Massachusetts Academy of Trial Attorneys
Journal
November 2011 | Vol. 5, No. 2

Amicus Committee update

By J. Michael Conley

Since our last report in the February 2009 MATA Journal, the Amicus Committee has continued to be active and productive.

Old business

Cases pending at last report had mixed results. In *Law v. Griffith*, 457 Mass. 349 (2010), the MATA - supported position briefed by Mike Najjar — that it was error for a trial judge to exclude a plaintiff's evidence of medical charges just because the amount actually paid was less than the face value of the bill — prevailed. Meanwhile, in *Foresta v. Contributory Retirement Appeal Board*, 453 Mass. 669 (2009) — MATA brief by Deborah Kohl — the court rejected an employee's argument, supported by MATA, that his entitlement to accidental disability retirement should be based on his job description, and not on injury-related changes in duties.

Newer business — cases briefed and decided

In *Sikorski's Case*, 455 Mass. 477 (2009), MATA, with valuable assistance from Boston College law student SoyoungYoon, submitted an Amicus brief in support of a high school teacher who had been injured while acting as a volunteer chaperone for a high school ski club trip and sought workers compensation benefits.

The employer opposed the claim asserting that the injury was recreational and not work related. The SJC ruled in favor of the injured teacher, reasoning that it was customary for teachers to serve as chaperones on such ski trips, that the school encouraged such service and that the ski trip advanced the school's broad educational mission. MATA and Yoon completed an outstanding draft amicus brief, honing in on the policy implications of the decision — the important role of extracurricular activities in secondary education and the essential function of volunteer teachers to allow such activities to occur.

MATA supported a police officer who was injured in a traffic accident on his way to responding to an emergency call. The call arose when a negligently discharged patient was struck by a vehicle while walking home from hospital. brought negligence action against In *Leavitt v. Brockton Hosp.*, Inc. 454 Mass. 37 (2009), the SJC ruled that the hospital owed no duty to officer, and that the officer's injuries were caused by a negligent motorist, not the hospital.

MATA submitted an amicus brief in support of the plaintiff in the landmark case of *Papadopoulos v. Target Corp.*, 457 Mass. 368 (2010), assisted by Tom Murphy, Professor Tom Carey and Boston College law student Ryan McLaughlin.

The SJC's ensuing decision abolished the anachronistic "natural accumulation" rule in snow and ice cases and put an end to the misuse of the so-called "open and obvious" rule in cases other than those based on failure to warn.

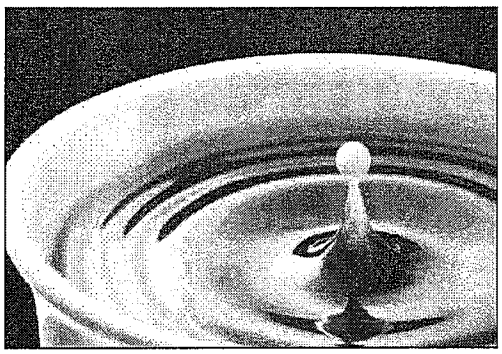
In *Joule, Inc. v. Simmons*, 459 Mass. 88 (2011), MATA joined in the amicus brief of the American Civil Liberties Union on a case in which the SJC ruled that an arbitration agreement binding on an employee did not preclude MCAD from proceeding with its own investigation and resolution/remediation of the employee's complaint of unlawful discrimination.

Mike Najjar was principal author of MATA's memorandum in support of Further Appellate Review and amicus

Continued on page 10

Wake up and smell the 'Hot Coffee'

By Andrew Abraham



©iStockphoto.com/René Mansi

PRESIDENT'S MESSAGE

As the current president of MATA, I am honored to represent an organization I have been involved with my entire legal career. I am very proud to be a trial lawyer and to be part of a group that works every day to make the world safer for people on every level. There is no more honorable work in our society as that which keeps people safe and holds those responsible who do harm. As difficult as it may be, we should all be proud to represent consumers against large corporations.

I have advocated for years that MATA (and AAJ) should play a larger role in advocating to the general public the need for a strong civil justice system. It is an unfortunate fact that most in our society view personal injury lawsuits — and lawyers — as an economic drain with no social value.

MATA can and should be at the forefront of a statewide effort of letting the public know how much safer their lives are because the "ambulance chasers" of the world have forced corporate America to pay more attention to safety. Our children's pajamas do not ignite, our cars do not explode in side impacts and breast cancer and colon cancer are much more likely to be detected earlier due to the efforts of the "ambulance chasers." It is high time we let

Continued on page 6

False advertising under the Lanham Act

By Roger T. Manwaring

The "Gobbler" was ACME Co.'s most popular vacuum cleaner and for many years had generated brisk sales nationwide of replacement bags and air filters. Bag and filter sales plummeted, however, after Knokoff Parts, Inc. began selling its own, much less expensive bags and filters, claiming that they were "Gobbler Bags" and "Gobbler Filters" and that they "fit the Gobbler."

In fact, the Knokoff bags and filters were of lesser quality and reduced the effectiveness of the Gobbler because they "fit" only very loosely into the Gobbler's bag and filter slots. Can ACME sue Knokoff for false advertising?

1. Federal law

To establish a claim for false advertising under §43(a) of the federal Lanham Act, 15 U.S.C. §1125 (a), a plaintiff must demonstrate that (1) the defendant made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product; (2) the misrepresentation is material, in that it is likely to influence the purchasing decision; (3) the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience; (4) the defendant placed the false or misleading statement in interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of

Continued on page 8

False advertising under the Lanham Act

Continued from page 1

sales or by a lessening of goodwill associated with its products. *Cashmere & Camel Hair Manufacturers Institute v. Saks Fifth Avenue*, 284 F. 3d 302, 310-11 (1st Cir. 2002). *See also Clorox Company Puerto Rico v. Proctor & Gamble Commercial Co.*, 228 F. 3d 24, 33 n. 6 (1st Cir. 2000); *American Medical Systems, Inc. v. Biolitec, Inc.*, 774 F. Supp.2d 375, 390 (D. Mass. 2011).

Only competitors, not consumers, have standing to bring a Lanham Act false advertising claim. *Edquist v. Bidz.com, Inc.*, 2011 WL 841047, *1 (D. Mass. 3/8/11), citing *Podiatrist Ass'n, Inc. v. La Cruz Azul De P.R., Inc.*, 332 F. 3d 6, 19 (1st Cir. 2003).

a. A statement

A false advertising claim may be based not just on false statements, but also on visual images which convey claims (e.g. images in an orange juice commercial which convey the claim that the product is produced by squeezing fresh oranges directly into the carton). *Gillette Co. v. Norelco Consumer Products Co.*, 946 F. Supp. 115, 128 (D. Mass. 1996), citing *Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F. 2d 312, 317 (2d Cir. 1982).

b. Which is false or misleading

The plaintiff must show that the defendant has made a false or misleading statement of fact. Thus, statements of mere opinion are not actionable. *Gillette*, 946 F. Supp. at 136-37 (capacity for verification is the most important question in determining whether a statement is one of fact).

In determining whether a statement is false, the court looks to the advertisement in its full context. The focus, however, is on the individual advertisement, not an ad campaign as a whole. *Hipsaver Co., Inc. v. J. T. Posey Co.*, 490 F. Supp. 2d 55, 67 (D. Mass. 2007).

A false advertising plaintiff must show that the advertisement is either literally false or, while true or ambiguous, is nevertheless misleading. *Cashmere*, 284 F. 3d at 311. As discussed below, whether a claim is "literally false" impacts the burden on the plaintiff to prove other elements of the false advertising claim.

Notably, a claim may be literally false even if the false statement is implied rather than explicit.

[A]lthough factfinders usually base literal falsity claims upon the explicit claims made by an advertisement, they may also consider any claims the advertisement conveys by 'necessary implication.'... [A] claim is conveyed by necessary implication when, considering the advertisement in its entirety, the audience would recognize the claim as readily as if it had been explicitly stated.

Cashmere, 284 F. 3d at 315, quoting *Clorox*, 228 F. 3d at 34-35.

For example, in *Cashmere*, the plaintiffs alleged that the defendant department store was marketing as "cashmere" clothes which contained only recycled, rather than virgin, cashmere. The court held that the statement was literally false because consumers would view the term "virgin" as necessarily implied when a garment was labeled "cashmere." *Cashmere*, 284 F. 3d at 316.

However, not "all messages implied by an advertisement will support a finding of literal falsity ... The greater the degree to which a message relies upon the viewer or consumer to integrate its components and draw the apparent conclusion, ... the less likely it is that a finding of literal falsity will be supported." *Clorox*, 228 F. 3d at 35. (internal quotation marks omitted).

The method by which to prove literal falsity also differs depending on whether or not the claim is a so-called "establishment claim." *Spalding Sports Worldwide, Inc. v. Wilson Sporting Goods Co.*, 198 F. Supp. 2d 59, 66-67 (D. Mass. 2002); *Gillette*, 946 F. Supp. at 121-22.

An establishment claim asserts that scientific tests or studies establish that a product works, while a non-establishment claim is a claim of general superiority and does not rely on tests or studies. *Id.* A plaintiff can show that an establishment claim is literally false simply by proving that the tests or studies relied upon to validate the claimed fact do not do so.

This can be done in two ways. "First, the plaintiff may demonstrate that the test is not sufficiently reliable to permit one to conclude with reasonable certainty that [it] established the claim made. ... Second, the plaintiff may show that the tests, even if reliable, do not establish the proposition asserted by the defendant." *Spalding*, 198 F. Supp.2d 59, 66-67. (internal citations and quotation marks omitted). The fact that the defendant conducted the tests in good faith is not a defense. *Gillette*, 946 F. Supp. at 122.

The plaintiff's burden is greater with regard to a non-establishment claim. "The plaintiff must prove actual falsity of the challenged claim." *Gillette*, 946 F. Supp. at 122.

In the hypothetical, Knokoff's claims concerning the replacement bags and filters are non-establishment claims because they do not rely on studies or testing. Therefore, ACME must show that the bags and filters do not, in fact, "fit" the Gobbler.

ACME can argue that Knokoff's claims that its filters and bags "fit" ACME's Gobbler are literally false by necessary implication. While Knokoff's bags and filters do fit into the Gobbler's bag and filter slots, they do so only loosely, not snugly as do ACME's own bags and filters, as required to take full advantage of the Gobblers vacuuming abilities. ACME's position would be that use of the term "fit" necessarily implies a snug fit similar to that of the ACME parts originally installed in the Gobbler. See *Holmes Group, Inc. v. RPS Products, Inc.*, 424 F. Supp. 2d 271, 290 (D. Mass. 2006) (holding that "advertisement that the filter 'fits' a Holmes air purifier necessarily implies a secure fit").

c. In a commercial advertisement

The false statement must be part of a commercial advertisement. The courts have adopted a four-part test for commercial advertising:

[A] representation must (a) constitute commercial speech (b) made with the intent of influencing potential customers to purchase the speaker's goods or services (c) by a speaker who is a competitor of the plaintiff in some line of trade or commerce and (d) disseminated to the consuming public in such a way as to constitute "advertising" or "promotion." *Encompass Ins. Co. of Massachusetts v. Giampa*, 522 F. Supp. 2d 300, 311 (D. Mass. 2007), quoting *Podiatrist Ass'n*, 332 F. 3d at 19. *See also Gillette*, 946 F. Supp. at 133.

Thus, where the plaintiff and defendant are not competitors, there will be no viable Lanham Act claim. Nor can the plaintiff succeed if the allegedly false statements are made not to influence a purchasing decision, but are conveyed to purchasers after the sale has been completed. *Gillette*, 946 F. Supp. at 135 ("Advertising or promotion implies that the statements are made to influence a consumer in his or her choice to purchase a product. Statements made inside the product's packaging, available to consumers only after the purchase has been made, do not affect the choice to purchase, that choice having been made at an earlier point. The court thus concludes that Norelco's package inserts are not "commercial advertising or promotion" as that phrase is used in section 43(a)").

In the hypothetical, the statements were made as part of commercial advertising and reached consumers in time to influence their purchase decisions.

d. Materiality

In addition to showing that the defendant's statement is false or misleading, a Lanham Act false advertising plaintiff must show that the deception is likely to influence a consumer's purchasing decision. *Cashmere*, 284 F. 3d at 311; *Clorox*, 228 F. 3d at 33 n. 6. It is not necessary to show that the deception actually influences the purchasing decision, only that it is likely to do so. *Cashmere*, 284 F. 3d at 313; *Clorox*, 228 F. 3d at 33 n. 6. "One method of establishing materiality involves showing that the false or misleading statement relates to an 'inherent quality or characteristic' of the product." *Cashmere*, 284 F. 3d at 311-12; *Holmes*, 424 F. Supp. 2d at 292.

However, mere puffery is not actionable because, by definition, such statements do not influence purchasing behavior. "Puffing is exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely." *Clorox*, 228 F. 3d at 38. *See also Gillette*, 946 F. Supp. at 130. In contrast, "a specific and measurable advertisement claim of product superiority ... is not puffery." *Id.*

In the present case, Knokoff's claims that its bags and filters are "Gobbler Bags" and "Gobbler Filters" and that they "fit the Gobbler" are specific statements of fact, not puffery. The statements concern an inherent quality or characteristic of the bags and filters and are, therefore, material to the purchasing decisions of the target audience, those customers who already own a Gobbler vacuum.

e. Consumer deception

A false advertising plaintiff must prove that the defendant's statements actually deceive or have a tendency to deceive a substantial segment of the audience. "The relevant 'consumers' are those groups of people to whom the advertisement was addressed," *Cashmere*, 284 F. 3d at 312 n. 11, (i.e. the target audience). The segment which is deceived need not be a majority. Any "not insubstantial" segment is sufficient. *Gillette*, 946 F. Supp. at 128.

Where the plaintiff has shown only that the advertisement, while true or ambiguous, is nevertheless misleading, the plaintiff must also prove deception (or tendency to deceive) through relevant evidence. Usually this evidence is in the form of "surveys, which establish that consumers were misled by the alleged misrepresentations." *Cashmere*, 284 F. 3d at 313-14. "To satisfy its burden, the plaintiff must show how consumers have actually reacted to the challenged advertisement rather than merely demonstrating how they could have reacted." *Clorox*, 228 F. 3d at 33; *Gillette*, 946 F. Supp. at 128.

Where, however, the plaintiff shows that the defendant's statements are literally false (or false by necessary implication), the plaintiff can take advantage of a legal presumption that consumers have been deceived. *Cashmere*, 284 F. 3d at 314; *Clorox*, 228 F. 3d at 33; *American Medical Systems*, 774 F. Supp. 2d at 390. "Common sense and practical experience tell us that we can presume, without reservation, that consumers have been deceived when a defendant has explicitly misrepresented a fact that relates to an inherent quality or characteristic of the article sold." *Cashmere*, 284 F. 3d at 315.

By showing that Knokoff's claims are literally false by necessary implication, ACME can take advantage of this presumption of consumer deception.

Similarly, even if the statements are not literally or by necessary implication false, there is a presumption that consumers have been deceived if the plaintiff proves that the defendant intended the advertisement to deceive. *Cashmere*, 284 F. 3d at 311 n.8.

f. Interstate commerce

A plaintiff asserting a false advertising claim under the Lanham Act must show that the defendant's statements were placed in interstate commerce. In the present hypothetical, this requirement is satisfied because both ACME and

Roger T. Manwaring is an attorney at Barron & Stadfeld in Boston. He is the head of the Barron & Stadfeld Legal Research and Writing Service, which provides cost-effective, outsourced legal research and writing to attorneys in private and corporate practice. Learn more about the service at www.barronstad.com. He can be reached at rtm@barronstad.com or connect with him via LinkedIn.

False advertising under the Lanham Act

Knokoff sell their products nationwide and Knokoff presumably advertised its replacement bags and filters in multiple states.

g. Injury

In order to recover monetary damages for false advertising, the plaintiff must show actual damage to its business. *Holmes*, 424 F. Supp.2d at 292, citing *Cashmere*, 284 F. 3d at 311. In contrast, to obtain injunctive relief a plaintiff need only show a likelihood that defendant's statements will cause consumer confusion or deception. *Id.*

"A precise showing [of injury] is not required, and a diversion of sales, for example, would suffice." *Cashmere*, 284 F. 3d at 318, quoting *Quabaug Rubber Co.* v. Fabiano Shoe Co., Inc., 567 F.2d 154 (1st Cir. 1977). A lessening of goodwill associated with the plaintiff's products also constitutes injury. *Cytologix v. Ventana Medical Systems, Inc.*, 2006 WL 2042331, *5 (D. Mass. 7/20/06), quoting *Cashmere*, 284 F. 3d at 310-11; *Clorox*, 228 F. 3d at 33 n. 6. A plaintiff satisfies the injury element "if he puts forward evidence from which a fact-finder can draw a 'reasonable inference' of a causal connection between the misrepresentation and the harm sustained." *Hipsaver*, 490 F. Supp. at 67.

ACME will need to offer evidence that Knokoff sold its replacement bags and filters to persons who would otherwise have purchased ACME products.

h. Lanham Act remedies

A Lanham Act plaintiff can obtain injunctive relief. 15 U.S.C. §1117(b). Most Lanham Act false advertising claims are litigated as motions for preliminary injunction. Damages may also be awarded if proven. A successful plaintiff under the Lanham Act can recover, subject to equitable principles: "(1) the defendant's profits [disgorgement], (2) any damages sustained by the plaintiff, and (3) the costs of the action." 15 U.S.C. §1117(a). Treble damages may also be awarded in egregious cases. Expert testimony is often crucial in establishing damages.

2. Massachusetts law

False advertising is not actionable under Massachusetts common law. *Thornton v. Harvard University*, 2 F. Supp. 2d 89, 95 (D. Mass. 1998). G.L.c. 266, §91 prohibits misleading advertising, but does not provide a private right of action for damages (any aggrieved party can obtain injunctive relief). *Id. See also Chelen v. Philips Electronics North America*, 20 Mass. L. Rep. 652, 2006 WL 696568 (Mass. Super. 3/1/06); *Mullins v. Corcoran*, 2003 WL 25335521 (Mass. Super. 1/6/03).

However, a victim of false advertising can obtain damages in an action under the Massachusetts unfair business practices act, G.L.c. 93A, §§2, 11. *Skinder-Strauss Assoc. v. MCLE, Inc.*, 914 F. Supp. 665, 681-82 (D. Mass. 1995) ("[C]ourts have confirmed that ch. 93A makes misleading or false advertising actionable by a competitor damaged by such advertising"). *See Abruzzi Foods, Inc. v. Pasta & Cheese, Inc.*, 986 F. 2d 605, 605-06 (1st Cir. 1993). A c. 93A, §11, plaintiff can obtain damages (which the court may double or treble if the violation was willful or knowing), injunctive relief and reasonable attorneys' fees.

Regulations promulgated under c.93A at 940 CMR 6.04 state generally:

(1) Misleading Representations. It is an unfair or deceptive act for a seller to make any material representation of fact in an advertisement if the seller knows or should know that the material representation is false or misleading or has the tendency or capacity to be misleading, or if the seller does not have sufficient information upon which a reasonable belief in the truth of the material representation could be based.

The regulation then lists numerous specific practices which are deemed unfair or deceptive. 940 CMR 6.04 (2). The U.S. District Court for the District of Massachusetts has noted that, "[t]he elements of a claim under chapter 93A, for the most part, mirror the elements of a section 43(a) [Lanham Act] claim" and "the only difference between section 43(a) and chapter 93A, as to false advertising claims, is the additional element that the plaintiff must demonstrate that the defendant 'knows or should know' that a statement it has made is false or misleading...." *Empire Today, LLC v. National Floors Direct, Inc.*, 2011 WL 2161898, *10 (D. Mass. 6/2/11), citing *Gillette*, 946 F. Supp. at 120 n. 3.

The Supreme Judicial Court has further defined an advertisement as deceptive when "it has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted (i.e. to entice a reasonable consumer to purchase the product.)" *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 396 (2004). *See also Hager v. Vertrue, Inc.*, 2011 WL 4501046, *5 (D. Mass. 9/28/11).

In *Aspinall*, the Court held that "a successful [c.93A] action based on deceptive acts or practices does not require proof that a plaintiff relied on the representation ... or that the defendant intended to deceive the plaintiff, ... or even knowledge on the part of the defendant that the representation was false." *Id.* at 394. Further, "advertising need not be totally false in order to be deemed deceptive in the context of c.93A. ... The criticized advertising may consist of a half truth, or even be true as a literal matter, but still create an over-all misleading impression through failure to disclose material information." *Id.* at 394-95.

In our hypothetical, Knokoff's advertisements claiming that its bags and filters, were "Gobbler Bags" and "Gobbler Filters" and that they "fit the Gobbler" would satisfy the deceptiveness element of a 93A claim because they are material statements of fact which Knokoff knows or should know are misleading and which have the capacity to mislead consumers into acting differently than they otherwise would have. Of course, ACME would still have to establish the other elements of a 93A claim (e.g. injury) in order to bring a viable claim under state law for false advertising.

A free-market economy thrives on competition and encourages every business to advertise aggressively, highlighting the value of its products or services and the flaws in those marketed by others. The assumption is that consumers, armed with accurate information, will make informed purchasing decisions and companies offering better products and services will prosper. The system breaks down, however, when a business makes false or misleading claims, gaining an undeserved advantage. Fortunately, a competing business victimized by false advertising can pursue a remedy under the Lanham Act and Massachusetts law.

MATA Guardians

The following firms have committed to giving a percentage of their fees to a MATA reserve fund to ensure the longevity of the organization and continued ability of MATA to preserve the rights of your clients and succeed in obtaining its mission of keeping Massachusetts families safe.

Baker & Abraham
Cooley Manion Jones LLP
Epstein, Lipsey & Clifford
Feinberg & Alban, PC
Law Offices of John B. Flemming
Karon & Dalimonte
Kazarosian Law Offices
Kenney & Conley
Leavis & Rest, PC
Meehan, Boyle, Black & Bogdanow, PC
Alan S. Pierce & Associates
Sheff Law Offices
Sugarman

If you are interested in participating in this program or would like more information on program specifics, please contact Paul Dullea at the MATA office.

MATA's Affinity Partners

MATA has developed partnerships with the following companies. Their services have been determined to be of the highest quality and cost beneficial for our members. Their generous support of MATA helps us to complete our mission. Please consider using them whenever possible. More detailed information can be obtained on our website at www.massacademy.com or through the MATA office.

Alliance Print
Catuogno Court Reporting
Citizens Bank
FORGE Consulting, LLC
Landy Insurance
MediVisuals
Eagle Strategies, LLC
TrialSmith