

## Not as Easy as Advertised: New Challenges in Bringing a Successful § 43(a) False Advertising Case

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Section 43(a) of the Lanham Act historically has been an important tool for false advertising plaintiffs seeking redress through injunctive relief and money damages. While Section 43(a) remains an important cause of action, two important changes in the past decade have made obtaining relief difficult. First, in the aftermath of *Twombly/Iqbal*, it is harder to bring a Section 43(a) false advertising claim to trial because courts are applying a heightened “plausibility” standard that makes getting past a motion to dismiss more demanding.<sup>1</sup> Second, the Supreme Court’s *eBay* and *Winter* decisions have made it more difficult in some circuits to obtain injunctive relief in false advertising cases because of the need to provide concrete evidence of harm, which can be difficult to do in false advertising cases.<sup>2</sup>

These four important Supreme Court cases were decided between 2006 and 2009. To research their effect on Section 43(a) litigation, we collected cases from 2003–2005 and 2010–2012 in which false advertising claims were a principal component.<sup>3</sup> Based on our research, we conclude that these four Supreme Court decisions have had an impact on Section 43(a) false advertising litigation because fewer false advertising claims are surviving motions to dismiss and courts in some circuits are denying more requests for preliminary injunctions based on an insufficient showing of harm.

### Effect of *Twombly/Iqbal* Plausibility Standard on Section 43(a) False Advertising Claims

Our research shows that a large number of Section 43(a) Lanham Act false advertising claims do not make it past a motion to dismiss. And there was a steady increase in the percentage of motions to dismiss granted each year between 2010 and 2013. This trend appears to result from the application of the *Twombly/Iqbal* plausibility standard to Section 43(a) Lanham Act false advertising cases. Indeed, during the 2010–2012 time period, courts dismissed Lanham Act false advertising claims at a rate 8 percent higher than during the 2003–2005 time period.<sup>4</sup> Under the

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<sup>1</sup> Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

<sup>2</sup> eBay v. MercExchange, 547 U.S. 388 (2006); Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008).

<sup>3</sup> We collected all reported and unreported federal district court cases that were available on Westlaw. Discretion was applied in screening out those cases that did not primarily involve false advertising allegations (e.g., the case was a patent case, with an ancillary Section 43(a) count appended). We also supplemented our research with the monthly case filing reports collected by the ABA Private Advertising Litigation Committee, where this information was available. This methodology yielded a collection of 398 cases for the 2003–2005 period and 412 cases for the 2010–2013 period.

<sup>4</sup> Within our collection of cases, 49 percent of motions to dismiss were granted during the 2003–2005 period. That number increased to 57 percent during the 2010–2012 period.

*Twombly/Iqbal* decisions, a plaintiff must not only allege a short and plain statement of the claim, it must also plead plausible facts to back up the assertions. In particular, when bringing a Section 43(a) false advertising claim, the plaintiff should allege facts that, if proven true, would support all of the following elements of a prima facie claim:

1. Defendant made false statements of fact about its own product or plaintiff's product. (Plaintiffs falter on this prong most often, because many fail to allege facts showing why the claims are untrue, and instead focus on why the claims are unsubstantiated.)
2. Those advertisements actually deceived or have the tendency to deceive a substantial segment of their audience. (This criterion is emerging as a litmus test, as some judges are refusing to sustain cases involving implied claims where no evidence of consumer interpretation to support a claim of deception has been provided.)
3. The deception is material in that it is likely to influence the purchasing decision. (This criterion has also been increasing in importance to courts, some of which are declining to presume advertising claims are material and are requiring evidence that consumers would change their purchase decisions based on the claims.)
4. Defendant caused the false advertisement or its falsely advertised goods to enter interstate commerce.
5. Plaintiff has been or is likely to be injured as the result of the foregoing either by direct diversion of sales from itself to defendant, or by lessening of the goodwill its product enjoys with the buying public. (As discussed in the next sections, below, this factor is most important in the context of injunctive relief.)<sup>5</sup>

Courts dismiss claims when plaintiffs have not adjusted to the new pleading standards post-*Twombly/Iqbal* and merely recite elements of the prima facie test without including plausible facts to back up the assertions.<sup>6</sup> For example, in *Ameritox Ltd. v. Millennium Laboratories, Inc.*,<sup>7</sup> Ameritox sued one of its main competitors in the drug testing and medication monitoring market. Ameritox alleged that Millennium sent false advertisements to physicians regarding billing for clinical laboratory tests. These advertisements allegedly told doctors that they could earn large amounts of money by billing for unnecessary testing. According to Ameritox, these material representations led physicians to choose Millennium for their laboratory services instead of Ameritox. The court dismissed the claims because Ameritox simply alleged Millennium's statements were "likely to deceive a substantial portion of the targeted customers."<sup>8</sup> Without information about *how* doctors were being misled by the advertisement, the complaint was simply a "naked assertion" reciting an element of the cause of action. Thus, the complaint failed to meet the *Twombly/Iqbal* plausibility standard.<sup>9</sup>

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<sup>5</sup> All circuits have adopted a variation of this test known as the "Skil" test. See *Skil Corp. v. Rockwell Int'l Corp.*, 375 F. Supp. 777, 783 (N.D. Ill. 1974).

<sup>6</sup> See, e.g., *Reliable Carriers, Inc. v. Excellence Auto Carriers, Inc.*, No. 11-cv-15326, 2012 WL 1931519 (E.D. Mich. May 29, 2012); *Pitney Bowes, Inc. v. ITS Mailing Sys., Inc.*, No. 09-05024, 2010 WL 1005146 (E.D. Pa. Mar. 17, 2010); *Jurin v. Google Inc.*, No. 2:09-cv-03065-MCE-KJM, 2010 WL 3521955 (E.D. Cal. Sept. 8, 2010).

<sup>7</sup> 2012 WL 33155, at \*3 (M.D. Fla. Jan. 6, 2012).

<sup>8</sup> *Id.* at \*3.

<sup>9</sup> *Id.*

Not only has the *Twombly/Iqbal* plausibility standard forced plaintiffs to plead their false advertising claims with greater particularity, but a minority of district courts in the Seventh and Ninth Circuits have held that Section 43(a) false advertising claims are subject to Federal Rule of Civil Procedure 9(b), which applies a heightened pleading standard to claims involving fraud or deception. When 9(b) is applied in the Section 43(a) context, a plaintiff must not only plead the five *Skil* factors with particularity but also the who, what, where, and when of the alleged deception.

For example, in one case, armored car manufacturer Oshkosh brought a false advertising counterclaim against Control Solutions, a manufacturer of control interface devices.<sup>10</sup> Oshkosh alleged, on information and belief, that Control Solutions falsely advertised to the U.S. military that Control Solutions's power door system was being used on Oshkosh vehicles. The court held that Oshkosh's counterclaim fell short of the 9(b) heightened pleading standard because its allegations based on information and belief failed to state a basis for its suspicion that these allegations occurred. Finding that Oshkosh's counterclaim lacked the required specificity, the court dismissed it.

But whether a Section 43(a) claim is evaluated under Rule 9(b) or the *Iqbal/Twombly* standards, the pleading must include plausible factual allegations addressing all the elements of a false advertising claim. Many plaintiffs have had difficulty pleading facts that would prove specific elements of the *Skil* test. For instance, it can be difficult to plead facts that a defendant's alleged false advertising is material in that it is likely to influence a potential customer's purchasing decision.<sup>11</sup> Likewise, Section 43(a) claims have been dismissed when plaintiffs have failed to establish a likelihood of injury by direct diversion of sales or a lessening of goodwill.<sup>12</sup>

Although there is still a great deal of uncertainty about what is "plausible" in false advertising cases post-*Iqbal/Twombly*, it is safe to say that under the new regime, simply labeling a claim as "false advertising" and regurgitating the language of the statute will lead to the claim's disposal on a motion to dismiss.

### Impact of *eBay/Winter* on Lanham Act False Advertising Injunction Proceedings

The Lanham Act gives courts the power to grant injunctions to prevent a violation of Section 43(a).<sup>13</sup> Injunctive relief is often a plaintiff's primary goal when bringing a false advertising claim to protect its brand and reputation from a competitor's false advertising. The *eBay* and *Winter* decisions, however, have made it more difficult in many jurisdictions to obtain injunctive relief in false advertising cases because of the need to show irreparable harm.

The Supreme Court held in *eBay* that a permanent injunction should not be automatically issued based on a finding of patent infringement.<sup>14</sup> Rather, to obtain an injunction, a plaintiff in a patent case must satisfy all four parts of the "traditional" injunction standard:

1. that it has suffered an irreparable injury;
2. that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;

<sup>10</sup> Control Solutions, LLC v. Oshkosh Corp., No. 10 C 121, 2011 WL 1131329, at \*1 (N.D. Ill. Mar. 28, 2011).

<sup>11</sup> Reliable Carriers, Inc. v. Excellence Auto Carriers, Inc., No. SACV 12-463 DOC(MLGx), 2012 WL 1931519 (E.D. Mich. May 29, 2012).

<sup>12</sup> Ferrington v. McAfee, Inc., No. 10-cv-01455, 2010 WL 3910169 (N.D. Cal. Oct. 5, 2010).

<sup>13</sup> 15 U.S.C. § 116.

<sup>14</sup> *eBay v. MercExchange*, 547 U.S. 388 (2006).

*[W]hether a Section 43(a) claim is evaluated under Rule 9(b) or the Iqbal/Twombly standards, the pleading must include plausible factual allegations addressing all the elements of a false advertising claim.*

3. that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and
4. that the public interest would not be disserved by a permanent injunction.<sup>15</sup>

*The first cases to apply eBay to the Section 43(a) setting acknowledged the difficulty of proving harm in a false advertising case, but accepted the Supreme Court's mandate that specific evidence of harm be proved before a permanent injunction would issue.*

Traditionally, to obtain a permanent injunction in Section 43(a) false advertising cases, plaintiffs enjoyed a presumption of harm once they won their claim on the merits.<sup>16</sup> A number of courts justified application of this presumption on the grounds that it is exceedingly difficult for a plaintiff to prove that a specific quantum of harm has been created by a particular false advertising or advertising campaign. This tension is particularly acute at the outset of a campaign, before the advertisements have had a chance to work on the consuming public.

The first cases to apply *eBay* to the Section 43(a) setting acknowledged the difficulty of proving harm in a false advertising case, but accepted the Supreme Court's mandate that specific evidence of harm be proved before a permanent injunction would issue. In *Schering-Plough Healthcare Products, Inc. v. Neutrogena Corp.*, Schering-Plough sued rival sunscreen maker Neutrogena for falsely advertising that one of Neutrogena's products contained a photo-stabilizing agent when it did not.<sup>17</sup> The court granted partial summary judgment, finding the challenged advertisements were literally false. Schering-Plough then argued the court did not need to apply the *eBay* factors to determine whether to issue a permanent injunction because the court had already found Neutrogena's advertisements were literally false. The court, however, declined to forgo *eBay*'s four-factor analysis, noting the test could not be supplanted by a presumption of irreparable harm.<sup>18</sup> The court then denied Schering-Plough's motion for a permanent injunction, finding it had not proved any irreparable injury because it had not articulated with any particularity how the false advertising resulted in the loss of sales, customers, or business opportunities.<sup>19</sup> Decisions like *Schering-Plough* demonstrate that even if a competitor's advertisement is false, a plaintiff needs to articulate how the false advertisement is harming its business if it wants to obtain permanent injunctive relief.

Just as *eBay* clarified the standard for permanent injunctions, *Winter* defined the standard for preliminary injunctions. Prior to *Winter*, false advertising plaintiffs enjoyed a presumption of harm in some cases—that is, if the plaintiff was successful in demonstrating that the challenged claim was literally false the court would generally presume that harm existed, thereby bypassing the need for specific evidence of irreparable harm.<sup>20</sup> Other courts presumed that harm existed if the false claim directly named or implied a comparison with the competitor.<sup>21</sup> This presumption was based on the recognition that “it is virtually impossible to ascertain the precise economic consequences of intangible harms, such as damage to reputation and loss of goodwill, caused by such violations.”<sup>22</sup> But after *Winter*, most circuits now require evidence that the moving party is likely to suffer irreparable harm.

<sup>15</sup> *Id.* at 391.

<sup>16</sup> *See, e.g.*, *Johnson & Johnson Vision Care, Inc. v. Ciba Vision Corp.*, 348 F. Supp. 2d 165, (S.D.N.Y. 2004).

<sup>17</sup> *Schering-Plough Healthcare Prods., Inc. v. Neutrogena Corp.*, Civ. No. 09-642-SLR, 2011 WL 2312569 (D. Del. June 8, 2011).

<sup>18</sup> *Id.* at 4 n.2.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *See, e.g.*, *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1183 (8th Cir. 1998).

<sup>21</sup> *See, e.g.*, *Ortho Pharm. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 695 (2d Cir. 1994).

<sup>22</sup> *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992).

*Winter* involved an environmental group's challenge to the U.S. Navy's ability to use sonar during drills because of possible harm to marine mammals.<sup>23</sup> The case came to the Supreme Court from the Ninth Circuit, which had applied a preliminary injunction test that considered whether it was "possible" the plaintiffs would suffer irreparable injury in the absence of an injunction. The Supreme Court ruled that this test was too lenient and that plaintiffs must show that irreparable injury is "likely" in the absence of an injunction. Specifically, the *Winter* Court held that a plaintiff seeking a preliminary injunction must establish that:

1. it is likely to succeed on the merits;
2. it is likely to suffer irreparable harm in the absence of preliminary relief;
3. the balance of equities tips in its favor; and
4. an injunction is in the public interest.<sup>24</sup>

In the aftermath of *eBay/Winter*, some circuits have expressly disallowed the presumption of harm in Lanham Act cases,<sup>25</sup> while other circuits have not yet applied *eBay/Winter* to Section 43(a) false advertising cases. Still others have discussed *eBay/Winter* without entirely doing away with the presumption of irreparable harm.

For instance, a court in the Seventh Circuit applied the circuit's traditional "sliding scale" approach while at the same time citing *Winter* for the proposition that "there must be more than a mere possibility that the harm will come to pass."<sup>26</sup> Under this sliding scale approach, the "likelihood of success" and "likelihood of irreparable harm" elements are interdependent. Thus, the greater the likelihood of success on the merits, the less harm the injunction must prevent to warrant a preliminary injunction.<sup>27</sup> In *North Star*, the court found the plaintiff established it was likely to succeed on the merits because the defendant's advertisements regarding the plaintiff's snow plows were literally false. As a result, the court presumed irreparable harm and did not address additional reasons the plaintiff offered to suggest irreparable harm, such as website postings and comments received by its dealers.<sup>28</sup>

Likewise, in *Church & Dwight Co. v. Clorox*, a court in the Second Circuit enjoined a defendant from running an advertisement even though the plaintiff had not submitted evidence to prove harm.<sup>29</sup> In this case, the defendant ran an advertisement claiming, based on a sensory lab test, that its cat litter was more effective at absorbing odor than the plaintiff's cat litter.<sup>30</sup> The court found the test was unreliable and could not support the defendant's claims.<sup>31</sup> When applying the likelihood of harm element, the court found that "where the misrepresentation is so plainly material on its face, no detailed study of consumer reactions is necessary to conclude inferentially that Clorox

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<sup>23</sup> *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

<sup>24</sup> *Id.* at 20 (emphasis added).

<sup>25</sup> See, e.g., *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111 (4th Cir. 2011); *Osmose Inc. v. Viance LLC*, 612 F.3d 1298 (11th Cir. 2010).

<sup>26</sup> *North Star Indus., Inc. v. Douglas Dynamics LLC*, 848 F. Supp. 2d 934, 945 (E.D. Wis. 2012).

<sup>27</sup> *Id.* at 945.

<sup>28</sup> *Id.* at 950.

<sup>29</sup> *Church & Dwight Co. v. Clorox Co.*, 840 F. Supp. 2d 717, 722–23 (S.D.N.Y. 2012).

<sup>30</sup> *Id.* at 720.

<sup>31</sup> *Id.* at 722–23.

is likely to divert customers from C & D's products to its own unless the offending commercial is enjoined."<sup>32</sup> After inferring there was a high likelihood of irreparable harm, the court granted the preliminary injunction.<sup>33</sup>

The defendant in *Church & Dwight Co.* argued that *eBay* cautioned against the use of presumptions when establishing irreparable harm during injunction proceedings.<sup>34</sup> The court, however, cited *Time Warner Cable, Inc. v. DIRECTV, Inc.* a Second Circuit opinion issued after *eBay*, which held that:

the likelihood of irreparable harm may be presumed where the plaintiff demonstrates a likelihood of success in showing that the defendant's comparative advertisement is literally false and that given the nature of the market, it would be obvious to the viewing audience that the advertisement is targeted at the plaintiff, even though the plaintiff is not identified by name.<sup>35</sup>

Decisions like *Church & Dwight Co.* suggest that the presumption may have continued sticking power in some courts, but the general trend appears to favor doing away with the presumption of harm in Section 43(a) Lanham Act injunction cases. In those circuits where courts have applied the *eBay/Winter* holding to Lanham Act cases, proving likely harm or actual harm is not an insurmountable obstacle, but it has become more difficult for parties to obtain injunctive relief. We provide below examples of how courts applied the *eBay/Winter* analysis in 2012 and 2013 and discuss how potential Lanham Act plaintiffs might structure their cases to maximize their chance of obtaining injunctive relief.

### **Application of *eBay/Winter* to Recent Lanham Act False Advertising Cases**

In *United Fabricare Supply, Inc. v. 3Hanger Supply Co.*, the plaintiff dry-cleaning supply company sought to enjoin preliminarily a competing dry-cleaning supply company from distributing a pamphlet that contained false claims to the plaintiff's customers.<sup>36</sup> Before *Winter*, most courts would have presumed harm because the pamphlet was directed explicitly at the plaintiff and contained information that was literally false. But the court, citing *Winter*, reasoned that it had to decide whether there was a likelihood of irreparable harm.<sup>37</sup>

The court found the plaintiff was unlikely to suffer irreparable harm because the defendant had already received a cease and desist letter and had informed the court that it would no longer distribute the pamphlet.<sup>38</sup> Thus, the court held the plaintiff had failed to demonstrate the likelihood of irreparable harm and denied the motion for a preliminary injunction. This conflation of mootness and harm analysis shows that defendants can often avoid an injunction by withdrawing the challenged false claim shortly after learning of the plaintiff's objections. The plaintiff's ability to sustain the motion for an injunction in light of these tactics will depend on whether it is able to show the conduct is likely to recur absent an injunction as, for example, in the classic "cheat and retreat" strategy used by some defendants.

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<sup>32</sup> *Id.* at 723.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 723.

<sup>35</sup> *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 148 (2d Cir. 2007) (emphasis added).

<sup>36</sup> *United Fabricare Supply, Inc. v. 3Hanger Supply Co., Inc.*, No. 12-03755-MWF (FFMx), 2012 WL 2449916 (C.D. Cal. June 27, 2012).

<sup>37</sup> *Id.* at \*2.

<sup>38</sup> *Id.* at \*6.

By contrast, Del Monte Corp. (DMC) was permanently enjoined from mislabeling its products with claims that they contained fresh fruit after a jury determined there was more than the mere possibility that the infringing conduct would recur.<sup>39</sup> In that case, the jury found that DMC had violated the Lanham Act by improperly placing the label “Must be Refrigerated” on merchandise that contained preserved fruit. DMC argued the injunction was unnecessary because it had already stopped committing the practices. Applying *eBay*, the court determined the plaintiff had demonstrated that a permanent injunction was warranted because the record showed that DMC knew consumers might misperceive its refrigerated products as fresh produce, and it continued these marketing and labeling practices throughout the pendency of the trial.

In *Scotts Co., LLC v. Pennington Seed, Inc.*, the court denied a motion for a preliminary injunction because, inter alia, the plaintiff had not shown it was likely to suffer irreparable harm in the absence of preliminary relief.<sup>40</sup> The plaintiff brought a Lanham Act false advertising claim contending the defendant’s advertisements, which claimed to have “twice the seed” or “twice as many seeds” as the plaintiff’s products, were literally false and misleading.<sup>41</sup> The plaintiff argued those claims were likely to cause irreparable harm and asked the court to enjoin the claims. Noting that in the aftermath of *Winter* there was no presumption of harm, the court held that the plaintiff had not satisfied its burden of showing irreparable harm would result absent preliminary injunctive relief. Relying on the parties’ own representations, the court found most consumers purchased their products at the beginning of the spring grass-seed season, but the season ends in May and the plaintiff was seeking a preliminary injunction in November, so there was no likelihood of irreparable harm.<sup>42</sup>

Although *Winter* has generally made it more difficult for a plaintiff to obtain a preliminary injunction, some plaintiffs have succeeded by offering evidence to show the likelihood of actual harm. For instance, in *Neighborhood Assistance Corp. of America v. First One Lending Corp.*, the court found the plaintiff was entitled to a preliminary injunction under the *Winter* test.<sup>43</sup> The plaintiff, a non-profit advocacy organization, brought an action against the defendant for misleading victims into paying for mortgage modification services the plaintiff made free to the public. The plaintiff alleged that the defendants used false and misleading representations of facts, which caused confusion as to the defendant’s association with plaintiff.<sup>44</sup> The plaintiff established the likelihood of harm element of the *Winter* test by submitting declarations from the defendant’s customers, saying they had been misled by the defendant’s advertising.<sup>45</sup> Citing the declarations, the court found that the customers’ conflation of the defendants with the plaintiff was likely harmful to the plaintiff because the defendant’s conduct left customers feeling that they had been cheated, thus tarnishing the plaintiff’s reputation.<sup>46</sup> Finding that the other elements of the *Winter* test were met, the court granted the preliminary injunction.<sup>47</sup>

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<sup>39</sup> *Fresh Del Monte Produce Inc. v. Del Monte Foods Co.*, No. 08-8718 (SHS), 2013 WL 1242374 (S.D.N.Y. Mar. 28, 2013).

<sup>40</sup> *The Scotts Co., LLC v. Pennington Seed, Inc.*, Civ. No. 3:12-cv-168, 2012 WL 6004140 (E.D. Va. Nov. 30, 2012).

<sup>41</sup> *Id.* at \*3.

<sup>42</sup> *Id.* at \*5.

<sup>43</sup> *Neighborhood Assistance Corp. of Am. v. First One Lending Corp.*, No. SAVC 12-463 DOC(MLGx), 2012 WL 1698368 (C.D. Cal. May 15, 2012).

<sup>44</sup> *Id.* at \*5.

<sup>45</sup> *Id.* at \*3.

<sup>46</sup> *Id.* at \*18.

<sup>47</sup> *Id.* at \*19.

## Recommendations for Practitioners

Before *eBay* and *Winter*, the presumption of harm allowed judges to bypass consideration of exactly how a false advertisement was harming a party seeking injunctive relief. But after *eBay/Winter*, moving parties can no longer simply assert that false advertising will lead to the diversion of sales or the loss of goodwill. Thus, it is advisable for plaintiffs to put forth evidence of the harm they will suffer in the absence of an injunction. *Neighborhood Assistance Corp.* points to a successful strategy in false advertising cases, providing concrete evidence from actual consumers, who showed they had been deceived. While consumer surveys are one means to demonstrate the likelihood of deception of the consuming public, they cannot substitute for particularized evidence from specific consumers who can testify to the impact the claims had on their own beliefs and purchase decisions.

*Parties who wish to bring a false advertising claim under Section 43(a) of the Lanham Act should recognize that recent developments have made it harder to obtain an injunction or survive a motion to dismiss.*

Moreover, because all of the circuits have not fully adopted *eBay/Winter* in the Section 43(a) Lanham Act context, plaintiffs may have more success in some circuits than others. Indeed, in the period from 2010–2012, plaintiffs have had the most success obtaining preliminary injunctions in the Second Circuit, where more than two-thirds were granted. In comparison, during this same time period, courts in the other circuits granted preliminary injunctions only 53 percent of the time. This is a noticeable drop from the 2003–2005 period before *Winter*, when those circuits were granting preliminary injunctions 62 percent of the time. For this reason, plaintiffs seeking preliminary injunctions should strongly consider their forum options before filing suit. Plaintiffs often have several options when deciding where to bring their claims because venue is proper in any judicial district where the advertisements are likely to confuse or deceive consumers or in the district where the advertisements originated.<sup>48</sup>

## Conclusion

The *Twombly/Iqbal* plausibility standard has made it more difficult for parties to survive a motion to dismiss while the *eBay/Winter* decisions have made it more difficult for parties in some jurisdictions to obtain preliminary and permanent injunctions. Nonetheless, parties who actually had their Lanham Act claims decided on the merits in the 2010–2012 period had a high rate of success in proving that a competitor had committed false advertising.<sup>49</sup> This suggests that plaintiffs who clear the *Twombly/Iqbal* hurdle and actually try their cases to verdict frequently succeed. However, plaintiffs need to be ready to show irreparable harm if they hope to obtain injunctive relief because the presumption of harm no longer automatically flows from a showing that an advertisement is false.

Parties who wish to bring a false advertising claim under Section 43(a) of the Lanham Act should recognize that recent developments have made it harder to obtain an injunction or survive a motion to dismiss. While Section 43(a) is still a valuable tool for companies to protect their brand and reputation from false advertising by a competitor, counsel must be prepared to comply with the new pleading standard and tests for injunctive relief. ●

<sup>48</sup> See, e.g., *Sechel Holdings, Inc. v. Clapp*, Civ. No. 3:12-cv-00108-H, 2012 WL 3150087 (W.D. Ky. Aug. 2, 2012); *Overland, Inc. v. Taylor*, 79 F. Supp. 2d 809, 811 (E.D. Mich. 2000).

<sup>49</sup> For instance, in *Skydive Arizona, Inc. v. Quattrocchi*, Skydive Arizona sued Quattrocchi and the other operators of Skyride for false advertising, trademark infringement, and cybersquatting. On the false advertising claim, Skydive alleged that Skyride deceived consumers into believing that Skydive would accept Skyride's skydiving certificates and that Skyride owned skydiving facilities in Arizona when both of these facts were false. The jury found that Skyride had violated the Lanham Act and awarded Skydive Arizona \$1 million in damages. The court also granted a permanent injunction against Skyride's operations in Arizona. *Skydive Ariz., Inc. v. Quattrocchi*, CV-05-2656-PHX-MHM, 2010 WL 1743189 (D. Ariz. Apr. 29, 2010). Both the money damages and injunctive relief were affirmed by the Ninth Circuit on appeal. *Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105, 1112 (9th Cir. 2012).