

Can Targeted Pitches be False Advertising?

April 7, 2011

On March 28, the Northern District of Illinois [held](#) that a single in-person sales pitch is not commercial advertising and therefore the speaker cannot be liable for a false advertising suit under the federal Lanham Act. Specifically, the court dismissed Oshkosh Corporation's claim against Control Solutions LLC for representing to the U.S. Army that Control Solutions' power door system was being used on All Terrain Vehicles that Oshkosh had begun making for the U.S. Army. Because the communication was targeted to a potential purchaser and thus was not made in an anonymous fashion, the court held that it was not a commercial advertisement.

This case serves as a reminder that some courts interpret federal false advertising law as applying only to a classic advertising campaign, in which a message is conveyed to many potential purchasers through a mass-marketing campaign by direct mail, television, radio, the internet, or other channels. However, other courts have held that communication to a "sufficient" portion of the purchasing public, regardless of anonymity or formality, can constitute commercial advertising under the Lanham Act.

Because courts apply flexible standards as to how much dissemination is "sufficient," and the standard varies by industry, marketers should take the same care when they communicate with an individual as when they kick off a mass-marketing campaign. In addition, marketers should be mindful that their communications may also be governed by state laws whose standards may differ from federal standards.