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**PRODUCT ADVERTISING**

# The power of puffery

J. Russell Jackson/Special to The National Law Journal
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Increasingly, product advertising — rather than the actual product itself — is coming under attack in class action litigation. Often the claim is not that the advertising is false, per se. Rather, it is that the advertising makes the product too appealing to resist, resulting in over-consumption or even illegal consumption of the product.

Indeed, product advertising has not been under such scrutiny since the hysteria of the late 1950s, when Vance Packard described in his book, *The Hidden Persuaders*, "subliminal" advertising that the viewing public purportedly was powerless to resist. Today, Congress and federal agencies are studying the alleged effects of advertising for a wide variety of products, including food and medicines.

**Longstanding precedent protects use of puffery**

A series of recent decisions highlights the need to allege false statements of material fact when attacking product advertising, because longstanding precedent in tort, warranty and consumer protection law protects sellers who use opinion and unquantifiable statements — what many call "puffery" — to sell their products.

It is important to recognize, as an initial matter, that the First Amendment to the U.S. Constitution protects commercial speech about products, so long as it is not false. For example, in *Lorillard v. Reilly*, 533 U.S. 525, 564-65, 571 (2001), the U.S. Supreme Court held that restrictions on truthful advertising for an age-restricted product — tobacco — violated the First Amendment, and thus it invalidated a ban that prevented such advertising on billboards within 1,000 feet of a school. The court reiterated its prior admonition that adults have a First Amendment right to receive such commercial speech, noting that " '[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.' " Id. at 564 (citation omitted).

Thus, advertising for adult-oriented products like a state lottery constitutionally can use pictures of kittens and endorsements of NASCAR drivers that may improve their general appeal, so long as those advertisements are not otherwise false or misleading.

Material falsity has long been the key to legal liability for product advertising. For example, warranty law has long recognized that mere puffery does not create a warranty, in part because it is not the type of statement that a consumer can rely upon in buying the product. Section 2-313(2) of the Uniform Commercial Code provides that "an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

Similarly, most state consumer protection statutes, common law fraud and the federal Lanham Act (15 U.S.C. 1125(a)) include as elements of liability that the statement must be both material and false or misleading. Many of these causes of action also require that the consumer relied on the false statement — or at least that the false statement actually caused the consumer harm.

**Consumers know product basics**

The common law also has long history of imputing basic knowledge about products to consumers. For example, most states reject, as a matter of law, any duty to warn of product risks that are common knowledge to the public at large. Terrence F. Kiely & Bruce L. Ottley, *Understanding Products Liability Law* 189-193 (2006).

Thus, it should come as no surprise that courts are skeptical of claims brought by people who cannot identify a false statement, but claim merely to have been induced by positive imagery to purchase a product or use it in a way that the general public knows is illegal or unhealthy. See, e.g., *Goodwin v. Anheuser-Busch Cos.*, No. BC310105, 2005 WL 280330, at *5 (Los Angeles Co., Calif., Super. Ct. Jan. 28, 2005) (dismissing Consumer Legal Remedies Act claim because "plaintiffs focus on puffery or on qualities that are not affirmations of fact such as fun, sexiness, popularity, social acceptance, athleticism, etc.").

In *Tietsworth v. Harley-Davidson Inc.*, 677 N.W.2d 233 (Wis. 2004), the Wisconsin Supreme Court rejected a claim that a manufacturer's positive marketing statements about its product — which allegedly contained an engine defect — violated the state's deceptive trade practices act, concluding that the statements were mere puffery. The court recognized that consumers obviously understand that marketers associate their products with positive concepts, defining "puffery" as "'the exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined.' " Id. at 245 (citation omitted).

The defendant's characterization of the product as "a masterpiece" of "premium quality" and "filled to the brim with torque and ready to take you thundering down the road" were nonactionable puffery precisely because they were " 'not capable of being substantiated or refuted,' " and thus the court held that the claim should have been dismissed as a matter of law. Id. at 246.

The Illinois Supreme Court similarly found that descriptions of certain automobile replacement parts were nonactionable puffery because the statements were "subjective" and the sort of " 'meaningless superlatives that no reasonable person would take seriously, and so it is not actionable as fraud.' " *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801, 846 (Ill. 2005) (citation omitted). Thus, statements that the parts were "quality replacement parts" that met the defendant's "very high performance criteria" could not support a claim under the Illinois Consumer Fraud Act. See also *Saltzman v. Pella Corp.*, No. 06 C 4481, 2007 WL 844883 (N.D. Ill. March 20, 2007) (granting a motion to dismiss and finding product descriptions such as "durable," "manufactured to high quality standards" and "maintenance free" to be nonactionable puffery).

The Vermont Supreme Court recently dismissed a consumer fraud claim by making the distinction between a statement of fact and a statement of opinion. "[M]isrepresentations of the former may constitute fraud," the court instructed, "while misrepresentations of the latter cannot." *Heath v. Palmer*, 915 A.2d 1290, 1296 (Vt. 2006) (representations of "quality construction" and "exceptional value" are puffery because they are "subjective evaluations of workmanship rather than objectively verifiable statements of fact").

**The decision in 'Ortho-McNeil Pharmaceutical'**

Recently a federal court dismissed a putative class action alleging that a pharmaceutical company's "direct to consumer" advertisements violated New Jersey's Consumer Fraud Act, finding that the ads were not deceptive, but instead constituted mere puffery. In *Adamson v. Ortho-McNeil Pharmaceutical Inc.*, 463 F. Supp. 2d 496 (D.N.J. 2006), the plaintiff alleged that she bought a name-brand prescription contraceptive that was more expensive than a licensed identical generic contraceptive because the manufacturer failed to disclose that the two products were identical. The court noted that a seller has no independent duty to advertise a competitor's products; thus, the only basis for liability could arise from the manufacturer's statements about its own product. Id. at 504.

The plaintiff relied primarily on two statements. The first was that "not all birth control pills contain the same type of hormones." The court held that this was a true statement of fact that could not give rise to liability under New Jersey's Consumer Fraud Act.

The second statement was "[i]sn't it great to find one that's right for you?" Analyzing the New Jersey Supreme Court's interpretation of its Consumer Fraud Act, the court concluded that the statement was nonactionable puffery and not a representation that the manufacturer's drug was the only one like it available on the market.

The plaintiff moved for reconsideration, after which the court reiterated its position and dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) without leave to amend. *Adamson v. Ortho-McNeil Pharmaceutical Inc.*, No. 06-866, 2007 WL 604790 (D.N.J. Feb. 20, 2007). See also *New Jersey Citizen Action v. Schering Plough Corp.*, 842 A.2d 174 (N.J. App. Div. 2003) (allergy drug advertisements stating that "you . . . can lead a normal nearly symptom-free life again" were nonactionable puffery).

**Plaintiff must show ads are false or misleading**

The recent puffery decisions make it plain that if one intends to premise liability on product advertising, one must do more than simply point to its attractive nature; one must identify how it is false or misleading about a material fact.

This is amply demonstrated by *Pelman v. McDonald's Corp.*, 452 F. Supp. 2d 320 (S.D.N.Y. 2006). In *Pelman*, the plaintiffs sued a fast-food restaurant chain, alleging that it violated New York's consumer protection statutes by advertising its food as healthier than it actually was and suitable for everyday consumption. The trial court had dismissed the claims, and the 2d U.S. Circuit Court of Appeals reversed. On remand, after allowing the plaintiffs to amend the complaint, the trial court denied the defendant's Rule 12(e) motion to strike the complaint, but in doing so it made it clear that the plaintiffs' claims would be limited to actual deception in specifically identified advertisements. Statements that were objectively true statements of fact and those that were pure puffery — such as the term "Mighty Kids Meal" — could not form the basis of the plaintiffs' claim.

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