

## FALSE ADVERTISING CLAIMS

# Consumer Class Actions

**U**NDER § 43(A) of the Lanham Act, 15 U.S.C. 1125(a), standing to sue for false advertising is limited to competitors and others who claim to have suffered a business injury as a result of the defendant's advertising claims. See, e.g., *Telecom Int'l Am. Ltd. v. AT&T Corp.*, 280 F.3d 175, 197 (2d Cir. 2001). Consumers do not have standing to bring false advertising suits under § 43(a). See, e.g., *Serbin v. Ziebart Int'l Corp.*, 11 F.3d 1163, 1177 (3d Cir. 1993).

Historically, this limitation on standing has had a substantial, albeit little recognized, minimizing impact on the litigation risk and costs associated with the advertisement of consumer products. In Lanham Act false advertising jurisprudence, damages are difficult to prove and infrequently awarded. This is largely because it is difficult—indeed, often impossible—to isolate the effect, if any, that the challenged advertisement had on product sales and market share from the many other factors that contribute to changes in sales and market share. Consequently, the principal remedy in these cases is injunctive relief.

This in turn has led to the following: Typically, the law firms representing plaintiffs in Lanham Act cases charge by the hour, in part because there has been little attraction for

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contingent-fee lawyers to become involved in such cases. Therefore, litigating these cases is approximately as expensive for plaintiffs as for defendants. And the prospect of substantial fees frequently causes potential plaintiffs to choose far less expensive advertising challenges before the National Advertising Division of the Council of Better Business Bureaus, the advertising industry self-regulatory body.

### State law consumer class actions increased recently

In the last few years, however, there has been a notable increase in state law-based false advertising class actions brought on behalf of consumers who allegedly were harmed by false advertisements. These recent consumer class actions have received substantial publicity, which will likely cause the number of such suits to rise still further. Consumer class actions create an additional source of possible liability for false advertisements. Perhaps even more significantly, such suits also risk increasing substantially the legal costs of defending false advertising claims. In class actions, class plaintiffs' counsel typically is retained on a

contingency basis. Therefore, unlike in most Lanham Act cases, plaintiffs in false advertising consumer class actions often are not motivated to keep legal fees down, and indeed, could well have the opposite motivation.

A recent decision in the 2d U.S. Circuit Court of Appeals, *Pelman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005), appears to open the door for false advertising consumer class actions in the New York federal courts, where more Lanham Act false advertising cases have been filed than any other judicial district. In *Pelman*, the 2d Circuit reversed a lower court decision and reinstated the claims of a consumer class alleging that McDonald's used deceptive advertising to mask the health risks associated with its products. The suit alleged that McDonald's created the false impression that its food products are nutritionally beneficial and, as a result, caused health problems for potentially millions of class members.

The trial court had dismissed the claims principally because the plaintiffs had failed to allege particularized reliance on the allegedly false statements, which the trial court held was required by § 350 of the New York General Business Law. However, the 2d Circuit, citing precedent from New York's highest state court, held that § 349 of the General Business Law, under which the plaintiffs also sued, does not require proof of actual reliance, and thus reversed.

The 2d Circuit's reasoning was puzzling. Section 349 authorizes, and primarily addresses, lawsuits by the state attorney general to remedy deceptive acts and practices. See *id.* §§ a-g. Section 349(h) does permit private actions to be brought under this statute, but only by persons

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