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Client Alert

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Massachusetts Supreme Judicial Court Issues Important Consumer Class Action Ruling

The question of who has standing to sue for false advertising under § 43a of the Lanham Act is not entirely free from doubt.[1] However, one aspect of Lanham Act standing is clear: neither individual consumers, classes of consumers nor organizations representing consumers can maintain a Lanham Act false advertising suit.[2] We have previously advised clients and friends that in the last few years, there has been a notable increase in the number of consumer class action false advertising suits brought under state unfair competition laws. These false advertising class actions have proliferated due to the recognition by the plaintiffs' class action bar that such suits are potentially very lucrative, particularly in states whose unfair competition statutes contain provisions awarding statutory damages and attorneys' fees to prevailing plaintiffs. Often, but not always, these consumer class action suits piggy back on a Lanham Act false advertising suit in which the advertisement in questions was found to be false.

Although false advertising consumer class actions have been commenced in many states, Massachusetts is perceived by many plaintiffs' class action lawyers to be a particularly hospitable forum as a result of the *Aspinall* case, a 2004 decision by Massachusetts' highest court, the Supreme Judicial Court (the "**SJC**"), involving advertisements for Marlboro Light cigarettes. In this client alert, we discuss a new Massachusetts SJC decision, *Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc.*, 840 N.E.2d 526 (2006), which could signal that the SJC has begun to move away from the extreme, pro-plaintiff approach it took in *Aspinall* and in an earlier case called *Leardi*. Although Massachusetts is likely to remain a favored forum for consumer class action false advertising litigations, *Hershenow* helps to even the playing field for defendants in Massachusetts courts, and may increase the number of advertisers who defend these cases on the merits, instead of capitulating via settlement.

Massachusetts General Laws, Chapter 93A

Under the Massachusetts unfair competition statute, Mass. Gen. Laws, Ch. 93A ("**Chapter 93A**"), consumers have standing to sue for false advertising, and plenty of incentive to do so. Under Chapter 93A, a prevailing plaintiff is entitled to attorneys fees, which can be substantial in a class action case. In addition, actual damages are not only subject to trebling, it is also much easier to obtain enhanced damages under Chapter 93A than under the Lanham Act. While, under the Lanham Act, an award of enhanced damages is generally reserved for cases of willfully false advertising, under Chapter 93A, treble damages are the norm; indeed, the SJC has held them to be appropriate whenever, in the after-the-fact opinion of the finder of fact, the advertiser did not make a reasonable offer of settlement in response to the plaintiff's statutorily-required demand letter. *International Fidelity Ins. Co. v. Wilson*, 387 Mass. 841, 857 (1983).

But perhaps the class action bar's greatest incentive to bring consumer class action false advertising suits in Massachusetts has been Chapter 93A's statutory damages provision. Chapter 93A provides that in lieu of actual damages (which typically are difficult for

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[1] For example, *compare Jack Russell Terrier Network of Northern California v. American Kennel Club, Inc.*, 407 F.3d 1027 (9th Cir. 2005) (standing under the false advertising prong of § 43a is limited to direct competitors of the advertiser) *with Ortho Pharmaceutical Co. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994) (to have standing to sue for false advertising under the Lanham Act, a plaintiff "need not demonstrate that it is in direct competition with the defendant").

[2] *E.g., Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995); *Serbin v. Zeibart Int'l Corp.*, 11 F.3d 1163, 1177 (3d Cir. 1993).

either a consumer or a business competitor to prove), a prevailing plaintiff is entitled to a statutory award of $25. To an individual plaintiff, this is a de minimis award, but it can be very substantial in aggregate when the plaintiff is a vast class of consumers who allegedly were deceived by a false advertisement. Moreover, while statutory damage provisions are not unusual in state unfair competition statutes, the decisions of the SJC concerning who is entitled to receive them have been strongly favorable to plaintiffs, at least until *Hershenow*.

The SJC's *Aspinall* Decision

On its face, Chapter 93A limits standing to sue to persons who have been "injured" by another's deceptive act or practice. One would suppose that in the context of a claim for false advertising, this would mean that standing to sue and to recover for false advertising would be limited to consumers who had actually seen or read the advertisement in question, and whose purchase decision had been materially affected by the false statements or depictions in the advertisement. However, in *Aspinall v. Philip Morris Cos. Inc.*, 442 Mass. 381 (2004), the SJC did not see things that way. There, the defendant was sued for false advertising regarding its Marlboro light brand of cigarettes. The plaintiff claimed to represent a class of purchasers of that cigarette brand. Defendant contended that plaintiff failed to allege that each class member (1) had relied on the allegedly false ads in making their purchase decisions, and (2) had suffered injuries as a result of the advertisements' false statements. The SJC rejected Defendant's arguments, holding that (1) proof of reliance on the false advertisement was not required to state a claim for false advertising under Chapter 93A, and (2), while Chapter 93A did require proof of causation, a deceptive advertisement can effect a "per se injury on consumers who purchased the advertised product", thus satisfying the causation requirement. *Id*. at 400.

The *Aspinall* decision relied heavily on *Leardi v. Brown*, 394 Mass. 151 (1985), even thought it was not a false advertising case. In *Leardi*, the SJC affirmed a $25 statutory damages award under Chapter 93A to each member of a class of tenants who received a lease renewal form from their landlord that deviated from the statutorily-required lease terms, without requiring the tenant-plaintiffs to submit any proof that they had even read the non-compliant lease provisions, much less that they relied on them to their detriment.

In the aftermath of *Aspinall*, members of the Massachusetts plaintiffs' class action bar took the position in demand letters to advertisers that Chapter 93A, as interpreted by *Leardi* and *Aspinall*, deems any Massachusetts purchaser of a product found to have been falsely advertised in violation of Chapter 93A to have suffered a *per se* injury, and therefore to be entitled to statutory damages. It is easy to imagine how catastrophic such a statutory damage award could be in the case of popular name brand consumer products, which likely explains the media reports of a number of seven-figure settlements in Massachusetts consumer class action false advertising cases in the aftermath of *Aspinall*.

The SJC's *Hershenow* Decision

In *Hershenow v. Enterprise Rent-A-Car Co. of Boston, Inc.*, 840 N.E. 2d 526 (2006), plaintiffs had rented motor vehicles from defendant, and claimed that the collision damage waiver ("**CDW**") provision in defendant's standard form rental contract violated Chapter 93A. The nature of defendants' alleged violation of the statute was that defendant's CDW stated that the driver would be responsible for any damages to the vehicle occurring outside of Massachusetts, whereas under Massachusetts law, the CDW provision of a vehicle rental contract can only shift liability from the rental company to the driver for vehicle damages occurring outside the United States.

Defendant moved for summary judgment, based on plaintiffs' admissions that the cars they rented had not sustained any damages during the rental period. Plaintiffs argued that this did not matter, because under *Leardi*, any false statement in a consumer contract is a "*per se* deception", and that no more is needed for liability under Chapter 93A. The SJC disagreed with plaintiffs and granted summary judgment for defendant. It accepted for argument's sake that plaintiff's argument that defendant's CDW provision constituted a *per se* deception within the meaning of *Leardi* because it was inconsistent with the terms mandated by Massachusetts law, but held that under Chapter 93A, plaintiffs were required to demonstrate that "even a per se deception caused a loss", and that they did not do so.

Specifically, the SJC concluded that plaintiffs could not establish that they suffered any legally cognizable injury or loss, because "the statutorily noncompliant terms in Enterprise's automobile rental contracts did not . . . deter the plaintiffs from asserting any legal rights. Nor did the plaintiffs experience any other claimed economic or noneconomic loss. The CDW made neither rental customer worse off during the rental period than he or she would have been had the CDW complied in full with the [statutory] requirements". Summing up, the SJC concluded that under "the plaintiffs' theory of 'injury', any consumer contract that . . . is noncompliant with any statute automatically . . . entitl[es] the plaintiff to recover statutory damages, attorney's fees, and costs, even though the plaintiff cannot demonstrate that the illegal contract . . . causes any loss. There is nothing to suggest that the Legislature ever intended such a result . . . and this court has never sanctioned that view."

The Likely Impact of *Hershenow*

From the perspective of national advertisers, the *Hershenow* decision is encouraging, and suggests that the Massachusetts SJC is moving away from the extreme interpretation of Chapter 93A found in the *Leardi* and *Aspinall* decisions. But *Hershenow* must be read with a note of caution. It is not a false advertising case, and in its decision, the SJC distinguished *Aspinall* on dubious grounds and expressly refused to overturn *Leardi*, notwithstanding a strong invitation to do so by Justice Cowin in his concurring opinion.[3] That being the case, it is highly unlikely *Hershenow* will discourage the class action bar from initiating consumer false advertising suits in Massachusetts. It does, however, give advertiser defendants in such cases at least a fighting chance, and thus could have a positive impact on the types and terms of settlements in such suits.

[3] The Hershenow court distinguished *Aspinall* on the ground that there, causation had been established because the advertisements' false message that light cigarettes delivered less tar and nicotine than regular cigarettes "could reasonably be found to have caused a person to act differently from the way he [or she] otherwise would have acted". That statement would no doubt be true for Marlboro light smokers who had seen the false advertisements and acted in reliance on the false statements. But the problem with *Aspinall* is that it did not require that the plaintiffs even have seen the advertisements, much less relied on them. In his concurrence, Justice Cowin chastised the majority for declining to overrule *Leardi*, which was the foundation for the SJC's subsequent decision in *Aspinall*, and predicted that as a result of the majority's failure to do so, the law in Massachusetts has become "unnecessarily confused."

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