



# IP: Light at the end of the tunnel

## Courts are saying no more often to false advertising class action lawsuits

BY LAWRENCE WEINSTEIN | December 20, 2011

Four years ago, I spoke at a national advertising law conference on the sharp rise in consumer class action false advertising lawsuits. These lawsuits, once principally confined to California and a few other states, had by 2007 become the “next big thing” among the plaintiffs’ class action bar.

The potential for, and occasional reality of, large damages and attorneys’ fees awards, plus heavy media coverage that presumed the advertiser was guilty as charged, made these suits attractive to the plaintiffs’ bar and dangerous to advertisers throughout the U.S. These class actions are much more dangerous, in fact, than competitor versus competitor false advertising litigations filed under the federal statute known as the Lanham Act.

Although the recovery of damages and attorneys’ fees to a prevailing plaintiff are available under the Lanham Act, they are relatively rare, and the substantial expense of discovery and concern about the potential “glass houses effect” of a Lanham Act suit have caused many prospective corporate plaintiffs instead to proceed before the National Advertising Division (NAD), the advertising industry self-regulatory body, where no damages or attorneys’ fee awards are available.

By 2007, consumer class action false advertising suits had become a major cost item in corporate legal budgets, a distraction for in-house counsel and senior corporate management, as well as an unwanted source of bad publicity. When the U.S. economy nosedived a year later, and many U.S. companies faced hard times and even extinction, the risk posed by these class actions became even greater.

In the intervening four years, the legal landscape has changed significantly, and for corporations that advertise in the U.S., there is now a light at the end of the false advertising class action tunnel. Although many new false advertising class actions continue to be filed, U.S. courts have become increasingly amenable to granting early stage motions to dismiss, which end these suits in their infancy and greatly lower corporate legal fees, risk and the blood pressure of inside counsel.

Below are three important factors that have helped turn the litigation tide.

1. Courts, legislatures and, in California, citizens through ballot box propositions, have largely rejected the notion that consumers should be permitted to act as “private attorneys general” and file false advertising lawsuits to remedy alleged injury to the public, even if those consumers suffered no injury from and did not base their own purchasing decisions on the challenged statements.

Today, courts regularly dismiss class actions for failure to state a claim for relief when plaintiffs fail clearly to allege that they personally have suffered a specific injury or loss directly resulting from the allegedly false advertising, or that they relied on the alleged falsity in making their purchase decisions. See, for example, *Lieberson v. Johnson & Johnson Consumer Companies*, 2011 WL 4414214 (D.N.J. 2011); *Gifford v. U.S. Green Bldg. Council*, 2011 WL 4343815 (S.D.N.Y. 2011).

2. The Supreme Court issued two landmark decisions re-interpreting Rule 8 (a) of the Federal Rules of Civil Procedure.

*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), tightened the standards for pleading complaints in federal courts, by requiring a plaintiff to allege non-conclusory facts sufficient to demonstrate a plausible basis to believe the defendant is liable for the misconduct alleged. No more can a plaintiff satisfy

Rule 8 merely by conclusorily alleging a cause of action in the hope discovery will later fill in the blanks. *Twombly* and *Iqbal* govern all federal court pleadings, regardless whether the alleged wrongs arise under federal or state law, and numerous recent false advertising class actions have been dismissed for failure to satisfy Rule 8(a). *E.g. Guzman v. Bridgepoint Education, Inc.*, 2011 WL 4964970 (S.D.Cal. 2011); *Carrea v. Dreyer's Grand Ice Cream*, 2011 WL 159380 (N.D. Cal 2011).

3. Finally, numerous recent false advertising class actions have been premised on alleged violations of state law, without regard to the fact that defendant's alleged "misconduct" was either compelled by federal law or concerned acts regulated by a federal agency that was in the process of evaluating the alleged misconduct.

In such cases, early stage dismissal of the class action under the related doctrines of federal preemption and primary jurisdiction has been granted in numerous recent decisions. *E.g., Chacanaca v. Quaker Oats Co.*, 752 F.Supp.2d 1111 (N.D. Cal. 2010); *Gordon v. Church & Dwight Co.*, 2010 WL 1341184 (N.D.Cal. 2010).

Although false advertising class actions are not extinct, a shift in judicial assessments combined with legislative and electoral changes, has resulted in a major uptick in early stage dismissals. This trend gives hope that false advertising consumer class action suits will wane as the plaintiff's bar searches for greener pastures.

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