



Ep. 2: False Advertising Claims and Consumer Class Actions

September 12, 2018

Jose Garriga:

Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga. In this episode, we'll be speaking with Neal Marder, a partner in Akin Gump's Los Angeles office. Neal is the head of the firm's consumer class action litigation practice, and today we'll be discussing a topic of interest, and occasionally concern, to many in the business community: how false advertising claims are driving consumer class actions. Neal, welcome to the podcast.

Neal Marder:

Good morning. Great to be with you.

Jose Garriga:

So, Neal, you oversee the firm's consumer class actions work. A lot of your work focuses on class action defense in California. How would you define "false advertising" in this context, and how does it feed consumer class actions?

Neal Marder:

Yeah, that's right. A big portion of my practice is focused on defending our clients against false advertising class actions, not only here in California, but across the country. We're really seeing, and have seen over the last few years, a significant uptick in the filing of these cases, and, primarily, it's because "false advertising" is such a loose term, and very broadly defined. It comes in many different forms, but, at bottom, it really consists of any claim that a plaintiff can make against a business that's engaged in the practice of selling a service or product where they're making, allegedly, a false or misleading statement about their service or their product, or omitting something that, someone could say, creates a false impression about the product. If that false advertisement uniformly impacts a large number of consumers or similarly situated individuals, that's when you get in trouble, and it can form the basis for a class action. That's really the predicate for a false advertising claim that can be brought on an individual basis, that could turn into something much larger.

Jose Garriga:

I know that this type of litigation has been trending upwards. Could you provide some examples of recent litigations that you've heard about?

Neal Marder:

Sure. This is happening a lot in California, but not just in my home state. You're seeing claims that are brought against manufacturers, nutritional supplements or beauty products, that tout the benefits of their products, which consumers are alleging are false or misleading. You see a lot of claims being brought in connection with advertisements that a product is "all natural" or "organic." We see a lot of that out here in California.

Claims being brought against restaurants or coffee houses or shops for advertising a drink as a “12-ounce drink” that contains two ounces of ice. You name it. It really runs the gamut, but those are just a few examples of some of the types of claims that we’re seeing being filed these days.

Jose Garriga: You mentioned California. California leads, I think, the U.S. as a consumer-friendly venue for this type of complaint. What makes California such a haven for the plaintiffs’ bar?

Neal Marder: Well, you know, most states may have one consumer protection statute that the plaintiffs’ bar can hang their hat on. California has three, and it’s widely regarded as the most consumer-friendly venue in the country for bringing false advertising claims, because there’s so many different statutes to pursue claims, assert claims against. For example, there’s False Advertising Law. There is the Unfair Competition Law, and then a statute called the Consumer Legal Remedies Act. All of these are vehicles in which to assert one form of a false advertising claim or another. What makes this particularly troublesome for businesses in this state is that the remedies under these statutes are cumulative, so the plaintiffs can sue under all three.

When you add to that the fact that the language under these statutes is very broad, that makes the breadth of California’s false advertising law particularly attractive to the plaintiffs. For example, California prohibits any unfair, deceptive or misleading advertising. This can cover not only advertising which is actually false, but advertising which, although true, can be deemed misleading because it may have the capacity, likelihood or tendency to confuse the public. That’s a very broad standard for the plaintiffs.

Jose Garriga: You hold California out as a very consumer-friendly venue. To what extent could that could be considered a bellwether for the U.S. in terms of expanding consumer class action vulnerability for companies?

Neal Marder: Well, for the reasons I stated: three statutes, each with very broad language. That makes virtually any business in this state vulnerable to getting hit with a false advertising case. It’s become a cost of doing business here, and because of the prevalence of these types of claims, that makes California a battleground for litigating cutting issues in consumer class action litigation, and, in particular, false advertising claims. By way of example, one of the hot issues being litigated in California concerns a court’s ability to determine at the pleading stage whether or not a given advertisement is likely to deceive or mislead a reasonable consumer.

That issue is starting to play out, particularly in federal court. Traditionally, the plaintiffs had been able to get to take discovery. Courts have been historically reluctant to make that determination at the pleading stage, but because of the volume of cases, federal courts are looking for an opportunity to clear their dockets and are much more willing these days. We’ve had a considerable amount of success convincing some of our federal courts here in California to determine at the pleading stage whether or not a reasonable consumer, based on an objective standard, would be misled by an alleged false advertisement.

Jose Garriga: That’s interesting. Do you see other states looking to California as a model?

Neal Marder: Well, certainly. The four or five states where we see the highest filings, in addition to California, are New Jersey, Florida, New York and Illinois. That’s where the large body of law is developing, but I think California is certainly one of the leading states in terms of the development of the law in this area.

Jose Garriga: So, you've mentioned a couple of sectors, let's say, that have so far been vulnerable to this type of litigation. Overall, which industries would you say are most at risk for false advertising litigation?

Neal Marder: Well, there's no question but that the food and beverage industry is getting hit the hardest, but certainly the cosmetics industry, the apparel industry, the electronics industry are all facing a number of these cases. But I'm seeing cases now being filed against issuers of credit cards, pharmaceutical companies, those in the finance industry, the telecommunications industry. If you are in California, you just have to be recognizing that false advertising claims are going to come sooner or later.

Jose Garriga: Speaking to something you'd said earlier, you talked about a couple of the litigations have involved things, claims of being all natural and healthy, what have you. Are there other claims that you could say are trending, if you will, in terms of seeing litigation founded on certain claims that are being made by consumers?

Neal Marder: Yeah. The "all natural" or "healthy" are some of the most prevalent, where companies are being accused of mislabeling their products with statements such as "all vegetable" or "wholesome," when they, in fact, contain some trace amounts of high-fructose corn syrup, something like that, but there's these slack fill cases we're seeing a lot of, where the plaintiffs claim a product packaging is deceptively large in an attempt to mislead consumers into thinking they're getting more for their money. It could be a bag of potato chips that has a third of it is air and not filled to the brim.

You're seeing these green eco-friendly cases, where plaintiffs allege that "environmentally friendly" labeling is misleading due to the products' manufacturing. We have a lot of cases being filed against outlet stores. Plaintiffs allege that "compare at our former price listed" advertising at outlet or discount stores is misleading because the product may not have ever actually been sold at that price. So, those are just a few of the categories of different types of cases that we're seeing filed.

Jose Garriga: As a reminder, listeners, we're here today with Neal Marder, Akin Gump partner based in Los Angeles, who's talking about some of the latest trends in consumer class actions. So, Neal, you've said a fairly daunting array of claims that can be made against companies. How can companies protect themselves?

Neal Marder: Well, we advise our clients to take a number of prophylactic and precautionary steps to try and ensure that they don't get ensnared in a case. There are a host of best practices that companies can employ when putting together an advertising campaign, or considering how they're going to label their product or to promote their service. I think the starting point is to analyze any potential false advertising claim that could conceivably be made in the proposed advertisement or packaging or labeling itself. We tell our clients to make sure that the proposed advertisement isn't making any claims that could be viewed as contrary to the practices actually used or the utility of a particular product. Avoid using undefined words that can be subject to multiple interpretations. That can be a real problem.

Jose Garriga: Sorry to interrupt, but what would you call an "undefined word" in that context?

Neal Marder: As companies, and particularly their marketing and sales groups, attempt to promote a product, it's not unusual to use some adjectives to describe a product that can be vague in its usage and therefore subject to misunderstanding. The important point is to be consistent in messaging. Make sure the product's label or the website or social media all provide the same consistent and pre-approved messaging. And you got to look beyond the mere words to the optics of the message. Evaluate not only the product's packaging

or pictures or name, but also anything else that could convey an unintended implied message. What we tell our clients to do is really put yourself in the shoes of a plaintiff's lawyer in evaluating the contents and messaging of an ad or label, so you're being really self-critical. Most importantly, don't count on fine print. And for any ad or, particularly, larger campaigns, it's always a good idea to work with outside counsel to review the claim, any potential claim.

Jose Garriga:

I know you've had a lot of success in this area working with clients. Speaking generally, what defenses can counsel erect in the face of these claims and litigations?

Neal Marder:

Despite all the best practices I've identified, you get hit with one of these cases; there are a number of defenses that can be raised to try and get out early. If I can, I would like to always try and litigate in federal court, where the federal judges are much more willing to, as I said, assess at the pleading stage whether or not an advertisement is misleading to an objective, reasonable consumer. That's certainly a defense that we are employing more and more now. We also can argue that the plaintiff wasn't really harmed by the alleged advertisement, and therefore they have no standing to sue, under the U.S. Supreme Court's recent decision in the *Spokeo* case.

You can dramatically decrease the size of the class by arguing that the plaintiff can't certify a nationwide class because of variances in state laws, consumer protection laws under the 9th Circuit's *Mazza* decision. And probably the most common defense is to argue that the advertisement doesn't uniformly affect all consumers similarly. In other words, there are individual issues that predominate, pointing to the uniqueness or specific decision making of consumers when purchasing a product or service. Those are just a few of the defenses that are commonly raised in these type of cases

Jose Garriga:

Thank you, Neal, for joining us today and for sharing your thoughts on what's a very lively, volatile and relevant topic. And thank you, listeners, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you don't miss an episode. We're on, among others, iTunes, Google Play, and Spotify. Today, you've had the pleasure of listening to Neal Marder, partner at Akin Gump in our Los Angeles office, who, among other things, works on class action cases and class action litigations in that state and also nationally.

To learn more about Akin Gump and the firm's work in, and thinking on, consumer class action cases, go to the experience section on akingump.com and look under litigation or search for consumer class actions on the News, Insights & Blogs tab. Until next time.

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