InsideCounsel

IP: The top 5 advertising litigation cases of 2011

The trends reflected by these cases are worthwhile for in-house counsel to keep in mind as they review their own advertising for 2012

BY LAWRENCE WEINSTEIN | January 17, 2012

What better time than the day after the Golden Globes to host my own awards, the 2011 Advertising Litigation Cases of the Year Awards. Even Ricky Gervais would struggle to make this topic funny, so I won't even try. But while false advertising cases may not make for great party conversation, they do keep inside counsel awake at night, and thus the trends reflected by the cases discussed below are worthwhile for inside counsel to keep in mind as they review their company's own proposed advertising and those of their competitors in the coming year.

False advertising cases typically take the form of:

- Business to business disputes under the Lanham Act
- Suits brought by classes of consumers under state law
- Proceedings before the National Advertising Division (NAD), the advertising industry's self-regulatory body
- Proceedings brought by the U.S. Federal Trade Commission (FTC) or by comparable state agencies

A case from each of these categories is included in my list.

1. Lanham Act: *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc.,* 653 F.3d 241 (3d Cir. 2011)
Under the Lanham Act, an advertisement can be false in one of two ways. A literally false ad is one that unambiguously communicates a false message. An impliedly false ad is one that is either literally true or ambiguous, but is nonetheless capable of communicating a false message. The finder of fact may determine that an advertising claim is literally false without reference to consumer reaction to the ad. By contrast, a claim that an ad is impliedly false requires evidence of consumer reaction, almost always in the form of a consumer survey.

Spirits manufacturer Pernod sued Bacardi, alleging that the latter's Havana Club rum, by virtue of its name, communicated the false message that the product was made in Cuba, when in fact the rum was made in Puerto Rico from local ingredients. Among Pernod's evidence was a consumer survey showing that nearly 20 percent of those surveyed believed that after looking at the Havana Club bottle, that Havana Club rum was either made in Cuba or from Cuban ingredients.

The district court found in favor of Bacardi, and the 3rd Circuit affirmed. The appeals court found no fault in the methodology of Pernod's survey but, nonetheless, concluded that because the Havana Club label clearly and prominently stated that the rum was a "Puerto Rican rum" that was "distilled and crafted in Puerto Rico," no reasonable person could be believe that the rum or its ingredients came from Cuba.

Recognizing that although surveys typically and properly are used by courts to determine false messages that consumers in fact take away from advertisements that are not expressly stated in the ad, the appeals court held that the Havana Club label fell into the potentially "rare" category of language that is "clear enough that its

meaning is beyond reasonable dispute" (*id*. at 250) and, thus, cannot be found to be false—survey or no survey.

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While the 3rd Circuit hastened to predict that cases in which properly designed surveys should be disregarded "are rare," and cautioned district courts to resist the temptation to disregard survey evidence because it is inconsistent with the court's perception of the challenged advertisement, only time will tell whether the *Pernod* decision is a "one-off," or the beginning of a trend to diminish the importance of surveys in false advertising cases.[1]

2. Consumer Class Actions: *Kwikset Corp. v. Superior Court*, 51 Cal 4th 310 (2011)

In my last column, I noted the many forces at work that are reducing the threat of state law-based consumer class action false advertising suits. The California Supreme Court's decision in *Kwikset* is a step in the opposite direction. *Kwikset* has a tortured history. The suit was first brought in 2000 by a man named Benson, suing as a private attorney general on behalf of the general public. Benson alleged that Kwikset had falsely labeled certain products as having been "Made in the U.S.A." when they actually were made elsewhere, or with foreign parts. Benson largely won his case, but while an appeal was pending, California voters passed Prop 64. The new law precluded such private attorney general suits, and required a plaintiff to prove that he/she had suffered injury in fact and lost money or property as a result of the defendant's false advertising.

Thereafter, the Court of Appeal remanded for a determination of standing; Benson once again prevailed in Superior Court but the Court of Appeal reversed, holding that even though Benson's alleged desire to buy an American-made product might have been frustrated, he had failed to allege sufficient injury in fact and thus lacked standing, absent an allegation that the products he purchased were either overpriced or defective. In its 2011 decision, the California Supreme Court overturned the Court of Appeals decision and ruled in favor of Benson.

While making clear that under Prop 64, standing was not available to any plaintiff unless he/she had engaged in business dealings with the defendant that had caused plaintiff injury, the Supreme Court held that "plaintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise," have lost money or property within Prop 64's meaning. *Id*. at 317. The effect of *Kwikset* in California may be limited. In cases where the alleged false advertising statement does not concern the advertised product's essential purpose, plaintiffs' counsel still may have limited ability to obtain class certification. Still, in what was a very good year for the class action defense bar, *Kwikset* is a notable exception.

3. NAD: *Procter & Gamble Crest Sensitivity Toothpaste*, NAD press release Oct. 28, 2011

On the merits, NAD's recent decision recommending that Procter & Gamble (P&G) cease advertising that its Crest Sensitivity toothpaste eases tooth sensitivity "within minutes" is of little interest except to P&G and the competitor who successfully challenged that advertising statement. What elevates this decision to my NAD Case of the Year is that, just before year's end, a plaintiffs' firm, piggybacking on the NAD decision, very publicly commenced a consumer class action false advertising suit in New Jersey federal court. *Rossi v. Procter & Gamble* (D.N.J.), reported in Law360 Class Action Law, Dec. 16, 2011.

This was not the first time an NAD decision has led to a class action suit, but previous cases have been exceedingly rare and generally under the radar. NAD provides a significant benefit to advertisers and consumers alike: It's an informal forum in which advertising disputes can be resolved by an experienced body far more inexpensively than in litigation, and without the business interruptions that major advertising litigation can cause. But as a voluntary dispute resolution body, NAD relies on the willingness of advertisers to participate when challenged. If that willingness to participate diminishes because of the risk that an adverse decision will lead to a consumer class action lawsuit, then the plaintiffs' class action bar will have done a major disservice to the consumers they claim to represent.

4. Federal Trade Commission: *FTC v. Reebok International Ltd*. (N.D. Ohio)
There is no question that the FTC has been more active in challenging deceptive advertising under the current administration. While it has been said that most of the FTC's resources are devoted to the pursuit of disreputable fraudsters in industries such as nutritional supplements and weight loss programs, the Reebok case is an example of FTC litigation against a highly reputable advertiser.

Among Reebok's products were EasyTone and RunTone shoes, which were advertised to have various muscle toning and strengthening benefits. For example, EasyTone shoes were "proven" to "work your hamstrings and calves up to 11% harder" and "ton[e] your butt up to 28% more than regular sneakers. Just by walking."

The FTC alleged that these and similar claims, made in provocative advertisements portraying well-toned, sometimes scantily clad women, were unsubstantiated by reliable scientific testing. Faced with the FTC lawsuit, Reebok entered into a settlement which, according to the FTC website, included a $25,000,000 refund and strong injunction provisions. The upshot of this litigation is that major, reputable advertisers are not immune from FTC lawsuits for advertising claims that the FTC believes are unsubstantiated and materially deceptive to consumers.

5. One last case: *Gifford v. U.S. Green Building Council*, 10 Civ. 07747 (S.D.N.Y. Aug. 16, 2011)
I cannot resist mentioning one of my own cases as the coda to this column. Everyone knows that a primary benefit of false advertising litigation, regardless of the forum, is to protect consumers from being influenced in their purchasing decisions by false advertisements. This last sentence posits that consumers often need to be protected from unscrupulous or careless advertisers. But sometimes, scrupulous advertisers need to be protected from plaintiffs who misuse false advertising law for anticompetitive purposes, or for the benefit of agendas that advance their own interests at the expense of consumers.

Gifford was a good example of this latter problem, and it says much about our federal judicial system that, in the cacophony of the adversarial system, federal judges can readily distinguish meritless false advertising suits from good ones.

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[1] Perhaps "two-off" would be a better word. A 7th Circuit panel decision, *Mead Johnson & Co. v. Abbott Labs.,* 201 F.3d 883, 886 (7th Cir. 2000), reached a similar result on similar analysis, but that decision was materially amended by the same panel. 209 F.3d 1032 (7th Cir. 2000).

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