of Competition and Your Ammo to Combat a Rival's False Advertising

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I. Introduction

Competition in the free-market economy is cutthroat and businesses seek to gain a slight edge over their competitors however they can. In an effort to gain such an advantage, these businesses may spread falsehoods about the quality of their rivals' products or services. Though a business suffering from a competitor's false advertising may take the non-litigious "high road" as long as possible, this scenario can reach a point where it causes a business to lose customers or, even worse, its business reputation in the community is permanently damaged. Accordingly, the question remains: what can a business do in the event a competitor lies about its product or services? After the United States District Court for the Southern District of California decided *CrossFit, Inc. v. National Strength and Conditioning Association* in the fall of 2016, suffering businesses finally have some guidance.

II. What Did the Court Say?

By way of background, CrossFit, Inc. filed a lawsuit against the National Strength and Conditioning Association (NSCA) on May 12, 2014, alleging false advertising and unfair competition in the aftermath of the November 2013 publication of the NSCA's article "CrossFit-based high-intensity power training improves maximal aerobic fitness and body composition," which was published in the *Journal of Strength and Conditioning Research*. The article stated, "[i]n spite of a deliberate periodization and supervision of our CrossFit[sic]-based training program by certified fitness professionals, a notable percentage of our subjects (16%) did not complete the training program and return for follow-up testing." The NSCA also noted CrossFit's "injury rate" and emphasized its conclusion that CrossFit's training regimen caused injuries to that 16 percent of test subjects. The parties ultimately filed dueling motions for summary judgment.

The court issued a ruling granting CrossFit's motion for summary judgment on the basis of falsity, holding that the NSCA's publication that CrossFit's fitness program had a high rate of injury was unsupported by the data and false "regardless of whether the authors knew it at the time." In other words, a federal judge recognized falsity in a publication as a matter of legal fact. In so holding, Judge Sammartino stated, "[a] reasonable fact finder could conclude that the NSCA fabricated the injury data . . . with the intention of protecting its market share in the fitness industry."¹

Notably, the court rejected the NSCA's First Amendment argument that scientific journals have the right to publish false or unsupported information about commercial competitors without facing false advertising charges. Indeed, Judge Sammartino reasoned, "[i]f a party intentionally publishes false data about a competitor's product to protect its own market share, that speech is commercial in nature and not subject to the same degree of protection as noncommercial speech."

III. So What Now?

Imagine, for a moment, a world where the NSCA had prevailed. Burger King could publish that McDonald's hamburgers cause humans to spontaneously combust, and McDonald's could not retaliate with a lawsuit for false advertising.

Thankfully, a business suffering from a competitor's false advertising can file a lawsuit against the competitor and, under the holding in *CrossFit*, survive summary judgment and advance its claims to the fact finder for a determination on damages. Competing businesses spreading false advertising must be held accountable for their statements and publications, and they cannot hide behind the First Amendment if their publication was "commercial" in nature.

IV. What Do You Need to Prove to Succeed in a Suit for False Advertising?

To succeed in a lawsuit for false advertising, a plaintiff would need to establish:

- **Falsity.** That is, that the competitor's statement "was literally false, either on its face or by necessary implication, or that the statement was literally true but likely to mislead or confuse consumers";
- That the competitor **intended** to publish the false information – for example, in *CrossFit*, CrossFit established that the NCSA's editor-in-chief pressured the authors to include the injury data in their study;
- That the competitor's publication was **economically-motivated and commercial in nature** in order to defeat the competitor's inevitable First Amendment defense; and
- **Damages.** That is, that the erroneous data in the competitor's publication hurt your brand financially through lost customers, sales or damage to your business's reputation.

V. What Action Can You Take?

As you achieve success, your business may face competitors' false advertising and combating it is not easy or for the faint of heart. First, make sure the advertising actually originates from a competitor and is not simply a misunderstanding. If the competitor is indeed trying to discredit you or steal your business, it may be time to step into the ring and file suit. As you know, your customer loyalty and business reputation are incredibly important, especially if your brand is already a recognized authority in your industry. Accordingly, don't hesitate to seek legal assistance to help you maneuver through the complex legal requirements of stating a claim and succeeding in your lawsuit. Take a page out of CrossFit's book and don't accept a competing business's bullying and lies.

For any questions about filing such a suit or protecting your business's brand, please contact the author or any member of Baker Donelson's Hospitality and Distribution Service Team.

¹As of this writing, the NSCA is currently seeking for the court to certify its order so that it can appeal the ruling.