

False Advertising and Unfair Competition

By Robert S. Thompson

A primer to help you become versed in the elements of these claims.

Claims for Injunctive Relief Under the Lanham Act

In today's tough economic environment, obtaining and retaining market share in the consumer industry is more competitive than ever. Not surprisingly, this environment gives rise to claims that a competitor has crossed the line

from honest competition to unfair competition through the use of deceptive advertising and promotion. While most states have statutes and common law that address deceptive trade practices and unfair competition, this behavior is typically enforced through the provisions of the Lanham Act.

In most cases, including those involving allegations of false advertising, time is of the essence as the alleged victim of the advertising will want to stop it. The first step is to seek injunctive relief. The purpose of this article is to give a short primer in the elements required for interlocutory injunctive relief for false advertising under the Lanham Act.

The Lanham Act was intended, in part, to protect persons engaged in commerce against false advertising and unfair competition. See *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 767–68, 120 L. Ed. 2d 615, 112 S. Ct. 2753 (1992) (quoting 15 U.S.C. §1127); 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §27:25

at 27–40 (West Group 1997). In particular, the Lanham Act prohibits commercial advertising or promotion that misrepresents the nature, characteristics, qualities or geographic origin of the advertisers or another person's goods, services, or commercial activities. See *Rhone-Poulenc Rorer Pharm., Inc. v. Marion Merrell Dow, Inc.*, 93 F.3d 511, 514 (8th Cir. 1996) (citing 15 U.S.C. §1125(a)(1)(B)).

§43(a) of the Lanham Act, codified at 15 U.S.C. §1125(a) provides:

- (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading misrepresentation of fact, which...
- (B) In commercial advertising or promotion, misrepresents the



■ Robert S. Thompson is a partner with Hawkins Parnell Thackston & Young in Atlanta and a member of the firm's Business Litigation Group focusing on commercial and contract disputes, business torts, false advertising, unfair business practices, fiduciary duty disputes, product liability, construction litigation, and intellectual property disputes. He brings and defends cases on behalf of individuals and businesses in both the state and federal courts of Georgia and the Southeastern United States. Mr. Thompson is a member of the DRI Commercial Litigation Committee and member of the ALFA Business Litigation Steering Committee.

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 act.

According to the Ninth Circuit in *Coastal Abstract Service, Inc. v. First American Title Ins. Co.*, 173 F.3d 725 (9th Cir. 1999),

For representations to constitute "commercial advertising or promotion" under the Lanham Act, they must be (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services; while the representations need not be made in a "classic advertising campaign," but may consist instead of more informal types of "promotion," the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

In order to warrant preliminary injunctive relief, a party need only show the following four elements:

- a likelihood of success on the merits;
 - irreparable harm absent issuance of an injunction;
 - the balance of harms favors the movant; and
 - the public interest favors a grant of relief.
- Carillon Imps., Ltd. v. Frank Pesce Int'l Group Ltd.*, 112 F.3d 1125 (11th Cir. 1997).

Likelihood of Success on the Merits

In order to establish the likelihood of success on the merits under the Lanham Act, a party must establish that:

- The challenged advertisements were false or misleading;
- The advertisement deceived or has the capacity to deceive consumers;
- The deception has a material effect on purchasing decisions; and
- Plaintiffs have been injured or are likely to be injured by the false advertising.

Johnson & Johnson Vision Care, Inc. v. 1-800Contacts, Inc., 299 F.3d 1242, 1247 (11th Cir. 2002).

False and Misleading

The first element, that the ads are false

or misleading, "generally falls into one of two categories: (1) commercial claims that are literally false as a factual matter; and (2) claims that may be literally true or ambiguous but which implicitly convey false impression, or misleading in context, or likely to deceive consumers." *United Ind. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1988).

Literal Falsity

The first element of a false advertising claim is a fact question and is "satisfied if the challenged advertisement is literally false, or if the challenged advertisement is literally true, but misleading." *1-800 Contacts*, 299 F.3d at 1247 (citation omitted). When determining whether an advertisement is false or misleading, courts "must analyze the message conveyed in full context," and "must view the face of the statement in its entirety, rather than examining the eyes, nose, and mouth separately and in isolation from each other." *Id.* at 1248 (citations omitted).

Opinion Versus Fact

Plaintiff must prove that a claim is false or misleading, not merely that it is unsubstantiated. *Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Rhone-Poulenc Rorer Pharmaceuticals, Inc.*, 19 F.3d 125 (3d Cir. 1994). Expressions of opinion (as opposed to fact) are not actionable as false advertising under the Lanham Act.

First, to qualify as a non-actionable opinion, a statement must amount to nothing more than puffery. *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 160 (2d Cir. 2007); *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 390-91 (8th Cir. 2004); *Robert Bosch LLC v. Pylon Mfg. Corp.*, 632 F. Supp. 2d 362, 366 (D. Del. 2009); *Bracco Diagnostics, Inc. v. Amer-sham Health, Inc.*, 627 F. Supp. 2d 384, 464 (D.N.J. 2009) ("nonspecific statements that do not refer to specific characteristics of a product are non-actionable puffery."). Puffery comes in two forms: (1) a general claim that is so vague it can be understood as nothing more than an expression of opinion; or (2) an exaggerated, blustering statement that no reasonable buyer would be justified in relying on. *Time Warner*, 497 F.3d at 160. Even where a representation may arguably be of a factual nature, it will

not be actionable if the defendant can persuade the trier of fact that it merely engaged in sales puffery. "Puffing" is an exaggeration or overstatement expressed in broad, vague, and commendatory language. *Castro, Inc. v. Pennzoil Co.*, 987 F. 2d 939 (3d Cir. 1993) Puffery is commonly considered to be offered by a seller and understood by the public to be an expression of the seller's

Even where a representation may arguably be of a factual nature, it will not be actionable if the defendant can persuade the trier of fact that it merely engaged in sales puffery.

opinion only. Thus, in one case the court rejected a false advertising claim where the defendant's medical care provider advertised that its services were "better than" a health maintenance organization's, saying the advertising was "the most innocuous kind of 'puffing.'" *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914 (3d Cir. 1990); *See, e.g., Am. Italian Pasta Co.*, 371 F.3d at 391 ("if the statement is not specific and measurable, and cannot be reasonably interpreted as providing a benchmark by which the veracity of the statement can be ascertained, the statement constitutes puffery."). Courts are also hesitant to stifle "robust debate between competitors" in the free market system and allow general claims of superiority. *See, Licata & Co., Inc. v. Goldberg*, 812 F. Supp. 403, 408 (S.D.N.Y. 1993).

Second, when determining whether an assertion is mere opinion, "the form of the statement is not controlling." *Restatement (Third) of Unfair Competition* §3, cmt. d (1995). The Restatement explains: "In many circumstances prospective purchasers may reasonably understand a statement of opinion to be more than a mere assertion as to the seller's state of mind. Some representa-

tions of opinion may imply the existence of facts that justify the opinion....” *Id.*; see also, *Am. Italian Pasta Co.*, 371 F.3d at 391 (actionable statements include those capable of being “reasonably interpreted as a statement of objective fact”). Similarly, the First Amendment does not protect, as pure opinion, a statement of opinion that “implies that it is based upon facts which

If the court deems an ad to be true but misleading, the movant, even at the preliminary injunction stage, must present some evidence of deception.

justify the opinion but are unknown to those reading or hearing it....” *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 288 (N.Y. 1986).

Standing alone, a statement that “We think our product is safer than theirs” might qualify as a mere opinion. But even standing alone, it is doubtful that a statement such as, “we believe our competitor’s product is unsafe” could be considered puffery. That is a classic example of an opinion that “impl[ies] the existence of facts that justify the opinion.” *Restatement (Third) of Unfair Competition* §3, cmt. d (1995).

Literally False by Necessary Implication

A “literally false by necessary implication” argument hinges on looking at the overall message of the advertisement, and determining whether “the audience would recognize the claim as readily as if it had been explicitly stated.” *Clorox Co. P. R. v. Proctor & Gamble Co.*, 228 F.3d 24, 34 (1st Cir. 2000); see also *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 586 (3d Cir. 2002) (noting that a message is false by necessary implication “when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated”); *Scotts Co. v. United Indust. Corp.*, 315 F.3d 264, 274 (4th

Cir. 2002). Further, “a court must analyze the message conveyed in full context,” and that “the court must view the face of the statement in its entirety, rather than examining the eyes, nose, and mouth separately in isolation from each other.” *Castrol, Inc. v. Pennzoil Company*, 987 F.2d 939, 946 (3d Cir. 1993).

For example, in *Tambrands v. Warner-Lambert Co.*, 673 F. Supp. 1190 (S.D.N.Y. 1987), the district court determined that the claims of a home-pregnancy test maker were “literally false by necessary implication” because the ads claimed results “in as fast as 10 minutes.” In fact, only 52 percent of pregnant women would obtain positive results in 10 minutes, while 48 percent of pregnant women, and all non-pregnant women required 30 minutes to confirm test. *Id.* at 1194. The court rejected defendant’s argument that the qualifying words—“in as fast as”—sufficiently modified the message to render the advertisement true. *Id.* See also *Clorox Co. P.R.*, 228 F.3d 24 (reversing dismissal of Lanham Act claim because fact-finder could have determined comparison claim of “Compare with your detergent... whiter is not possible” was literally false by necessary implication); *Castrol Inc.*, 987 F.2d at 945–48 (discussing difference between finding claim false by necessary implication, and finding claim true, but likely to deceive; noting that consumer evidence is required only for the latter, and that it is within judicial province to find the former; and concluding that claim that motor oil provided superior engine protection was literally false based on the commercial’s necessary implication without reference to consumer confusion); *Playskool, Inc. v. Product Dev. Group, Inc.*, 699 F. Supp. 1056, 1060 (E.D.N.Y. 1988) (finding claim that defendant’s toys could attach to plaintiff’s toys was literally true, but the “clear implication” was that defendant’s toys could safely attach to plaintiff’s toys, which was untrue and misleading without referring to consumer surveys).

If the words, considered in context, “necessarily imply a false message, the advertisement is literally false and no extrinsic evidence of consumer confusion is required.” *Time Warner*, 497 F.3d at 158 (emphasis added); see also *Clorox Co. P.R.*, 228 F.3d at 34–35; *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck*

Consumer Pharm., 129 F. Supp. 2d 351, 364 (D.N.J. 2000), *aff’d*, 290 F.3d 578 (3d Cir. 2002) (product name Mylanta “Night Time Strength,” which necessarily implied that it worked especially well at night, was literally false); cf. *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1225 (11th Cir. 2008) (“it is often a matter of degree whether a statement is literally false or merely misleading.”).

However, a false-by-necessary-implication claim fails if the statement can reasonably be understood to convey different messages. See, e.g., *Scotts Co. v. United Indust. Corp.*, 315 F.3d 264, 274–75 (4th Cir. 2002); and see *Novartis Consumer Health*, 290 F.3d at 586–87. “Commercial claims that are implicit, attenuated, or merely suggestive usually cannot fairly be characterized as literally false.” *United Indust. Corp.*, 140 F.3d at 1181.

Comparative Advertisements

“[T]he nature of a plaintiff’s burden in proving an advertisement to be literally false should depend on whether the defendant’s advertisement cites consumer testing.” *1-800 Contacts*, 299 F.3d at 1248 (citing, among other cases, *Rhone-Poulenc Rorer Pharms., Inc. v. Marion Merrell Dow, Inc.*, 93 F.3d 511, 514–15 (8th Cir. 1996)). Thus, courts typically place comparative advertising claims into one of two categories:

- “my product is better than yours” advertisements; and
- “tests prove that my product is better than yours” advertisements.

Rhone-Poulenc, 93 F.3d at 514.

To challenge the first type of false advertising, “a Lanham Act plaintiff must prove that defendant’s claim of superiority is false.” *Id.* If the advertisement in question cites consumer testing, “the advertisement is labeled as an ‘establishment’ claim.” *1-800 Contacts*, 299 F.3d at 1248 (citing *BASF Corp. v. Old World Trading Co.*, 41 F.3d 1081, 1090 (7th Cir. 1994)). “To prove an establishment claim literally false, the movant must ‘prove that the tests did not establish the proposition for which they were cited.’” *Id.* (quoting *Castrol, Inc. v. Quaker State Corp.*, 977 F.2d 57, 62 (2d Cir. 1992)). See also *Rhone-Poulenc*, 93 F.3d at 514–15. (“[T]o successfully challenge the second type of claim, where defendant has hyped the claim of superiority

by attributing it to the results of scientific testing, plaintiff must prove *only* ‘that the tests [relied upon] were not sufficiently reliable to permit one to conclude with reasonable certainty that they established the proposition for which they were cited.’”) (quoting *Quaker State*, 977 F.2d at 62–63). An example of a court’s detailed analysis, finding that a manufacturer’s tests did not support its advertising claims, may be found in *McNeil-PPC, Inc. v. Pfizer, Inc.*, 351 F. Supp. 2d 226 (S.D.N.Y. 2005). As shown there, “tests-prove” advertising statements based on broad extrapolations from the test results cannot withstand a false advertising challenge. See, *id.* at 250–52.

Literally True but Misleading

Section 43(a) of the Lanham Act makes actionable not only false designations of origin and false descriptions and representations of fact, but also misleading descriptions and representations of fact. The falsity must be of fact, not opinion, to be actionable. *Dial A Car v. Transportation, Inc.*, 884 F. Supp. 584 (D.D.C. 1995). Thus, the courts have recognized a distinction between designations, descriptions and representations that are literally false and those that, while not literally false, are likely to mislead or confuse customers—perhaps more accurately referred to as “deceptive advertising.” *Johnson & Johnson v. GAC International, Inc.*, 862 F.2d 975 (2d Cir. 1988). As to this type of “falsity,” a different standard of proof applies, requiring actual evidence of consumer deception, even at the interlocutory injunction stage.

Evidence of Deception

If a court deems an advertisement to be literally false, the movant need not present evidence of consumer deception. *1-800 Contacts*, 299 F.3d at 1247; *American Council Certified Podiatric Physicians and Surgeons v. American Board of Podiatric Surgery, Inc.*, 185 F.3d 606, 614 (6th Cir. 1999). If the court deems an ad to be true but misleading, the movant, even at the preliminary injunction stage, must present some evidence of deception. While “full-blown consumer surveys or market research are not an absolute requisite” the moving party must provide “expert testimony or other evidence” in order to obtain even interlocutory injunctive relief. *United Ind. Corp.*, 140 F.3d at 1183.

Materiality

A plaintiff “must establish materiality even when a defendant’s advertisement has been found literally false.” *1-800 Contacts*, 299 F.3d at 1251. A plaintiff may establish materiality by demonstrating “that the deception is likely to influence the purchasing decision.” *N. Am. Medical Corp.*, 522 F.3d at 1226 (quoting *1-800 Contacts*, 299 F.3d at 1250). A plaintiff may also demonstrate materiality by showing that the defendant “misrepresented an inherent quality or characteristic of the product.” *1-800 Contacts*, 299 F.3d at 1250 (quoting *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 855 (2d Cir. 1997)). As one commentator has observed, claims relating to health, safety and other areas of consumer concern have been presumed to be material, “because of their obvious potential effect on purchasing decisions....” Richard J. Leighton, *Materiality and Puffing in Lanham Act False Advertising Cases: The Proofs, Presumptions, and Pretext*, 94 Trademark Rep. 585, 595 (2004).

Likelihood of Injury

The last element a movant must establish to show a likelihood of success on the merits of a false advertising claim is that, “the movant has been—or is likely to be—injured as a result of the false advertising.” *1-800 Contacts*, 299 F.3d at 1247. Because a plaintiff must demonstrate irreparable injury in order to be entitled to a preliminary injunction, the court’s analysis of the irreparable injury requirement for a preliminary injunction will also decide the likelihood of injury element of a plaintiff’s false advertising claim.

Irreparable Harm

The irreparable harm showing requires a plaintiff to demonstrate “a reasonable basis for the belief that the plaintiff is likely to be damaged as a result of the false advertising.” *Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 190 (2d Cir. 1980). When, as here, the parties’ products compete in the same market, that fact weighs in favor of an irreparable harm finding. See *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994). The plaintiff can establish irreparable injury by demonstrating that the parties are competitors and showing a logical causal connection

between the false advertising and the plaintiff’s own sales position. *McNeil-PPC, Inc.*, 351 F. Supp. at 247.

When a statement is literally false, the court presumes that it will cause injury to a competitor. *Energy Four, Inc. v. Dornier Medical Sys.*, 765 F. Supp. 724, 734 (N.D. Ga. 1991) (“proof of falsity is sufficient to sustain a finding of irreparable harm for purposes

Commercial speech is protected only insofar as it serves an informational function, and it loses its protection if it deceives, misleads or constitutes fraudulent activity.

of a preliminary injunction.”). If the parties are competitors and the false advertising is comparative in nature, harm is presumed, and no proof of actual injury is needed, even to support the irreparable injury requirement for a preliminary injunction. *Black Hills Jewelry Mfg. Co. v. Gold Rush, Inc.*, 633 F.2d 746 (8th Cir. 1980); *McNeilab, Inc. v. American Home Products Corp.*, 848 F.2d 34 (2d Cir. 1988). That rule may still properly be applied even after the Supreme Court’s decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 126 S. Ct. 1837 (2006). See, *Operation Able of Greater Boston, Inc. v. Nat’l Able Network, Inc.*, 646 F. Supp. 2d 166, 176–77 (D. Mass. 2009). See also, *Petro Franchise Sys., LLC v. All Am. Prop., Inc.*, 607 F. Supp. 2d 781, 794 (W.D. Tex. 2009); *Warner Bros. Entm’t, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 552 (S.D.N.Y. 2008); *Eisai Co., Ltd. v. Teva Pharm. USA, Inc.*, 2008 WL 1722098, at *10 (D.N.J. 2008); *Christiana Indus. v. Empire Elec., Inc.*, 443 F. Supp. 2d 870, 884 (E.D. Mich. 2006).

First, *eBay*’s holding was confined to permanent injunctions issued under the Patent Act. Second, *eBay* does not necessarily foreclose a presumption of harm; **False and Unfair**, continued on page 76

False and Unfair, from page 55
it holds only “that [equitable] discretion must be exercised consistent with traditional principles of equity.” *eBay*, 547 U.S. at 394. The Supreme Court precluded “a rule that an injunction automatically follows a determination that a copyright has been infringed.” *eBay*, 547 U.S. at 393–94 (emphasis added). A conclusive determination that three equitable factors automatically follow when success on the merits is established is quite far from a mere presumption that a single factor—irreparable harm—should usually follow when likelihood of confusion is established.

Moreover, even in non-competitor contexts, the plaintiffs need not show the precise amount of their likely injury or even that the occurrence of harm is certain to obtain an injunction. Rather, all that the plaintiffs need demonstrate is a reasonable belief that injury will occur. *Warner-Lambert Co. v. Breathasure, Inc.*, 204 F.3d 87, 95–96 (3d Cir. 2000).

Balance of Harms

In a case where a substantial likelihood of success on the merits and irreparable harm have been established, the balance of the harms will flow naturally to the plaintiff’s side. *See, Osmose, Inc. v. Viance, LLC*, 612 F.3d 1298 (11th Cir. 2010). The key to maintaining the balance is to ensure that the injunctive relief requested goes no further than is necessary to limit the alleged wrong and does not hinder legitimate competition.

Public Interest

“There is a strong public interest in preventing false advertising of products in the marketplace.” *Kennedy Industries, Inc. v. Aparo*, 416 F. Supp. 2d 311, 317 (E.D. Pa. 2005).

When all a district court has prohibited is false advertising aimed at misleading the public, that relief will “serve, rather than disserve, the public interest in truthful advertising, an interest that lies at the heart of the Lanham Act.” *Abbott Lab. v. Mead Johnson & Co.*, 971 F.2d 6, 19 (7th Cir. 1992).

First Amendment Concerns

The First Amendment right to free speech may provide a defense in false advertising cases, given the fact that advertising is a form of commercial speech. The United States Supreme Court has made it clear that commercial speech is within the ambit of the First Amendment. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976). However, the Supreme Court has frequently held that false or misleading commercial speech is not protected. *See Central Hudson Gas & Electric Corp. v. Public Service Com.*, 447 US 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980). Commercial speech is protected only insofar as it serves an informational function, and it loses its protection if it deceives, misleads or constitutes fraudulent activity. *Id.*

The Lanham Act’s content-neutral prohibition of false advertising “does not arouse First Amendment concerns that justify alteration of the normal standard for preliminary injunctive relief.” *Vidal Sassoon, Inc. v. Bristol-Meyers Co.*, 661 F.2d 272, 276 n.8 (2d Cir. 1981). In fact, false commercial speech “is not protected by the First Amendment and may be banned entirely.” *Castrol Inc. v. Pennzoil Co.*, 987 F.2d at 949.

Even so, free speech considerations can come into play in false advertising cases, particularly with respect to the scope of injunctive relief. In the event such relief is granted, courts should use the least re-

strictive alternative through a narrowly drawn order. *See, Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976). When considering whether an injunction is sufficiently specific, “the court should look at the injunctive order as a whole, including not only its text, but also the context of the litigation.” *ClearOne Commc’n. Inc. v. Chiang*, ___ F. Supp. 2d ___, 2009 WL 4034806, at *32 (D. Utah 2009) (citing *Reliance Ins. Co. v. Mast Constr. Co.*, 159 F.3d 1311, 1316 (10th Cir. 1998)). Federal Rule of Civil Procedure 65 requires only that the enjoined conduct be described in reasonable—not excessive—detail. *Reliance*, 159 F.3d at 1316. In fact, the more specific the order, “the more opportunities for evasion (‘loopholes’).” *Scandia Down Corp. v. EuroQuilt, Inc.*, 772 F.3d 1423, 1431 (7th Cir. 1985). If disputes arise over what speech is permissible under the injunctive order, those disputes may be resolved later by the district court. *See Scandia*, 772 F.3d at 1431 (“The right to seek clarification or modification of the injunction provides assurance, if any be sought, that proposed conduct is not proscribed.”). The key consideration is to ensure that the scope of the injunction is linked to advertising and promotion that is false and misleading and does not inhibit a competitors’ legitimate rights to engage in non-commercial speech.

Conclusion

The Lanham Act is an essential statute for those asserting claims for unfair competition through misleading or literally false advertising. Often, these types of cases are determined on the merits at the preliminary injunction stage. Accordingly, it is essential that you be well versed in the elements of these claims so you can be prepared to move quickly when the next case lands on your desk. 