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Single Communication-Based False Advertising Claim Permitted to Proceed

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A recent decision out of the District of Massachusetts serves as a reminder that a court may consider even a single communication by an advertiser made directly to a consumer to be advertising under the Lanham Act, particularly where the advertiser competes in a limited market. *Allscripts Healthcare v. DR/Decision Res.*, No. CV 19-11038-NMG, 2020 WL 837444 (D. Mass. Feb. 20, 2020).

As background, Allscripts, a healthcare information technology company that collects and licenses anonymized patient-level data from a collection of medical practices, agreed to license its data to DRG, a healthcare data and consulting firm. Several years later, Allscripts filed a lawsuit alleging that DRG was sublicensing Allscripts' data in violation of their agreement. DRG counterclaimed, alleging that an Allscripts subsidiary, Veradigm, which competes directly with DRG, violated the Lanham Act by informing one of DRG's customers that it "should be concerned about DRG's sustained ability to sell electronic health records data."

After failed cross motions for preliminary injunctions, Allscripts moved to dismiss DRG's counterclaim, arguing among other things that the alleged false statements did not qualify as commercial product advertisement under the Lanham Act.

The court denied the motion, holding that Allscripts' statements constituted commercial advertising or promotion because the statements were allegedly made "for the express purpose of influencing customers to discontinue their relationships with DRG in favor of competitor Veradigm." Although Allscripts argued DRG's claim must be dismissed because DRG identified only one instance of an alleged misrepresentation, the Court, quoting a Ninth Circuit decision, noted that where the market for a product is limited (as it is for the services provided by DRG and Veradigm), "even a single [solicitation] to an individual purchaser may be enough to trigger the protections of the Lanham Act." *See Costal Abstract Serv. v. First Am. Title Ins.*, 173 F.3d 725, 735 (9th Cir. 1999). In addition, the Court gave no weight to Allscripts' argument that DRG failed to plead facts sufficient to identify the allegedly false statement, holding that DRG pleaded facts sufficient to survive a motion to dismiss by identifying the "particular occasion on which [the] statement was made."

While we noted in a recent post that the definition of commercial advertising under the Lanham Act is not without limits, Allscripts provides a reminder that a false advertising claim under the Lanham Act can be sustained even when the misleading statement does not fall neatly within the traditional understanding of commercial advertising. Watch this space for further developments.

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