

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

KATE SCHWEIZER, on behalf of herself and all others similarly situated,
Plaintiff-Appellant,

v.

TRANS UNION CORPORATION,
Defendant-Appellee.

**On Appeal from the United States District Court
for the Southern District of New York**

BRIEF FOR AMICUS CURIAE FEDERAL TRADE COMMISSION

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STATEMENT OF INTEREST OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission submits this brief amicus curiae in response to this Court's letter of November 21, 1997, requesting that the Commission "set[] forth its views on the issues raised by the appeal."

QUESTION PRESENTED FOR REVIEW

Whether a letter demanding payment of a debt that is sent by ordinary first-class mail, in an envelope with a blue stripe bearing the legend "Priority-Gram" and the statement "Electronically transmitted * * * for Priority Postal Delivery," may be found to constitute a "false representation or deceptive means to collect or attempt to collect any debt," under Section 807(10) of the Fair Debt Collection Practices Act.

STATEMENT OF THE CASE

This is a private suit alleging violations of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692n ("FDCPA"), by the former collection division of defendant Trans Union Corporation ("TUC"). In the course of collecting debts for Roche Biomedical Labs, Inc., TUC used a collection letter styled at the top as a "Priority-Gram." The letter, typewritten in uppercase block letters, urged recipients to "send us the balance by check, money order, Western Union or bank wire." The envelope containing the letter is an ordinary #10 envelope measuring 9 1/2" x 4 1/4", adorned with a navy blue band, 7/8" in width, extending horizontally across the face of the envelope between two cellophane windows. The word "Priority-Gram" is printed on the blue stripe in white lettering, and below that appears the statement "Electronically transmitted by Lason Systems, Inc. for Priority Postal Delivery." The envelope was sent by first-class mail. Joint Appendix ("J.A.") 66-67.

Plaintiff Kate Schweizer received such a letter demanding payment of an alleged \$15 debt and sometime thereafter commenced suit under the FDCPA, requesting that it be certified as a class action. The complaint alleged that TUC's collection letters "creat[ed] a false sense of urgency by simulating a telegram" (J.A.5), and thereby violated Section 807(10) of the FDCPA, 15 U.S.C. § 1692e(10), which prohibits "any false representation or deceptive means to collect or attempt to collect any debt." The complaint did not allege that the letter violated the FDCPA in any other way.

Following a period of discovery, the district court (Brieant, J.), heard cross-motions for summary judgment by the parties and entered summary judgment for defendant. In the court's view, the issue was "whether a reasonable juror on the totality of the evidence presented could find that the total effect of the document, including the envelope, was to create a false sense of urgency essentially by simulating a Telegram. This Court concludes as a matter of law that it does not." J.A. 68. In reaching its conclusion, the court "as would a jury" relied "on the totality of the circumstances." J.A. 70. As the court explained:

The offending envelope, including its contents, does not look like a Telegram, even to the most ignorant debtor. It arrives by "snail mail" and looks like what it is. The least sophisticated consumer, no matter how gullible, could not conclude from the documentation present in this case, when received by "snail mail," that there was a sense of urgency of any kind, much less a false sense of urgency. Everyone gets lost in Brooklyn -- but not that lost.

J.A. 70 (footnote omitted).

In reaching its conclusion the court distinguished Trans World Accounts, Inc. v. FTC, 594 F.2d 212 (9th Cir. 1979), in which the Commission had found that a debt collector's use of simulated telegrams and Western Union Mailgrams were deceptive practices under Section 5 of the Federal Trade Commission Act. The district court reasoned that "judicial review [in Trans World Accounts] extended only to whether the findings of the Commission were supported by substantial evidence" and the case, in any event "originates in a different circuit." (J.A. 68.) However, the district court found its conclusion that TUC's Priority-Grams were not deceptive to be "sustain[ed] and reinforce[d]" (J.A. 69) by that portion of the 1988 FTC Staff Commentary on the FDCPA interpreting 15 U.S.C. § 1692f(8), a separate section of the Act.

Schweizer filed a timely appeal from the district court's decision and the case was submitted for decision on October 29, 1997. By letter dated November 21, 1997, the Court invited the Commission to file by December 19, 1997, a brief amicus curiae "setting forth its views on the issues raised by the appeal."

SUMMARY OF ARGUMENT

TUC's blue "Priority-Grams" with the legend "Electronically transmitted * * * for Priority Postal Delivery" would probably not be mistaken by consumers for yellow Western Union "telegrams." But they do resemble, and might plausibly be mistaken by some consumers for, other forms of "electronically transmitted" or "Priority" communications that cost more than ordinary mail to send, such as USPS "Priority Mail" or a Western Union "Mailgram." The district court's conclusion that consumers could not be misled as to the character of the Priority-Gram because it is delivered along with other first-class mail fails to consider the fact that a variety of expedited types of communications are delivered by the postal service along with ordinary first-class mail. Thus, a jury might reasonably find that TUC's letters, by conveying a false message about the manner in which they have been delivered, misrepresent the urgency of the subject communication, and thereby violate the FDCPA.

This conclusion finds support in Trans World Accounts v. FTC, in which a debt collector transmitted letters falsely threatening imminent legal action in envelopes made to look like something other than first-class mail. However, plaintiff's case is not as strong as that in Trans World Accounts, because the simulated formats in Trans World Accounts contributed to and enhanced the false message of urgency conveyed by the text of the letters themselves. Here, by contrast, the text of TUC's letter conveys no misleading impression of urgency. Thus, a factfinder might also reasonably conclude that even if TUC has misrepresented the manner in which its Priority-Gram has been transmitted, no actionable deception has resulted. Nevertheless, the district court erred in holding, for the reasons it gave, that as a "matter of law" no deception could be found. (POINT I, infra.)

In an administrative proceeding to determine whether a practice is "deceptive" within the meaning of Section 5 of the FTC Act, determination of the impression created upon consumers by an advertisement or other commercial representation would be treated as a matter of fact, for resolution by the Commission as factfinder, subject to deferential review in the court of appeals. By analogy to FTC Act precedents, this Court might appropriately remand this case to the district court for determination of the question of deceptiveness by the jury, or by the court if jury trial is waived. However, both this Court and others have treated determinations of how debt collection claims would be understood by the "least sophisticated consumer" as questions of "law" that may be decided by courts upon summary judgment. This development apparently has been driven by a burgeoning FDCPA caseload and the desire of plaintiffs, defendants, and courts alike for quick, inexpensive resolution of comparatively small cases. (POINT II, infra.)

If this Court concludes that a remand of this case for determination by the factfinder would be inconsistent with the trend of FDCPA jurisprudence to treat such issues as appropriate for summary judgment, then this Court should cast any affirmance of the decision below narrowly, on grounds that do not condone the use by debt collectors or others of envelopes that may misrepresent the means by which, and cost at which, those envelopes have been sent. Even if deception of consumers is considered unlikely under all the facts of this case, representations that ordinary first-class mail has been "Electronically transmitted" for "Priority Postal Delivery" may well cause deception and constitute grounds for liability in other circumstances. (POINT III, infra.)

ARGUMENT

I. TUC'S "PRIORITY-GRAMS" MIGHT REASONABLY BE FOUND TO MISREPRESENT THE URGENCY OF ITS MESSAGE BY SIMULATING AN EXPEDITED AND EXPENSIVE FORM OF MAIL DELIVERY.

Section 807 of the FDCPA, 15 U.S.C. § 1692e, prohibits "any false, deceptive, or misleading representation or means in connection with the collection of any debt." Section 807(10) reiterates that this includes "any false representation or deceptive means to collect or attempt to collect any debt." 15 U.S.C. § 1692e(10). Among those practices found to violate Section 807 is "[s]ending letters which appear to be telegraphs" because it generates a "sense of false urgency." Rosa v. Gaynor, 784 F. Supp. 1, 5 (D.Conn. 1989), citing In re Schrimpsheer, 17 B.R. 999, 1012-13 (N.D.N.Y. 1982); Trans World Accounts v. FTC, 594 F.2d 212, 215 (9th Cir. 1979) (simulated telegrams and mailgram used in debt collection are "deceptive practices" under Section 5 of the FTC Act). The 1988 FTC Staff Commentary on the FDCPA, in elaborating on the prohibitions of Section 807(10), likewise recognizes that "[a] debt collector may not communicate by a format or envelope that misrepresents the nature, purpose, or urgency of the message. It is a violation to send any communication that conveys to the consumer a false sense of urgency." 53 Fed. Reg. 50097, 50106 (1988).(1)

The district court held that "as a matter of law" TUC's "Priority-Gram" could not be found to misrepresent the urgency of TUC's message because consumers were not likely to believe that the blue Priority-Grams, which arrive in the regular mail, are yellow Western Union "telegrams." We agree that it is unlikely that consumers would mistake Priority-Grams for Western Union "telegrams." However, the district court's conclusion that consumers could not be misled as to the urgency of the Priority-Gram because it is delivered along with other first-class mail fails to consider the fact that other forms of expedited mail service, more costly than first-class mail, are sometimes delivered to the recipient's home or business along with the day's regular mail delivery. Two examples, both of which the Priority-Gram resembles, are USPS "Priority Mail"(2) and the Western Union "Mailgram."(3) Both of these are sent in envelopes that feature the blue and white pattern of the Priority-Gram. While this similarity alone might be insufficient to cause deception, the likelihood that consumers would mistake a Priority-Gram for Priority Mail or some other form of urgent communication is enhanced by the legend on the outside of the envelope: "Electronically transmitted by Lason Systems, Inc. for Priority Postal Delivery." We are aware of nothing in the record that explains what this sentence is intended to mean.(4) However, two plausible interpretations that might be placed upon it by consumers are that (1) the subject letter has been delivered by "Priority" mail, or, (2) like a Western Union "Mailgram," the letter has been "electronically transmitted" from the debt collector's locality to the debtor's locality in order to expedite "Postal Delivery" to the consumer's home.(5)

This Court has recognized that "collection notices can be deceptive if they are open to more than one reasonable interpretation, at least one of which is inaccurate." Clomon v. Jackson, 988 F.2d 1314, 1319 (2d Cir. 1993). Even a "sophisticated" consumer, let alone the "least sophisticated," whom the FDCPA protects (id. at 1316), might well be confused and misled by the language on TUC's envelopes regarding the manner by which they were sent.

The conclusion that the Priority-Gram could reasonably be found to be misleading is supported by Trans World Accounts, Inc., 90 F.T.C. 350 (1977), aff'd in relevant part, 594 F.2d 212 (9th Cir. 1979). There, a debt collector sent its communications in a yellow envelope styled a "telegram" and (after the Commission's complaint was issued), in a blue- striped envelope, styled a "Trans-O-Gram." The Commission found that these formats misleadingly simulated Western Union telegrams and "Mailgrams," respectively, and were therefore "deceptive practices" within the meaning of Section 5 of the Federal Trade Commission Act. As the Commission observed, "[w]hat is deceptive * * * is for respondents to attempt to convince their readers that a message is of such urgency or importance that they have taken particular pains or spent extra money to deliver it, when in fact they have not." 90 F.T.C. at 396. In affirming the Commission's decision, the Ninth Circuit concluded that "substantial evidence supports the Commission's findings that the telegrams and the Trans-O-Gram format are deceptive under Section 5 of the FTC Act." 594 F.2d at 216.(6)

The Ninth Circuit's decision in Trans World Accounts is certainly relevant to this case. The fact that the Ninth Circuit decided only "whether the findings of the Commission were supported by substantial evidence" (J.A. 68) does not, contrary to the district court's conclusion (id. at 69), distinguish that decision from this case. The district court here undertook to determine "whether a reasonable juror * * * could find that the total effect of the document * * * was to create a false sense of urgency essentially by simulating a Telegram." J.A. 68. That is in essence the same determination that the Ninth Circuit made when it decided that the Commission's findings of deception were supported by "substantial evidence."⁽⁷⁾ The district court was obviously correct that decisions of the Ninth Circuit are not binding upon courts in this Circuit. J.A. 69. But the court's reason for distinguishing Trans World Accounts as persuasive authority on the merits is untenable.

While Trans World Accounts is thus quite relevant to this case, and lends some support to plaintiff's position, there are also important differences between the present case and Trans World Accounts that might lead a reasonable factfinder to reject plaintiff's claim. Most importantly, the debt collector in Trans World Accounts (and Capax) used a series of form letters that threatened immediate legal action if alleged debtors did not pay within short specified deadlines. In fact, the only consequence of disregarding one letter in the series was receipt of the next. No decision to sue any debtor was ever made until the entire series of form letter threats had been exhausted. See 594 F.2d at 216 n.3. Thus, the misleading format of Trans World's envelopes complemented and enhanced their misleading text, combining to create the false impression that the collector was proceeding with great haste and urgency and was likely to take action precipitously if payment were not made.

By contrast, the TUC collection letter in evidence in this case contains no such misleading threats and the complaint alleges no violation of the FDCPA other than TUC's use of the Priority-Gram format. A reasonable factfinder could conclude that even if TUC's envelopes falsely represent the manner of delivery (i.e., by "Electronic Transmission" and "Priority Postal Delivery"), in context there is no material misrepresentation of the "urgency" with which the collector is proceeding, and thus no violation of the FDCPA.⁽⁸⁾

For the foregoing reasons, we believe that the district court erred in concluding for the reasons it did that "as a matter of law" no "reasonable juror could find that the effect of the [Priority-Gram] * * * was to create a false sense of urgency." J.A. 68. Whether these Priority-Grams do constitute a case of actionable deception presents a closer case than Trans World Accounts and might, on the record below, be reasonably resolved either way as a question of fact.

II. ALTHOUGH REMAND FOR DETERMINATION OF THE ISSUES BY THE TRIER OF FACT IS SUGGESTED BY ANALOGY TO FTC ADMINISTRATIVE PRACTICE, THIS COURT MAY CONSIDER THAT OPTION INCONSISTENT WITH THE TREND TO RESOLVE FDCPA LITIGATION BY SUMMARY JUDGMENT.

Had the court below been sitting as the trier of fact, the Commission would urge deference to its conclusion that TUC's Priority-Gram does not violate the FDCPA. When the Federal Trade Commission reviews advertising or other commercial representations in an adjudication under Section 5 of the Federal Trade Commission Act, the Commission's determination of what impression the advertising or claim is likely to make upon the consumer (even when based simply on the Commission's own inspection of the challenged advertisement), is treated by reviewing courts as a determination of fact subject to deferential "substantial evidence" review. See, e.g., Trans World Accounts v. FTC, 594 F.2d at 214-16 (debt collection representations); Kraft, Inc. v. FTC, 970 F.2d 311, 316-318 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993). By analogy, the determination of fact in this case should be made by the jury, unless the plaintiff consents to trial by the court. This observation is not affected by the fact that both the plaintiff and the defendant sought summary judgment in this case. "Even though both parties move for summary judgment and even though they agree that there are no issues of fact, the court may still find that factual issues exist." Cargill, Inc. v. Charles Kowsky Resources, Inc., 949 F.2d 51, 55 (2d Cir. 1991), citing Eastman Mach. Co. v. United States, 841 F.2d 469, 473 (2d Cir. 1988).

Nevertheless, while "courts have incorporated the jurisprudence of the FTC Act into their interpretations of the FDCPA," Clomon v. Jackson, 938 F.2d at 1319, the Commission recognizes that an important divergence has occurred insofar as courts have increasingly treated as questions of "law," various judgments about the way in which the "least sophisticated consumer" would interpret particular debt collection claims. See, e.g., Terran v. Kaplan, 109 F.3d 1428, 1431-33 (9th Cir. 1997) (discussing cases); Russell v. Equifax A.R.S., 74 F.3d 30, 33, 35 (2d Cir. 1996); Bentley v. Great Lakes Collection Bureau, Inc., 6 F.3d 60 (2d Cir. 1993); but see, Jeter v. Credit Bureau, Inc., 760 F.2d 1168, 1177-78 (11th Cir. 1985) ("we are confident that whether the 'least sophisticated consumer' would construe Credit Bureau's letter as deceptive is a question for the jury."); Baker v. G.C. Serv. Corp., 677 F.2d 775, 778 (9th Cir. 1982). Barring disagreement about "the credibility of extrinsic evidence," Terran v. Kaplan, 109 F.3d at 1432, courts have tended in recent years to decide for themselves, often as a matter of law, how the "least sophisticated consumer" would interpret a particular debt collection claim. This approach seemingly enjoys the support of plaintiffs, defendants, and courts, as a means of assuring speedy adjudication of the large number of private FDCPA cases with which the courts are increasingly faced. Although the Commission, if deciding this case for itself, would treat the questions involved as ones of fact, we recognize that this Court may be reluctant to do so.

III. SHOULD THE COURT TREAT THE QUESTION OF DECEPTIVENESS AS A MATTER OF LAW, THEN ANY AFFIRMANCE OF THE JUDGMENT BELOW SHOULD BE ON NARROW GROUNDS THAT DO NOT CONDONE MISREPRESENTATIONS OF HOW MAIL IS SENT.

For the reasons set forth in Part II above, this Court may conclude that the issues in this case ought be resolved, as the district court believed, on summary judgment. If so, then any affirmance of the judgment below should be drawn narrowly in a manner that does not broadly condone "as a matter of law" misrepresentations of the manner by which, and the cost at which, mail is sent either by debt collectors or others. The alleged deception in this case may rank low on the scale of public harms, but it ranks nowhere on the scale of public benefits. Neither debt collectors nor anyone else should tell consumers that mail has been sent "Electronically" or for "Priority Postal Delivery" if that is not true. And although the evidence of harm from such a practice seems slight in the present case, the potential for harm, as in Trans World Accounts, Capax, and cases outside the realm of debt collection is real.

Thus, if this Court determines to affirm the decision below, it should stress that while the claims made by TUC might confuse consumers as to the means by which mail has been delivered, the record as a whole fails to suggest that any misrepresentation of urgency would occur, as any fleeting sense of urgency created by the envelope is not sustained in any way by the text of the collection letter itself. A different collection letter might well lead to a different result.

Alternatively, without resolving the ultimate question of deception at all, this Court may simply wish to conclude that the district court correctly resolved the narrow question presented to it -- whether TUC's Priority-Gram falsely simulated a "telegram" -- and that the broader question of whether it misleadingly simulated other forms of expedited communications was not presented or preserved for this Court's consideration. See Racich v. Celotex Corp., 887 F.2d 393, 398 (2d Cir. 1989).⁽⁹⁾ Under any circumstances, the Court should not resolve the case in a manner that will encourage the use by others of formats that misrepresent the manner in which mail has been sent.

CONCLUSION

For the foregoing reasons, this Court should either remand this case for resolution by the factfinder or, if it believes that resolution as a matter of law is appropriate, rest any affirmance of the judgment below on the narrowest possible grounds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 18th day of December, 1997, I have caused two copies of the foregoing Brief Amicus Curiae for the Federal Trade Commission to be served by Federal Express Overnight Delivery upon counsel for appellant and appellee below:

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Endnotes:

1. Contrary to the district court's conclusion (J.A. 69), and TUC's claim (TUC Br. 7-8), that portion of the FTC Staff Commentary that addresses Section 808(8) of the FDCPA, 15 U.S.C. § 1692f(8), is not germane to this question in any way. Section 808(8) of the FDCPA defines as an "unfair" (not a "deceptive") debt collection practice the use of "any language or symbol, other than the debt collector's address, on any envelope." This prohibition was intended to prevent "embarrassment resulting from a conspicuous name [or other words or symbols] on the envelope, indicating that the contents pertain to debt collection." Rutyna v. Collection Accounts Terminal, Inc., 478 F. Supp. 980, 982 (N.D. Ill. 1979); see also Lindbergh v. Transworld Systems, Inc., 846 F. Supp. 175 (D. Conn. 1994); Masuda v. Richards, 759 F. Supp. 1456, 1466 (C.D. Cal. 1991). Mindful of the dire consequences of reading this section literally, the Staff Commentary concludes that Section 808(8) would not be violated by "harmless words or symbols," *i.e.*, "words or notations that do not suggest the purpose of the communication" such as "an actual telegram or similar service that uses a Western Union (or other provider) logo and the word 'telegram' on the envelope, or a letter with the word 'Personal' or 'Confidential' on the envelope." 53 Fed. Reg. at 50108 (emphasis added). Thus, the plaintiff is correct in her contention (Schweizer Br. 18-19) that the Staff Commentary's approval of the word "telegram" (when describing "an actual telegram") under Section 808(8) does not support in any way the conclusion that words such as "Priority-Gram" or "Electronically transmitted * * * for Priority Postal Delivery" are nondeceptive under Section 807 when used to describe first-class mail.

2. The Postal Service currently charges \$3.00 to deliver a letter up to 1 lb. by Priority Mail and represents that delivery within 2 days anywhere in the United States is likely (although it is not guaranteed). The letter to Schweizer states, on its face, that it was sent from Springfield, Pennsylvania, to Harriman, New York.

3. A Western Union "Mailgram," is a message unit that is telegraphically communicated to the general locale of the recipient and delivered from there by regular mail. Trans World Accounts, Inc., 90 F.T.C. 350, 396 n.3 (1977), aff'd in relevant part, 594 F.2d 212 (9th Cir. 1979).

4. Two recent district court decisions (holding that Lason Systems, a mailing service, is not a "debt collector" under the FDCPA) describe how the company transmits its Priority-Gram: "The customer mails or faxes to Lason the text it wants to disseminate. Lason keys the text into its computer system, proofreads it, and sends a copy back to the customer for verification. Once it has been verified, Lason merges the text with the list of names and addresses the customer provides, it laser prints the letters, and folds and mails the finished product to debtors." Laubach v. Arrow Service Bureau, Inc., No. 97 C 26, 1997 U.S. Dist. Lexis 17113 *7 (N.D. Ill. Oct. 30, 1997)(citations omitted); accord, Trull v. Lason Systems, Inc., No. 97 C 855, 1997 U.S. Dist. Lexis 17740 *6 (N.D. Ill. Nov. 4, 1997). Nothing in the courts' descriptions suggests that Lason either transmits the finished letter electronically to anyone, or secures "Priority Postal Delivery."

5. Indeed, although a Western Union "telegram" itself would not be delivered in this way, a consumer unfamiliar with exactly what a "telegram" is (which may describe most citizens of the United States today) could certainly be forgiven for thinking that (like a Western Union Mailgram), a telegram is electronically transmitted from the sender's locality to the recipient's locality, and then delivered by ordinary mail. Again, TUC's envelope heightens the likelihood of such confusion with the legend "Electronically transmitted * * * for Priority Postal Delivery."

6. The Commission followed Trans World Accounts in Capax, Inc., 91 F.T.C. 1048 (1978), aff'd mem., No. 78-1758 (D.C. Cir. Oct. 29, 1979), which involved a collection agency that had switched from a yellow first-class mail "telegram" to a gray and magenta "Letegram." The Commission concluded, from visual inspection of the evidence corroborated by witness testimony, that "the overall appearance of the 'Letegram' has the capacity to deceive consumers into believing that it is more urgent and significant than an ordinary letter. Both the name 'Letegram' and the format of the communication are susceptible of being confused by members of the public with a telegraphic communication." 91 F.T.C. at 1095-96.

7. As the Ninth Circuit observed in Trans World Accounts, "[s]ubstantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" 594 F.2d at 215 (citations omitted).

8. "Materiality" is a necessary element of actionable deception under Section 5 of the FTC Act. Generally, "[a] claim is considered material if it 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product.'" Kraft, Inc. v. FTC, 970 F.2d 311, 322 (7th Cir. 1992), cert. denied, 507 U.S. 909 (1993), quoting Cliffdale Assocs., 103 F.T.C. 110 (1984). In Trans World Accounts, the Commission held that the challenged false formats were material because (90 F.T.C. at 395):

* * * on some occasions money speaks louder than words. A creditor would not spend \$7.95 to convey a message when 13 cents might suffice, unless the message being sent were of the utmost importance and urgency. The obvious conclusion to be drawn from the receipt of a demand to pay, [ostensibly] telegraphically communicated at substantial cost, is that precipitous action may follow if immediate response to the message is not made.

Of course, Lason Systems, Inc. certainly believes that its Priority-Grams make a material difference. It describes them as a "communication intended to provide 'high visual impact' so that the customer's 'message will be read and acted upon,' 'adding value' to the customer's business and resulting in increased profits." Trull v. Lason Systems, Inc., 1997 U.S. Dist. Lexis 17740 at *8.

9. In this regard, it may also be relevant that plaintiff's complaint identified only TUC's letter as the basis for its complaint, (J.A. 5-6), not the envelope and accompanying legend. However, over defendant's objection (J.A. 62), the district court did consider both the envelope and the letter in reaching its decision (J.A. 67).