

# Statements Regarding Live Scientific Debate Still Subject to False Advertising Claim

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## Eastman Chemical Company v. PlastiPure, Inc.

According to the U.S. Court of Appeals for the Fifth Circuit, even if scientific claims are the subject of live scientific debates, that status will not immunize such statements containing such claims from false advertising claims under the Lanham Act. *Eastman Chemical Company v. PlastiPure, Inc.*, Case No. 13-51087 (5th Cir., Dec. 22, 2014) (Elrod, J.).

Eastman Chemical Company sued PlastiPure and CertiChem in a Texas district court for false advertising under the Lanham Act, business disparagement, tortious interference, unfair competition and conspiracy. The case centers around Eastman's Tritan product, a plastic resin used in water bottles, food containers and other consumer products. Eastman claims that its tests show that Tritan does not exhibit harmful estrogenic activity in humans found in other plastic resins called polycarbonates.

PlastiPure competes with Eastman, having also developed a plastic resin that PlastiPure claims does not exhibit estrogenic activity. PlastiPure collaborated with CertiChem to test and certify its products. In 2011, PlastiPure published a sales brochure claiming that Eastman's Tritan product does exhibit significant levels of estrogenic activity. After PlastiPure distributed the brochure at trade shows and to potential customers, Eastman filed suit.

A jury returned a verdict against PlastiPure and CertiChem, finding that they violated the Lanham Act by making false statements of fact about Eastman's Tritan product. The district court then entered a permanent injunction against the defendants and this appeal followed.

Section 43(a) of the Lanham Act provides a civil cause of action against any person who, in connection with goods or services, uses any "false or misleading description of fact, or false or misleading representation of fact . . . ." On appeal, PlastiPure and CertiChem argued that their statements were not actionable statements of fact under the Lanham Act. Rather, they argued, the statements in their marketing materials constituted non-actionable scientific opinions relating to live scientific controversies.

The 5th Circuit rejected PlastiPure and CertiChem's argument, concluding that their scientific claims

constituted false commercial speech. “[I]t is of no moment that the commercial speech in this case concerned a topic of scientific debate. Advertisements do not become immune from Lanham Act scrutiny simply because their claims are open to scientific or public debate.”

As the 5th Circuit explained, Eastman did not sue the appellants for publishing an article in a scientific journal. Rather, Eastman sought to enjoin statements “made in commercial advertisements and directed at customers.”

Because PlastiPure and CertiChem published their scientific claims in commercial advertisements and not a scientific journal, the court held the injunction “will not stifle academic freedom or intrude on First Amendment values.” Of course, the Court noted that PlastiPure and CertiChem “may continue to pursue their research and publish their results; they simply may not push their product by making the claims the jury found to be false and misleading.”

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