Recent Developments in Lanham Act and Class Action False Advertising Cases

Lawrence I. Weinstein

Partner and Co-Chair,
Intellectual Property Litigation Practice

Proskauer Rose LLP

lweinstein@proskauer.com

November 10, 2015

Proskauer

Lanham Act Pleading Standards

1. Advertising claim can be proven either literally or impliedly false;
   - Literal claim means an unambiguous claim.
   - Claim is literally false either if it is false on its face or false by necessary implication, *i.e.* words or images, in context, necessarily imply a false message.
   - Implied falsity shown either by survey or other extrinsic evidence of actual confusion or (in some circuits) by presumption following finding of deliberate falsity.
2. Claim must be material (2d Circuit has its own definition)
3. Claim must cause or likely cause injury to plaintiff.

Pleading Standards in Consumer Class Actions

- Pleading standards vary widely from state to state
- Pleading failures are more common in class actions than in Lanham Act cases.
- Reasons why?

Lanham Act Standing

Lanham Act Cases – *The Knit With v. Knitting Fever,* 2015 U.S. App. LEXIS 15575 (3d Cir. Sept. 2, 2015)

- Knit With lacked standing to pursue false advertising claims against its supplier, Knitting Fever, Inc., for falsely advertising to Knit With that its yarn contained cashmere.
  - Under *Lexmark v. Static Control Components*, 134 S. Ct. 1377 (2014) "a plaintiff must allege injury to a commercial interest in reputation or sales" to come within the "zone of interests" protected under Section 1125(a) of the Lanham Act.

Lanham Act Cases – *The Knit With v. Knitting Fever* (cont'd)

- Court took *Lexmark's* pronouncement that "[e]ven a business misled by a supplier into purchasing an inferior product is, like consumers generally, not under the Act's aegis" literally.
  - Would the outcome have been different if Knit With alleged it suffered reputational harm from representing its yarn contained cashmere based on the false representations of Knitting Fever, Inc.?

Lanham Act Cases – *Maine Springs v. Nestle Waters*, 2015 U.S. Dist. LEXIS 33259 (D. Maine Mar. 18, 2015)

- Another case dismissed under *Lexmark*
  - Maine Springs planned to bottle pure Maine spring water and sell it.
  - Alleged false advertising against maker of Poland Spring water because allegedly (i) it doesn't entirely from "springs" and doesn't come from the famous "Poland Spring" which has been dry for decades.
  - But complaint sprung a leak because Maine Springs had not yet bottled any water for sale and thus Nestle Waters' alleged false statements had caused no injury.
  - Insufficient causation allegations concerning fact two potential water supply companies had rejected offers from plaintiff.

Rule 12(b)(6) Motions

Lanham Act Cases – *Homeland Housewares v. Euro-Pro,* 2015 U.S. Dist. LEXIS 14169 (C.D. Cal. Feb. 5, 2015)

- Maker of Magic Bullet and Nutribullet blenders sued Euro-Pro for posting false internet reviews of the Magic Bullet and Nutribullet.
  - The Amended Complaint withstood a motion to dismiss because it "point[ed] to a specific review of its product on the internet as well as a comment on that review." Plaintiff adequately alleged these were (i) statements about plaintiff's products that were factual in nature, false, planted by defendant and presumably in the stream of interstate commerce.

Preliminary Injunctions

Lanham Act Cases – *Groupe SEB v. Euro-Pro*, 774 F.3d 192 (3d Cir. 2014)

- Euro-Pro advertised on its packaging that its Shark steam irons have the "#1 most powerful steam" and "more powerful steam vs. Rowenta at half the price."
  - Fine print footnotes on the package explained nature of the test that formed basis for the "most powerful" claim.
  - The Court held that these footnotes rendered the headline advertisement unambiguous and therefore subject to a claim of literal falsity.
  - Rejected defendant's proffer of survey evidence evidencing consumer takeaway of another meaning

Lanham Act Cases – *Groupe SEB v. Euro-Pro* (cont'd)

- Note, however, that a corrective statement in a footnote separated from the claim it purports to qualify almost never is sufficient to rescue that claim if, without the footnote, the claim is false or misleading.

Trial Outcomes

Lanham Act Cases – *Church & Dwight v. SPD Swiss Precision Diagnostics,* 2015 U.S. Dist. LEXIS 86170 (S.D.N.Y. Jul. 1, 2015)

- SPD was cleared by FDA to market pregnancy test branded "Clearblue Advanced Pregnancy Test with Weeks Estimator" that told a woman (i) if she was pregnant, and, if so (ii) how many weeks passed since she ovulated.
  - FDA instructed SPD (i) not to express the product's results as "weeks pregnant" and (ii) express the results only as the number of weeks that may have passed since ovulation.

Example Clearblue Advanced Pregnancy Test with Weeks Estimator Commercial

Lanham Act Cases – *Church & Dwight v. SPD Swiss Precision Diagnostics* (cont'd)

- Court found that by universal convention doctors communicate how many weeks patients are pregnant based on last menstrual period.
- The Court held that SPD's advertising conveyed the message that its product provides an estimate of weeks pregnant consistent with a doctor's estimate, and thus was both literally and impliedly false.
  - The Court also held SPD's deception was intentional and egregious.

Lanham Act – *Caltex Plastics v. Elkay Plastics*, 2015 U.S. Dist. LEXIS 13442 (C.D. Cal. Feb. 4, 2015)

- Elkay advertised that its product, StratoGrey static shielding line, “meets the electrostatic requirements for MIL 81705 Type III.”

- Caltex, the producer of the only packaging product qualified by the Department of the Navy (DoN) as meeting this specification, claimed Elkay’s advertising was literally false because the DoN hadn’t qualified StratoGrey.

Lanham Act – *Caltex Plastics v. Elkay Plastics* (cont'd)

- After a bench trial, court held Caltex failed to meet its burden of proof because:
  - The claim language discussed specifications rather than qualification;
  - Caltex failed to offer proof that Elkay's bags did not meet the specification; and
  - Caltex failed to offer proof of consumers being misled or confused.

Class Action Standing

Class Actions – Plaintiffs' Standing to Seek Injunctive Relief: Two Opposing Views

- *Belfiore v. Procter & Gamble*, 94 F. Supp. 3d 440 (E.D.N.Y. 2015)
  - Plaintiff had standing because an "injunction in connection with a class action is designed to afford protection of future consumers from the same fraud. It does this by permitting the plaintiff to sue on their behalf" even if that plaintiff will not buy the product at issue again.
- *Dapeer v. Neutrogena*, 95 F. Supp. 3d 1366 (S.D. Fla. 2015)
  - No standing to seek injunctive relief where Court one product at issue had been discontinued, and for the other products at issue, plaintiff failed to allege he faced future harm having now become aware of the alleged falsity.

Pleadings Successes and Failures

Class Actions – *Brown v. GNC*, 789 F.3d 505 (4th Cir. 2015)

- Plaintiffs alleged various claims made on defendant's joint health supplement packaging were false because "the vast weight of competent and reliable scientific evidence" did not support these claims.
  - Fourth Circuit held this wasn't enough to plead literal falsity.
  - Adequately pleading literal falsity requires plaintiff to allege that "all reasonable experts in the field agree that the representations are false."

Class Actions – *Zakaria v. Gerber Prods.*, 2015 U.S. Dist. LEXIS 80428 (C.D. Cal. June 18, 2015)

- Plaintiff alleged that Gerber's claim that its Good Start® Gentle baby food helps prevent babies from developing allergies was false and misleading.
- Gerber argued that *Brown v. GNC* compelled dismissal of the complaint, but the Court disagreed for three principal reasons

Class Actions – *Zakaria v. Gerber Prods.* (cont'd)

- The claims against Gerber were not literal falsity claims;
- The pleadings raised issues of fact about whether Gerber's claim was in fact false (and not just about whether all experts agree that the claim was false); and
- *Brown v. GNC* "left open the possibility that a false advertising claim could be brought where a manufacturer made representations that implied greater support for its health claims than were present."

Class Actions – *Mouzon v. Radiancy*, 309 F.R.D. 60 (D.D.C. 2015)

- Plaintiffs alleged that the no!no! Hair®'s claims of "long term" hair removal by suppressing hair regrowth were false and misleading under the laws of several states.
- False advertising claims brought under New York law were dismissed because the Complaint did not identify any transaction that occurred in New York in which non-resident plaintiffs were deceived.
- Remaining state law claims dismissed for failing to plead fraud with particularity under Rule 9(b).
  - No details about plaintiffs' exposure to infomercials/the role the infomercials played in decisions to purchase the no!no! Hair®.

Class Actions – *Salters v. Beam Suntory*, 2015 U.S. Dist. LEXIS 62146 (N.D. Fla. May 1, 2015)

- Plaintiffs alleged Maker's Mark's description of its bourbon as "handmade" was false because it is produced in industrial quantities to serve the national market.
  - Court held that a reasonable consumer could not be deceived by the term "handmade."
  - Court dismissed the action, holding that term "handmade" was puffery.

Class Actions – *Nowrouzi v. Maker's Mark Distillery*, 2015 U.S. Dist. LEXIS 97752 (S.D. Cal. July 27, 2015)

- Plaintiffs claimed label statement "handmade" on Maker's Mark was deceptive because the manufacturing process involves "little to no human supervision, assistance or involvement" and was "mechanized and/or automated."
  - Court dismissed complaint because "'handmade' cannot reasonably be interpreted as meaning literally by hand nor that a reasonable consumer would understand the term to mean that no equipment or automated process was used to manufacture the whiskey."

Class Actions – *Branca v. Nordstrom*, No. 14-cv-2062 (S.D. Cal. 2015)

- Plaintiffs claimed the savings marketed on price tags at Nordstrom's outlet stores saying "compare at" are illusory because Nordstrom never sold the items at a higher price.
  - Lead plaintiff initially failed to plead that:
    - Other merchants were not selling comparable goods at the advertised prices;
    - He had been deceived into making his purchases; or
    - Nordstrom had intentionally fabricated the prices.
  - Plaintiff's Amended Complaint remedied these failings and Nordstrom's motion to dismiss was denied.

Class Actions – *Paz v. AG Adriano Goldschmeid*, 2014 U.S. Dist. LEXIS 156413 (S.D. Cal. Oct. 27, 2014)

- Plaintiffs alleged Nordstrom and luxury denim manufacturer AG Adriano Goldschmeid (AGAG) violated California law by selling jeans labeled “Made in the U.S.A. of IMPORTED FABRIC” because rivets, buttons, and other components were made outside of the U.S.

Class Actions – *Paz v. AG Adriano Goldschmeid* (cont'd)

- Court rejected Defendants' arguments that they (i) could not comply with both California and FTC labeling rules for the claim "Made in the U.S.A." and (ii) had to apply the "Made in the U.S.A." labels under the Textile Fiber Products Identification Act, thus preempting California's regulations.
- Court held that state agencies may impose additional non-contradictory regulations to those of FTC.

Class Actions – *Clark v. Citizens of Humanity*, 2015 U.S. Dist. LEXIS 50155 (S.D. Cal. Apr. 8, 2015)

- Plaintiffs alleged that jeans purchased from Macy's contained components made outside of the U.S.A. despite the label containing Made in the U.S.A. country of origin designation.
- Court denied motion to dismiss, holding that California law was not preempted by FTC regulations and California's law does not violate the dormant commerce clause.

Class Actions – *Clark v. Citizens of Humanity* (cont'd)

- Judicially noticed the *Paz* decision.
- California's regulation construed to allow "Made in U.S.A." to be qualified so as not to be preempted.
- It was possible to comply with both California and federal law even though doing so could be burdensome.

Class Actions – *Gallagher v. Bayer*, 2015 U.S. Dist. LEXIS 29326 (N.D. Cal. Mar. 10, 2015)

- Plaintiffs alleged three statements made by Bayer on its One-A-Day multivitamin labels – that the vitamins promote or support "heart health," "immunity," and "physical energy" – falsely and deceptively misrepresent the health benefits of the supplements.
- Bayer argued that these statements are "structure/function" claims explicitly approved by FDA regulations; consequently, plaintiffs' allegations are preempted by federal law.

Class Actions – *Gallagher v. Bayer* (cont'd)

- Court held that these claims were structure/function claims and would thus be preempted without plausible allegations that claims violate the Food, Drug & Cosmetic Act or are false and misleading.

- Plaintiffs presented sufficient scientific evidence to cast doubt on the truth of Bayer's claims by citing National Institute of Health fact sheets and other reports in their Second Amended Complaint.

Class Actions – *Myska v. New Jersey Mfg. Co.*, 440 N.J. Super. 458 (App. Div. 2015)

- Plaintiffs alleged defendants violated New Jersey's Consumer Fraud Act by improperly denying diminution in value damages as a covered component of the underinsured and uninsured motorist provisions in their automobile insurance policies.
- Court denied class certification **before discovery**.
- The proposed class lacked typicality:
  - "the facts underpinning each plaintiff's claims were dependent upon the individual insurance policy provisions, the distinct vehicle damaged and the specific calculation of damages alleged, which require separate litigation of every action."

Ascertainability

Class Actions – Two Views of Ascertainability: *Carrera v. Bayer*, 2014 U.S. App. LEXIS 15553 (3d Cir. May 2, 2014)

- Class members are unlikely to have documentary proof of purchase of One-A-Day Weight Smart vitamins, which Bayer marketed as having metabolism-enhancing effects.
- The class must be "defined with reference to objective criteria."

Class Actions – Two Views of Ascertainability: *Carrera v. Bayer* (cont'd)

- "Plaintiff must demonstrate his purported method for ascertaining class members is reliable and administratively feasible, and permits a defendant to challenge the evidence used to prove class membership."
  - Plaintiff had to demonstrate that affidavits about consumers' purchases were reliable. Affidavits themselves were insufficient.

Class Actions – Two Views of Ascertainability: *Mullins v. Direct Digital*, 795 F.3d 654 (7th Cir. 2015)

- Plaintiffs claimed dietary supplement Instaflex Joint Support did not relieve joint discomfort as claimed.
- Seventh Circuit rejected the heightened ascertainability standard of *Carrera*.
  - District courts have the "discretion to allow class members to identify themselves with their own testimony and to establish mechanisms to test those affidavits as needed."
  - "District courts should continue to insist that the class definition satisfy the established meaning of ascertainability by defining classes clearly and with objective criteria. If a class is ascertainable in this sense, courts should not decline certification merely because the plaintiff's proposed method for identifying class members relies on affidavits."

Class Actions – Two Views of Ascertainability: *Mullins v. Direct Digital* (cont'd)

- Regarding concern about fraudulent affidavits, the Court observed that "risk of dilution" of settlement funds based on fraudulent or mistaken affidavits seems low given small amounts at issue counterbalanced by risk of perjury and can likely be addressed by pre-existing processes like claim administrators and fraud auditing.
- Court also explained that, given the small amount of each individual claim, plaintiffs recovering something (even if diluted) is a better outcome than denying class certification and having plaintiffs recover nothing.

Class Actions – *Allen v. Conagra Foods*, 2015 U.S. Dist. LEXIS 2653 (N.D. Cal. Jan. 8, 2015)

- Plaintiff alleged label of "Parkay Spray" misled consumers about the product's fat and calorie content.
- Class certification denied on ascertainability grounds because plaintiff had not presented a plan for identifying potential class members.
- Court declined to follow *Carrera*'s heightened ascertainability standard and granted plaintiff leave to seek class certification following completion of discovery.

Class Actions – *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397 (S.D.N.Y. 2015)

- Plaintiffs alleged EZ Seed does not grow grass "50% thicker with half the water" compared to "ordinary seed."
  - Either EZ Seed does not grow grass at all and is thus worthless or EZ seed is mislabeled because the above claim is false and misleading
- Plaintiffs sought to certify class of all persons in California and New York who bought EZ Seed in those states containing the label statement "50% Thicker With Half the Water," excluding persons who bought to resell.
  - Court held this was sufficiently specific to satisfy the requirement of ascertainability, without proof of purchase.

Class Actions – *In re Scotts EZ Seed Litig.*, (cont'd)

- Injunctive relief unavailable because the disputed claim had been discontinued.
- Under Rule 23(b)(3), Plaintiffs established they could meet the "reasonable consumer" standard New York and California use to show materiality and reliance elements.
- Plaintiffs also could show common questions concerning damages (full refunds if product worthless and price premium consumers paid if claim was misleading.
- Scott's guarantee refund not a superior way to resolve Plaintiffs' claims.

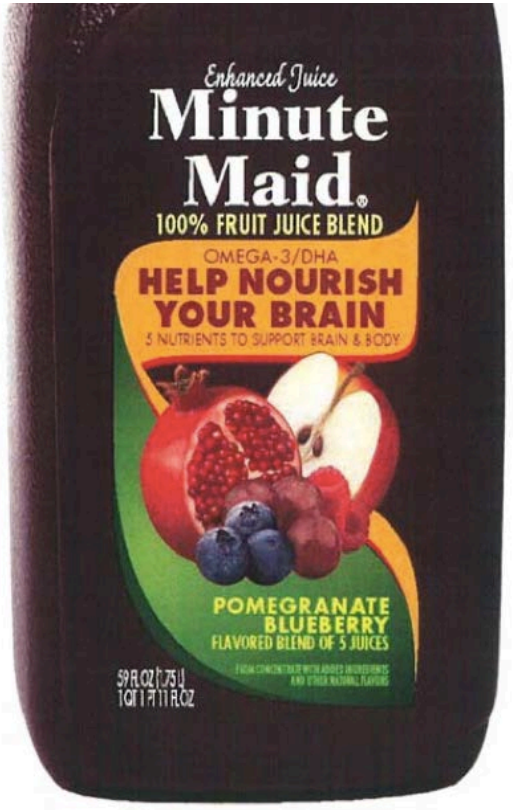
Class Actions – *Cabral v. Supple*, 608 F. App'x 482 (9th Cir. 2015)

- Plaintiffs alleged that Supple falsely claimed its dietary supplement drink was "clinically proven effective in treating joint pain."
  - Class certification vacated
  - The alleged misrepresentation must have been made to all class members
    - Court left open the possibility that minor variations in the claim's wording may not prevent class certification.

Summary Judgment

Class Actions – *Saeidan v. Coca Cola*, 2015 U.S. Dist. LEXIS 90733 (C.D. Cal. July 6, 2015)

- Plaintiffs alleged that Defendant misrepresented the makeup of its Pomegranate Blueberry Flavored Blend of 5 Juices, which contained mostly apple and grape juices and little pomegranate and blueberry juice



Class Actions – *Saeidan v. Coca Cola* (cont'd)

- Defendants argued that the FDCA preempted plaintiffs' claims.
- California's restrictions that were in addition to FDCA requirements were not preempted.
  - Court took guidance from *Pom Wonderful*, which "explicitly rejected the 'assumption that the FDCA and its regulations are at least in some circumstances a ceiling on the regulation of food and beverage labeling.'"
  - In doing so, court completely misunderstood critical difference between preemption and preclusion

Class Actions – *Major v. Ocean Spray Cranberries,* 2015 U.S. Dist. LEXIS 23542 (N.D. Cal. Feb. 26, 2015)

- Plaintiff claimed Ocean Spray's 100% juice products were misleadingly marketed because the "no sugar added" claim was not qualified by a disclaimer that the juice was not "low calorie" or "calorie reduced" and that the "100% juice" claim was literally false due to alleged use of fruit juice concentrate.

Class Actions – *Major v. Ocean Spray Cranberries* (cont'd)

- Partial summary judgment granted in favor of defendant on the "no sugar added" claim because it was not literally false and had not deceived the lead plaintiff.
- Class certification denied due to the lead plaintiff's admission that she did not rely on the "no sugar added" claim in deciding to purchase 100% juice.

Recent Developments in Lanham Act and Class Action False Advertising Cases

Lawrence I. Weinstein

Partner and Co-Chair,
Intellectual Property Litigation Practice

Proskauer Rose LLP

lweinstein@proskauer.com

November 10, 2015

Proskauer