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Client Alert

A report for clients and friends of the firm

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The Increasing Risk of Consumer False Advertising Class Actions

Under §43(a) of the Lanham Act, standing to sue for false advertising is limited to competitors and others who can claim to have suffered a business injury as a result of the defendant's advertising claims. *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).

Traditionally, this limitation on standing has had a substantial, albeit little recognized, minimizing effect on the litigation risk and costs associated with consumer advertising. Because competitive injury resulting from a particular false advertisement is often difficult to prove, the principal remedy in Lanham Act false advertising cases is injunctive relief. As a result, (1) the law firms representing plaintiffs in Lanham Act false advertising typically charge by the hour, instead of receiving contingent fees; (2) therefore, litigating Lanham Act false advertising cases tends to be approximately equally expensive for plaintiffs and defendants; and (3) the heavy expense associated with Lanham Act false advertising cases frequently causes potential plaintiffs to choose the far less expensive route of challenging an advertisement before the National Advertising Division or the national television networks.

In the last few years, however, a number of false advertising class actions have been brought by consumer classes under state laws in various state and federal courts. These cases not only create an additional source of potential liability for false advertising, but also have the potential to increase substantially the legal costs of defending false advertising claims. In class actions, the class plaintiffs' counsel typically is retained on a contingency basis, and therefore, unlike in most Lanham Act cases, the plaintiffs in false advertising class actions often are not motivated to keep legal costs down, and indeed, could well have the opposite motivation.

A recent decision in the Second Circuit, *Pelman v. McDonald's Corp.*, 2005 U.S. App. LEXIS 1229 (2d Cir. 2005), appears to open the door for additional false advertising consumer class actions in the New York federal courts, where more Lanham Act false advertising cases have been filed than anywhere else in the United States. In *Pelman*, the Second Circuit reversed a lower court decision and reinstated the claims of a consumer class 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 in 2003 principally because the plaintiffs had failed to allege particularized reliance on the allegedly false statements, which the trial court held is required by §350 of the New York General Business Law. *See McGill v. GMC*, 231 AD 2d 449, 450 (1st Dep't 1996). However, the Second 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 therefore reversed. 2005 U.S. App. LEXIS 1229 at *6. In the context of a false advertising lawsuit, this was a puzzling ruling. Section 349 principally authorizes 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 who "have been injured" by reason of a violation of the statute. It is true, in a sense, that reliance and injury are separate concepts, in that it is possible for a person to

rely on a false advertisement without being injured by it. But it is difficult to understand how the converse would be possible: in other words, how can a person who does not rely on a false statement in an advertisement be injured by it?

In an opinion which was rather less than clear, it may be that the Court was speaking merely of pleading requirements, rather than requirements of proof. Indeed, commenting on the trial court's holding that plaintiffs had "failed to draw an adequate causal connection between their consumption of McDonald's food and their alleged injuries," *id.* at *8, the Second Circuit explained that this "is the sort of information that is appropriately the subject of discovery," and therefore permitted the claims to proceed so that plaintiffs could gather such information. *Id.* *8-*9.

The likely effect of *Pelman* will be to embolden plaintiffs class action law firms to file class action false advertising suits. By setting an extremely low bar for the successful defense of motions to dismiss in such suits, the decision could well provide class action plaintiffs' firms with the incentive to pressure defendant/advertisers into expensive settlements to avoid the substantial expense of discovery that the Second Circuit's opinion openly invited.

This case was decided in the context of an already increasing body of consumer false advertising class actions filed in the last few years, including the potentially significant cases noted below:

Moviegoers sue Sony

What:
A lawsuit was brought against Sony Pictures Entertainment by moviegoers who saw films that were allegedly endorsed by a fake critic. The lawsuit alleges that Sony advertised certain films using quotations attributed to "David Manning" and incorrectly indicated that he was affiliated with *The Ridgefield Press*; it also alleged that Sony advertised *The Patriot* using endorsements of persons who were its employees without disclosing that they were its employees.

Where:
Los Angeles Superior Court

Claims:
Advertisements violated §§ 17200 and 17500 of the California Business and Professions Code and the Consumers Legal Remedies Act.

Resolution:
Sony denied liability, but has agreed to settle the action by paying up to $1.5 million to plaintiffs. A hearing to determine whether the settlement should be granted final approval will be held on April 15, 2005.

Class Action suit re: fountain sodas

What:
Coca-Cola and PepsiCo are facing multiple class actions claiming they had not disclosed that bottled and canned diet colas are different from the fountain versions and that the fountain versions contain saccharin.

Where:
Separate class actions against the two companies have been filed in Middlesex (MA), Chicago, Miami, San Diego and Kansas City.

Class Action against Anheuser Busch-Co and Miller Brewing Co. Dismissed

What:
Class-action suit claimed that Anheuser-Busch Co. and Miller Brewing Co. encouraged underage drinking by targeting teens with their advertising.

When:
Filed February 2004

Where:
Los Angeles Superior Court

Resolution:
Case dismissed. Court ruled that under state law, regulating alcohol ads is the job of the Department of Alcoholic Beverages Control, not the courts. He also stated that the suit had failed to identify beer ads that were literally false and the plaintiffs failed to show how they had suffered any direct harm as a result of the marketing campaigns.

Notes:
The *Los Angeles Times* reports that there are similar class-action suits against beer and spirits makers in Ohio, Colorado, North Carolina, and D.C. that allege they use sexually charged ads to induce illegal drinking by teens.

MGM DVDs

What:
MGM was sued in a class action alleging that the studio falsely advertised many of its DVD titles as widescreen. Other defendants named in the case are retailers that carried the DVD titles in question.

When:
Filed in 2002

Where:
Los Angeles County

Resolution:
Without admitting wrongdoing, MGM agreed to compensate consumers who bought DVDs in certain ratios during a specific timeframe. The offer is for a $7.10 cash refund or a new MGM title.

Splenda

What:
At least three class action false-advertising lawsuits were filed recently against the makers of Splenda, claiming consumers are wrongfully led to believe the product is sugar. McNeil Nutritionals, a Pennsylvania-based unit of Johnson & Johnson, has denied the allegations, saying the sweetener starts as cane sugar.

Challenged statement: "Splenda is made from sugar, so it tastes like sugar." (on advertisements and product packaging)

State Consumer Class Actions:

1. *Patton v. McNeil Nutritionals LLC* (filed in Santa Clara County, CA on 12/6/04)

2. *Backer v. McNeil Nutritionals LLC* (filed in Los Angeles County, CA on 12/21/04)

3. *Green v. McNeil Nutritionals LLC* (filed in Duval County, FL on 12/2/04)

Claims:
Florida and California statutes designed to protect consumers against misleading corporate statements.

Verizon

What:
Verizon Wireless Inc. is being sued by a class of its subscribers for allegedly disabling some Bluetooth short-range wireless features of its Motorola v710 handset. California law firm Kirtland and Packard has filed a class action suit on behalf of subscribers in the state accusing Verizon Wireless of false advertising.

Dell Computer

What:
A class action had been filed in San Francisco against Dell Inc. and its finance partner, CIT Bank, claiming they used deceptive advertising and bait-and-switch tactics to systematically deceive Dell customers. The alleged deception is that Dell advertised low prices and then told those who asked that the computers are no longer available for the advertised price, but then attempted to sell them another PC or ship one of lesser value. The claim against CIT Bank is that it increased interest rates and added hidden charges without notice. A class action against Dell Inc., Dell Financial Services L.P. and CIT Bank has also been filed in the Southern District of New York challenging the same advertising and financing practices under New York law.

Where:
California and New York

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Nexium

What:
Class actions have been filed against AstraZeneca regarding the marketing of Nexium alleging that AstraZeneca's promotion and advertising of Nexium to physicians and consumers is unfair, unlawful and deceptive conduct, particularly as the promotion relates to comparisons of Nexium with Prilosec. They also allege that AstraZeneca's conduct relating to the pricing of Nexium was unfair, unlawful and deceptive. The plaintiffs allege claims under various state consumer protection, unfair practices and false advertising laws.

Where/When:

1. Los Angeles Superior Court (10/04) – by the AFL-CIO, two unincorporated associations and an individual on behalf of themselves, the general public and a class of CA consumers, third party payers, cash payers and those making co-pay.

2. A second suit in Los Angeles Superior Court on behalf of a similar putative class of consumers.

3. Actions making similar allegations were filed on behalf of a putative class of consumers in the Circuit Court of Searcy County, Arkansas and on behalf of a putative class of third party payers in the Superior Court of the State of Delaware in and for New Castle County.

Fen-Phen

What:
In 2001 a class action was filed against Nutraquest, alleging that Nutraquest falsely advertised Xenadrine RFA-1 as safe

and effective. The class action lawsuit, which ultimately resulted in a $12.5 million judgment, sought to force the company to reimburse California consumers who purchased the diet aid.

Pfizer

What:
A number of purported class actions recently have been filed against Pfizer in the U.S. and in Canada alleging consumer fraud as the result of false advertising of Celebrex and Bextra and the withholding of information from the public regarding the alleged safety risks associated with Celebrex and Bextra. The plaintiffs seek damages in unspecified amounts for economic loss.

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