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Commentary

Five factors determine if false advertising case can proceed

It is a well-known reality that federal courts are courts of limited jurisdiction.

What this means is that only those plaintiffs who have a basis for bringing a claim can seek the keys to the courthouse. Before plaintiffs can get to a jury on a claim for false advertising under the federal trademark Lanham Act, they must show standing to sue. It is a threshold question of law without which no case can proceed.

Prudential standing is a judicially self-imposed restriction on jurisdiction which seeks to limit false advertising cases to plaintiffs whose claims are not too remote or attenuated. The current test for federal courts in the 11th U.S. Circuit Court of Appeals, which includes Florida, was adopted in 2007. If there is a common thread so far, it is that showing a direct injury, nonspeculative damages and a low risk of duplicative lawsuits are the most difficult obstacles for plaintiffs to overcome. This should give pause to any potential false advertising plaintiff and provides possible avenues for defendants to achieve a favorable outcome. In particular, a potential plaintiff should be aware that speculative damages can easily result in a lost case.

The current test balances five factors on a case-by-case basis:

What is the nature of the plaintiff's alleged injury? Is the injury a type that Congress sought to redress in providing a private remedy for violations of the Lanham Act? This asks whether the case involves a claim that commercial interests have been harmed by a competitor's false advertising.

How direct is the asserted injury? The issue here is whether there is demonstrable harm to the plaintiff stemming directly from the defendant's false advertising or whether the harm is more distant.

What is the plaintiff's proximity to the allegedly harmful conduct? Is the plaintiff within an identifiable class of people whose self-interest would normally motivate them to vindicate the public interest by bringing suit. Is it the plaintiff, as opposed to someone else, who has suffered the most direct harm?

How speculative is the plaintiff's damages claim? Are the damages likely to be indeterminate or difficult to quantify?

What is the risk of duplicative damages? Would allowing the plaintiff to sue open the floodgates to repetitive litigation against the defendant from a host of other third parties?



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In two cases applying this five-factor test, the lack of a direct injury, speculative damages and the prospects of floodgates litigation led the courts to hold there was no prudential standing. One case involved a claim by Burger King franchisees against McDonald's over a promotional contest compromised by an outside marketing company that fraudulently embezzled and diverted the proceeds. The franchisees claimed McDonald's allowed the contest to continue after learning of the marketing company's fraudulent acts. The second case involved a furniture store that alleged another furniture store misled the public into believing that it was holding a going-out-of-business sale.

In addition, a plaintiff who is not actually selling a product is going to have considerable difficulty suing a would-be competitor for false advertising. For example, a former manufacturer of anti-smoking lozenges did not have standing to sue a current manufacturer of anti-smoking lozenges. Similarly, an alleged biotechnology startup lacked standing to sue another biotech start-up over allegedly false advertisements to potential investors because the products of both companies were still in the development stage and neither had reached the market.

It is too soon to state with certainty how restrictive the five-factor test will be. However, it is safe to say at this point that the five-factor test presents a significant hurdle for plaintiffs thinking of bringing a false advertising claim.

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