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False Advertising Damages – "No Harm No Foul" .... Think Again

Ed Dailey
edailey@bromsun.com

Courtney Quish
cquish@bromsun.com

Ed Dailey is a litigation partner, and Courtney Quish is a litigation associate at Bromberg & Sunstein.

Comparative advertising is a marketing staple. Routinely, advertisers claim that a laboratory test, survey, or evaluation has demonstrated the durability, functionality, superiority, or unique capability of a product or service. Consider AT&T's claim that it had the "fewest dropped calls" and now "more bars in more places" or Gillette's claims about the "micropulse" capability of its MP3 Power shaving system. But what if comparative advertising is challenged as false and deceptive?

AT&T introduced the "more bars" ads after its "fewest dropped calls" advertising campaign was contested in a class action lawsuit. ***Kaltwasser v. Cingular Wireless LLC,*** No. 07-0411, complaint filed (N.D. Cal. Jan. 22, 2007). Gillette abandoned its "micropulse" advertising after Schick obtained an injunction in a Connecticut federal court. ***Schick v. the Gillette Company***, 372 F. Supp. 2d 273 (2005).

If you are a target of false, comparative advertising, your legal options have been limited until recently. While the Lanham Act, 15 U.S.C. §1125(a), bars deceptive advertising and seemingly provides both injunctive and monetary relief, federal courts were, for too long, resistant to awarding damages absent proof by the plaintiff that the defendant's false advertising actually caused injury and damages in the marketplace. So, if your challenge to a competitor's false comparative advertising was not compelling enough to warrant a preliminary injunction, as is frequently the case, the difficult burden of proving causation meant an uncertain prospect of damages. This risk was probably enough to counsel an early settlement without much in the way of relief. The defendant would skip away singing, "No harm, no foul." All of that has changed significantly over the last five years.

> [T]HE UNCERTAIN PROSPECT OF A DAMAGES AWARD WAS PROBABLY ENOUGH TO COUNSEL AN EARLY SETTLEMENT WITHOUT MUCH IN THE WAY OF RELIEF. THE DEFENDANT WOULD SKIP AWAY SINGING, "NO HARM, NO FOUL".

The benchmarks are the First Circuit's decisions in ***Tamko Roofing Products Inc. v Ideal Roofing Co., Ltd,*** 282 F.3d 23 (2002) and ***Cashmere & Camel Hair Mfrs. Inst. v Saks Fifth Avenue***, 284 F.3d 302 (2002). In ***Cashmere***, a manufacturer misrepresented the cashmere content of its products and gained some success in the marketplace by selling a mislabeled "cash-

CONTINUED ON PAGE 5

In This Issue

False Advertising CONTINUED FROM PAGE 1

mere" product at lower prices. Once this scheme was uncovered, a finding of false advertising was a given. The court next declared that, upon proof of literal falsity, a plaintiff is entitled to a presumption of consumer deception, one element required to prove false advertising. That was sufficient for injunctive relief, but how then to prove that the deceptive advertising has caused injury and damages?

Recognizing the difficulty of proving injury from false and deceptive advertising, the ***Cashmere*** court adopted a minimalist causation standard: while the injured party must show that the false advertisement actually harmed its business, "[a] precise showing is not required, and a diversion of sales, for example, would suffice." 284 F. 3d at 318. This standard allows the injured party to prove that the false advertising has caused injury and triggers the right to seek damages upon proof of lost sales.

Alternatively, where there is a finding of direct competition, a plaintiff can invoke the Lanham Act provision permitting an equitable award of damages under the First Circuit's decision in ***Tamko***. Equitable damages are based in a recovery of the defendant's profits from its falsely advertised goods or services. 15 U.S.C. §1117(a)(1). So, recovery of defendant's profits becomes a proxy for proof of actual damages. ***Tamko***, 282 F.3d at 36-38.

The decisions in ***Cashmere*** and ***Tamko*** represent a significant shift away from requirements of proof that false advertising has deceived consumers and has caused injury and actual damages. These decisions move a Lanham Act lawsuit towards a presumption-based case, at least where the contested advertisements are literally false and aimed at a single competitor. Once the plaintiff has demonstrated literal falseness and offers some proof of causation, the burden falls to the defendant to prove the negative. And now it appears that federal trial courts are ready to extend the reach of ***Cashmere*** and ***Tamko***.

> COUPLED WITH *CASHMERE* AND *TAMKO*, THE *HIPSAVER* DECISION AFFORDS AN OPPORTUNITY TO PURSUE PRESUMPTION BASED INJUNCTIVE AND DAMAGES RELIEF. UPON A SHOWING OF LITERALLY FALSE ADVERTISING AND WITH *HIPSAVER'S* INFERENTIAL BASIS FOR LOST SALES, A PLAINTIFF IS NOW ENTITLED TO PRESUMPTIONS OF DECEPTION, CAUSATION, AND DAMAGES.

Last year, the U.S. District Court in Boston dealt with a contentious false advertising claim where the parties were direct competitors in a two party marketplace. At summary judgment, the plaintiff established sufficient facts to go forward at trial with its claim of literally false comparative advertising but was unable to meet the ***Cashmere*** requirement for proof of injury, by, for example, at least some direct diversion of sales. That would have left the plaintiff without a damages claim.

After considering the implications of ***Cashmere*** and ***Tamko***, Judge Saris ruled that the plaintiff could indeed go forward to trial with a presumption of injury. The court found that ***Cashmere*** points to a presumption of lost sales injury because false advertising (invoking a finding of intentional deception) in a two party market necessarily targets the competitor. ***The HipSaver Company, Inc. v J.T. Posey Company***, 497 F. Supp. 3d 96, 106-109. And, consistent with ***Tamko***, the plaintiff would then have the right to seek an equitable award of damages based in recovery of the defendant's profits.

Coupled with ***Cashmere*** and ***Tamko***, the ***HipSaver*** decision affords an opportunity to pursue presumption based injunctive and damages relief for false and deceptive advertising, at least in cases where the market is largely the province of just two competitors. Upon a showing of literally false advertising and with ***Hipsaver's*** inferential basis for lost sales injury, a plaintiff is now entitled to presumptions of deception, causation, and damages. This gives substance to the Lanham Act's clear purpose to thwart false and deceptive advertising. No longer can defendants expect to take a walk from damages claims for false and deceptive advertising; the burden rests with them.

Ed Dailey – edailey@bromsun.com
Courtney Quish – cquish@bromsun.com
Ed is a litigation partner at Bromberg & Sunstein. Courtney is a litigation associate at Bromberg & Sunstein.