

False Advertising/Consumer Protection: Key Issues And Dangers

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The number of false advertising lawsuits, particularly state consumer protection class actions, is climbing dramatically, along with the dollar amounts being awarded in these cases. The potential financial impact of this development on advertisers is enormous. Just months ago, in *Price v. Philip Morris*, an Illinois trial court awarded \$10 billion in damages (based on prices paid by consumers for the product) when it found "the term [Marlboro] 'Lights' and the phrase 'Lowered Tar and Nicotine'" to be misleading.

There are several different false advertising/consumer protection regimes that should be of concern to advertisers in the United States: the Federal Trade Commission (FTC); the Lanham Act; the self-regulatory process administered by the National Advertising Division (NAD) of the Council of Better Business Bureaus, Inc.; enforcement actions by State Attorneys General; and individual actions by consumers, including class actions, under state consumer protection laws. Each of these regimes has its own rules and procedures as to who may sue, burden of proof requirements, evidentiary requirements and the type of relief that may be obtained.

FTC. Under Section 5 of the FTC Act, the Commission is given broad authority to prohibit "unfair or deceptive acts or practices." At the FTC, the advertiser has the burden of substantiating the ad in question and must possess at least the level of substantiation expressly or impliedly claimed in the ad. The FTC has a broad range of remedies, including cease and desist orders, corrective advertising, more complete disclosures, consumer redress, disgorgement, and other financial remedies and civil penalties for violations of Commission orders. There is no private right of action under Section 5 of the FTC Act.

The Lanham Act. Under Section 43(a) of the Lanham Act, competitors and also non-competitors who have a "reasonable interest" to protect may sue, but consumers may not. Unlike the FTC, the plaintiff in a Lanham Act case has the burden of proving affirmatively that the challenged ad is false or deceptive. Damages are available under the Lanham Act, particularly in egregious cases, but they are difficult to prove and relatively rare. For the most part, Lanham Act cases are brought by competitors to obtain quick preliminary injunctive relief.

The NAD. The NAD handles any case involving "national advertising." There is no discovery, briefing or hearing, and it normally achieves a final written decision in 60 business days. Challenges may be brought by competitors or consumers, or the NAD itself may initiate the process. Like the FTC, but unlike a Lanham Act proceeding, the NAD looks to whether the challenged advertiser is able to pro-

vide substantiation for its claims. While the NAD process is a voluntary one, compliance with its rulings consistently has been at or above 96 percent. The NAD is a desirable forum for companies seeking quick and inexpensive injunction-type relief against competitive advertising.

State Attorneys General. State Attorneys General have become increasingly active in the past two or three years bringing numerous challenges under state consumer protection laws, often in conjunction with an FTC complaint.

State Consumer Protection Laws. The most serious threat to U.S. advertisers has been the rapid increase in actions by consumers, particularly class actions, under state consumer protection laws. Logically, none of these consumer protection cases has the requisite commonality to be certified as class actions since each class member should be required to show reliance upon and harm caused by the challenged ad. However, courts in a number of states have held that false advertising class actions may proceed without individualized proof of knowledge of and reliance upon the ad. Moreover, in recent years, state consumer protection class actions almost invariably follow on the heels of: FTC consent agreements; successful Lanham Act suits by competitors; FDA warning letters; enforcement actions by State Attorneys General; and NAD decisions.

Key Issues For Advertisers

Explicit v. Implicit Claims. Under the Lanham Act, the courts have drawn a clear distinction between explicitly false and implicitly false claims. With the latter, a well-conducted consumer survey that meets a number of well-established standards, including use of an appropriate control, must be introduced. One exception to this flat rule under the Lanham Act is that a claim may be false "by necessary implication" if the court finds that a consumer will unavoidably receive a false message from the defendant's advertising.

In contrast, both the FTC and the NAD rely upon their expertise in advertising to evaluate the claim, whether it is express or implied. The same is generally true under most state consumer protection laws where liability has been found without consumer survey evidence even if the claim is implied. (California may be an exception. Recently, the California Court of Appeals in San Francisco affirmed the dismissal of a false advertising case brought under the California unfair competition laws on the ground that the claim was an implied one, and plaintiff's consumer survey was not reliable. *Zion Lavie v. Procter & Gamble Co.*, CA Super. Ct. No. 974757 (Jan. 17, 2003).)

Burden of Proving a Claim is False. In a normal Lanham Act case, plaintiff has the burden of proving that the challenged claim is false. One important exception – when an advertising claim expressly or impliedly asserts a favorable fact about a product and further asserts that the claim is based upon or supported by tests, studies, etc., the challenger must prove only that the referenced test does not validate the claim, rather than the more difficult task of proving that the favorable fact asserted is itself false. Most courts have adopted this "establishment" claim approach. A related issue is whether an establishment claim must

specifically use the words "tests" or "studies" or may there be an implied establishment claim. The courts have held that there may be an implied establishment claim and that the issue is one for the court to decide, with no consumer survey required. Both the FTC and the NAD look to whether the advertiser is able to provide substantiation for its claims so as to provide a "reasonable basis" for its claims.

Finally, many state consumer protection laws, so-called "little FTC Acts," are modeled after Section 5 of the FTC Act and specifically provide that "due consideration" be given to FTC and federal court decisions interpreting Section 5. Accordingly, courts in those states require the advertiser to provide the same type of "reasonable basis" for its claims as required by the FTC.

Omissions of Fact. While it may not be necessary for an advertiser to disclose all facts about its product or service to avoid liability, under all false advertising regimes a party may be liable if it fails to disclose material facts.

Materiality. Under the Lanham Act, a plaintiff must prove that the false claim is a material one, that is, one that is likely to affect consumer purchasing decisions. However, where the claim at issue is literally false or false by necessary implication, the courts will presume the claim is material. On the other hand, if the claim is impliedly false, then a consumer survey is required. The same consumer survey that demonstrates the claim to be impliedly false normally is sufficient to prove materiality as well.

The FTC also requires that a false claim be "material," one that is likely to affect a consumer's choice of, or conduct regarding a product or service. The Commission presumes materiality for certain categories for claims, including express claims, intentional implied claims, and claims that significantly involve health or safety.

In contrast, one of the serious concerns about class actions under state consumer protection laws, as discussed above, is the absence of a requirement of materiality, *i.e.*, that class actions are certified without individualized proof of knowledge of and reliance upon the ad by each class member.

Substantiation. The kind and amount of substantiation to support an advertising claim is often a key issue in all forums. However, the FTC generally has been stricter on the type of substantiation required than other regimes. A general rule of thumb is that substantiation must meet contemporary professional standards for evaluating the product claim. With a comparative ad, there must be head-to-head testing. With superiority claims, the testing should include all leading brands and be based on industry or professional standard testing.

Puffery. Under all false advertising regimes, "puffery" is not actionable. Puffing can be either "exaggerated blustering and boasting upon which no reasonable buyer would rely" or "a general claim of superiority over comparable goods that is so vague that it will be understood as merely the seller's expression of opinion." On the other hand, "a specific measurable advertising claim . . . is not puffery." *McCarthy on Trademarks and Unfair Competition*, § 27.38 (2003).

Greatest Danger To Advertisers

The greatest danger to advertisers comes from the significant increase in enforcement actions by State Attorneys General, and even more, from the large increase in cases brought by consumers, particularly class actions, under state consumer protection laws. Courts in several states, including CA, NY, FL, OH and IL, have held that classes may be certified in false advertising cases even without requiring proof that each class member relied upon or even was exposed to the allegedly deceptive advertising.

In addition to the lack of commonality arguments that can be used to defeat class certification, a forceful First Amendment argument can be made that there is a chilling effect on free speech if false advertising cases are allowed to proceed without a requirement that plaintiffs show they relied upon and were harmed by the challenged ad.

At present, plaintiffs' class action counsel, many of whom are veterans of the tobacco wars, are preparing to sue a wide range of food companies. Threats of litigation have been issued against fast food, soft drink and candy companies, and most recently, against ice cream companies. In the two major cases filed to date, a class action in New York against McDonald's and a private attorney general action against Tyson Foods in California, the allegations have been based primarily on state consumer protection laws. On September 3, 2003, the district court granted McDonald's motion to dismiss, noting that plaintiffs failed to follow the court's earlier admonition as to how to proceed in order to prove that defendant's products and the advertising of its products caused plaintiffs' obesity. Plaintiffs' attorneys undoubtedly will switch to the causation/damage theory upheld in *Price v. Philip Morris*, basing damages on prices paid by consumers for the product and not on the effects of the product.

Advertising Audits

All firms advertising and marketing products or services in the United States would be well advised to have their advertising and promotional material audited, including their Internet sites which automatically are national in scope. Such an audit, with follow-up reviews of new advertising, is a small and wise price to pay in view of the millions and even billions of dollars in potential damages to which their advertising exposes them. Alternatively, advertisers should have their existing advertising review procedures audited to assure that all the key issues and dangers are being taken into account.

In short, all advertisers are vulnerable, particularly to state consumer protection class actions. Obviously, an advertising audit could not preclude consumer class actions based on allegedly deceptive ads which already have run. However, voluntary discontinuance or modification of a problematic ad after an audit would avert, in all likelihood, enforcement actions by the FTC and State Attorneys General, FDA warning letters, Lanham Act suits by competitors and adverse NAD rulings. As pointed out above, all of these have been primary *provocateurs* of consumer class actions.

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