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MISSISSIPPI STATUTORY CLAIMS FOR FALSE ADVERTISING

*E. Barney Robinson III**

"Advertising may be described as the science of arresting the human intelligence long enough to get money from it."[1]

I. INTRODUCTION

As Mississippi continues to move into the digital age of mass media and e-commerce, the importance of advertising to business is growing. Converging with these changes is a new emphasis on consumer protection. Consumer-related commercial litigation has mushroomed in recent years, and businesses that once resolved their inter-business disputes informally are now more willing to litigate matters previously hidden from public view.

In recent times, the bar has moved headlong into commercial litigation. In the process, many attorneys have discovered longstanding but seldom used statutory claims. Further, the coming ubiquity of the Internet, and its creeping domination over consumer and business commerce, is certain to breed numerous advertising disputes—both between businesses and with consumers. For these reasons, false or deceptive advertising is one area that will spawn increasing litigation in coming years.

False advertising, as a topic, includes a broad area of the law. When taken most broadly, it may include claims as diverse as trade and service mark infringe-

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1. Stephen Butler Leacock, *quoted in* MICHAEL JACKMAN, CROWN'S BOOK OF POLITICAL QUOTATIONS 1 (1982).

ment as well as the common law torts of unfair competition[2] and "passing off."[3] One could easily fill a large book with a survey of the entire subject.[4]

This Article, however, focuses on two specific statutory claims regarding false advertising under Mississippi law: claims under the Mississippi Unfair Trade Practices Act ("MUTPA" or "Act");[5] and claims under the deceptive advertising statute, Mississippi Code section 97-23-3. These statutes are of interest for three reasons. First, the MUTPA was recently amended to provide for private causes of action.[6] Second, Mississippi Code section 97-23-3 is a somewhat obscure statute that has seldom been used. Finally, as the federal courts become more congested due to Congress's increasing federalization of criminal law, many practitioners are seeking non-federal civil remedies for commercial wrongs.

II. THE MISSISSIPPI UNFAIR TRADE PRACTICES ACT

"The art of publicity is a black art."[7]

A. Prohibited Acts

The Mississippi Unfair Trade Practices Act[8] generally prohibits "[u]nfair methods of competition affecting commerce and unfair or deceptive trade practices in or affecting commerce . . . ."[9] Although the Act does not purport to limit the myriad of conceivable acts that could constitute an "[u]nfair or deceptive trade practice[,]"[10] it does provide a non-exhaustive list of prohibited practices. Some of these prohibitions clearly implicate false advertising. For example, the Act prohibits:

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2. Mississippi first recognized the tort of unfair competition years ago. *See, e.g.*, Memphis Steam Laundry-Cleaners v. Lindsey, 192 Miss. 224, 5 So. 2d 227, 232 (1941) (recognizing tort for unfair and malicious competition where dominant purpose is to inflict wrongful competitive injury).

3. Under Mississippi common law, an action may be brought for misrepresenting the origin of goods or misappropriating a trade name. As a prerequisite to a claim for common law "passing" or "palming off," a plaintiff must show that a word or term is inherently distinctive or has, "by usage, acquire[d] a secondary . . . meaning as indicating the goods or business of a particular person, so as to entitle him to protection against any unfair or piratical use or simulation thereof by another." Richardson v. Thomas, 257 So. 2d 877, 879 (Miss. 1972) (quoting 52 AM. JUR. TRADEMARKS, TRADENAMES, ETC., § 55 (1944)). The plaintiff must thereafter show misappropriation and consumer confusion.

4. Whenever an attorney confronts a false advertising issue, he should consider a host of potential claims, many of which are federal. For example, the federal Lanham Act specifically prohibits false or deceptive advertising. Specifically, 15 U.S.C. § 1125(a)(1)(B) provides, in part, that:

> [a]ny person who . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

This section provides protection against a "myriad of deceptive commercial practices," including false advertising or promotion. Resource Developers, Inc. v. Statue of Liberty-Ellis Island Found., 926 F.2d 134, 139 (2d Cir. 1991).

5. MISS. CODE ANN. §§ 75-24-1 to 75-24-27 (1972 & Supp. 1999).

6. *Id.* at § 75-24-15.

7. Learned Hand, *quoted in* ROBERT I. FITZHENRY, THE FITZHENRY & WHITESIDE BOOK OF QUOTATIONS 19 (1993).

8. MISS. CODE ANN. §§ 75-24-1 to 75-24-27 (1972 & Supp. 1999).

9. *Id.* at § 75-24-5(1) (Supp. 1999).

10. *Id.*

(a) Passing off goods or services as those of another;
(b) Misrepresentation of the source, sponsorship, approval, or certification of goods or services;
(c) Misrepresentation of affiliation, connection, or association with, or certification by another;
(d) Misrepresentation of designations of geographic origin in connection with goods or services;
(e) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
(f) Representing that goods are original or new if they are reconditioned, reclaimed, used, or secondhand;
(g) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
(h) Disparaging the goods, services, or business of another by false or misleading representation of fact;
(i) Advertising goods or services with intent not to sell them as advertised;
(j) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
(k) Misrepresentations of fact concerning the reasons for, existence of, or amounts of price reductions.[11]

Obviously, Mississippi Code section 75-24-5 implicates a large number of practices that are broader in scope than mere false advertising. The statute, however, has been considered in the specific context of advertising in at least three reported Mississippi cases.

B. Must the Advertising Be Literally False?

In *Southwest Starving Artists Group, Inc. v. State ex rel. Summer*,[12] the court considered whether an advertisement had to be literally false to be actionable under the MUTPA. Southwest Starving Artists Group ran various radio and television advertisements promoting an art sale.[13] The advertisements and posted notices generally followed a format stating:

11. *Id.* at § 75-24-5(2) (1972 & Supp. 1999).
12. 364 So. 2d 1128 (Miss. 1978).
13. *Id.* at 1130.

SOUTHWEST STARVING ARTISTS

ART SALE
THIS SUNDAY ONLY
NOTHING OVER $35
(Including Beautiful Sofa Size Paintings)
MOST UNDER $20
FINE ART FROM ALL OVER THE WORLD
IDEAL FOR GIFTS
SUNDAY 12:00 5:00 PM
FREE ADMISSION
MISSISSIPPI STATE FAIRGROUNDS

AGRICULTURE BUILDING
SPONSORED BY THE SOUTHWEST STARVING
ARTIST GROUP, INC.
DEPOSIT GUARANTY BANK BLDG., NO. 1225,
JACKSON, MISS. 39201[14]

Nothing in the advertisements was literally false. However, at trial, the evidence showed that ninety percent of the paintings offered for sale came from Hong Kong, eight to nine percent were from areas outside of the United States, and only one to two percent were from American artists.[15] Based on this evidence, the Mississippi Supreme Court adopted the Chancellor's finding that:

> It was entirely possible for a reasonable person to believe after seeing and hearing the advertising complained of . . . that this sale was being put on by a group of artists who were desperate or hurting and wanted to part with their paintings at an extremely reasonable or below reasonable price; that they were either local as in Southwest Jackson or regional as in Southwest United States or the Texas area, when in truth the [Southwest Starving Artists Group] is owned by one person and ninety percent of the art he sells is from Hong Kong. It is also true that the paintings carried names which indicated a different origin than from what was otherwise portrayed by the publicity.[16]

Thus, *Southwest Starving Artists* established that Mississippi law recognizes the actionability of misleading advertisements even if the advertisement is not

14. *Id.*
15. *Id.*
16. *Id.* at 1131.

literally false.[17] The use of the words "Southwest" and "starving" was sufficient to render the advertisements misleading as to the origin and sponsorship of the goods for sale.

C. What is "Advertising" for Purposes of the Statute?

The radio and television "spots" and flyers in *Southwest Starving Artists* clearly constituted "advertising" as that phrase is commonly understood. However, on its next occasion to address such claim, the Mississippi Supreme Court encountered a more difficult set of facts.

In *Deer Creek Construction Co. v. Peterson*,[18] the court considered the issue of what constitutes "advertising" for purposes of the MUTPA. Peterson alleged that Deer Creek Construction Company ("Deer Creek") had misrepresented that it would complete her residence within ninety days.[19] The representations were personal in nature and not part of a public advertising campaign. According to Peterson, they nevertheless violated Mississippi Code section 75-24-5(i), which prohibits "[a]dvertising goods or services with intent not to sell them as advertised."[20]

The trial court directed a verdict for Deer Creek on this count and the Mississippi Supreme Court affirmed. Specifically, the court held: "[w]e are of the opinion and so hold that the term 'advertising' used in [75-24-5(i)] was intended to mean advertising and offering to the general public and does not include representations made during the negotiation process for the purchase of a particular item or items."[21] Thus, one-on-one promotional representations do not fall within the scope of the advertising portions of the Act. Interestingly, *Peterson's* holding suggests that MUTPA-covered "advertising" is a slightly more narrow class of practices than that governed by the federal Lanham Act.[22]

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17. Similarly, under section 43(a) of the Lanham Act, a plaintiff must prove the following:

> (1) that the defendant has made false or misleading statements as to his own product [or service] or another's; (2) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience; (3) that the deception is material in that it is likely to influence purchasing decisions; (4) that the advertised goods [or services] travelled [sic] in interstate commerce; and (5) that there is likelihood of injury to the plaintiff in terms of declining sales, loss of goodwill, etc.

Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1383 n.3 (5th Cir. 1996) (quoting Ditri v. Coldwell Banker Residential Affiliates, Inc., 954 F.2d 869, 872 (3d Cir. 1992)). "If a plaintiff proves that a challenged advertisement is *literally false*, a court may grant relief without considering whether the ["consumer" is] actually misled." United Indus. Corp. v. Clorox Corp., 140 F.3d 1175, 1180 (8th Cir. 1998). However, if the ad is only misleading, as a whole or by implication, consumer confusion must be proven.

18. 412 So. 2d 1169 (Miss. 1982).

19. *Id.* at 1172.

20. *Id.* at 1173 (quoting Miss. Code Ann. § 75-24-5(i) (1972 & Supp. 1999)).

21. *Id.*

22. Under section 43(a)(1)(B) of the Lanham Act

> [I]n order for representations to constitute "commercial advertising or promotion . . ." they must be: (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services. . . . [Further] the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379,1384 (5th Cir. 1996)(quoting and adopting Gordon & Breach Science Publishers v. American Inst. of Physics, 859 F. Supp. 1521, 1535-36 (S.D.N.Y. 1994)).

The required level of circulation, and the relevant "consuming" or "purchasing" public addressed by the dissemination of false information will vary from industry to industry. *Id.* at 1385. In some circumstances, "even a single promotional presentation to an individual purchaser may be enough to trigger the protections of the [Lanham] Act." *Id.* at 1386.

This result is curious as Mississippi Code section 75-24-5(2)(a) through (h) and (k) all potentially implicate advertising practices and yet none contain the word "advertising." For example, Mississippi Code section 75-24-5(2)(b) prohibits "[m]isrepresentation of the source, sponsorship, approval or certification by another . . . ."[23] Nothing in this prohibition addresses public dissemination, as might be the case with traditional advertising. Thus, one can only speculate that the homeowner in *Peterson* specifically plead that there was an "[a]dvertising [of] goods or services with intent not to sell them as advertised,"[24] and the court held her to that pleading.

D. The Limits of the Statute's Reach

Importantly, the mere fact that a practice is false "advertising" will not necessarily bring it within the prohibitory scope of Mississippi Code section 75-24-5. In *Burley v. Homeowners Warranty Corp.*,[25] for example, the plaintiffs alleged that certain homeowner's warranty brochures and literature violated the MUTPA as they contained false representations regarding coverage and other matters.[26] The plaintiffs, however, overlooked MUTPA's requirement that the wrongful acts concern "[g]oods or services . . . ."[27]

Seizing on that requirement, Federal District Judge Tom Lee held that "the policy at issue in the case at bar [was] not a 'good' or a 'service' and, accordingly, the cited statute [was] inapplicable."[28] Assuming *Burley's Erie*[29]-based assumption is correct, Mississippi Code sections 75-24-5(a) through (j) simply do not apply to insurance, warranties and/or financial instruments. Under *Burley's* logic, these items are not "goods" or "services" and, therefore, are beyond MUTPA's reach.[30]

E. Scienter and Proof

The language of Mississippi Code section 75-24-5 fails to address two important practice-related questions. The first is the level of *scienter* required to state a false advertising claim under the Act. The second closely related issue concerns the required standard of proof.

As discussed above, many of Mississippi Code section 75-24-5's subsections arguably reach acts of false advertising. For example, subsection (2)(a) prohibits

23. MISS. CODE ANN. § 75-24-5(2)(b) (1972 & Supp. 1999).

24. *Id.* at § 75-24-5(2)(i).

25. Burley v. Homeowners Warranty Corp., 773 F. Supp. 844 (S.D. Miss. 1990).

26. *Id.* at 861.

27. *See* MISS. CODE ANN. § 75-24-5(i) (1972 & Supp. 1999).

28. *Burley*, 773 F. Supp. at 863. Although *Burley* found that such insurance policies or warranties do not fall within the scope of Mississippi Code section 75-24-5, Judge Lee did *not* make a similar finding with respect to Mississippi Code section 97-23-3. *Id.* at 861-62. Thus it appears that Mississippi Code section 97-23-3 is broader in scope than Mississippi Code sections 75-24-5(i) and (j).

29. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

30. Arguably, even under *Burley's* holding, these limitations would not apply to a claim under Mississippi Code section 75-24-5(k). This subsection, dealing with price reduction, makes no mention of "goods" or "services." MISS. CODE ANN. § 75-24-5(k) (1972 & Supp. 1999).

"[p]assing off goods or services as those of another"[31] and subsection (2)(k) prohibits "[m]isrepresentations of fact concerning the reasons for, existence of, or amounts of price reductions."[32] However, *neither* of these sections specify the level of intent to be proven before such "passing off" or "misrepresentations" become actionable.

In contrast, Mississippi Code section 75-24-5(2)(i) prohibits "[a]dvertising goods or services with *intent* not to sell them as advertised"[33] and subsection (2)(j) prohibits "[a]dvertising goods or services with *intent* not to supply reasonably expectable public demand . . . ."[34] These are the only two subsections containing the word "intent."

In *Deer Creek Construction Co. v. Peterson*,[35] the only decision to date addressing the issues of *scienter* and standard of proof, the Mississippi Supreme Court characterized a claim under Mississippi Code section 75-24-5(2)(i) as "fraud within the scope of [that] section."[36] Although the court ultimately affirmed the dismissal of the claim on other grounds, it first found the claim insufficient, stating that "[t]here was no fraud proven by clear and convincing evidence."[37]

Thus, it would appear that claims under Mississippi Code sections 75-24-5(2)(i) and (j) will be treated like claims of fraud. If this is indeed the case, a plaintiff must show that there were intentional misrepresentations, and prove they were made by clear and convincing evidence.[38] Whether this standard will apply with respect to claims based on Mississippi Code sections 75-24-5(2)(a) through (h) and (k), none of which contain the word "intent," remains an open question.

F. Procedural Issues Under the MUTPA

The MUTPA grants the Mississippi Attorney General authority to proceed *parens patriae*[39] against a violator of the Act.[40] In such capacity, the Attorney General may obtain an injunction,[41] restitution,[42] and/or a civil penalty for intentional violations.[43] The most important provision for the majority of practitioners, however, is the availability of a private right of action under the Act. Mississippi Code section 75-24-15 creates a private right of action under the

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31. MISS. CODE ANN. § 75-24-5(2)(a) (1972 & Supp. 1999).
32. *Id.* at § 75-24-5(2)(k).
33. *Id.* at § 75-24-5(2)(i) (emphasis added).
34. *Id.* at § 75-24-5(2)(j) (emphasis added).
35. 412 So. 2d 1169 (Miss. 1982).
36. *Id.* at 1173.
37. *Id.*
38. *See, e.g.*, Boling v. A1 Detective & Patrol Serv., Inc., 659 So. 2d 586 (Miss. 1995).

> The elements of fraud are: a representation; its falsity; its materiality; the speaker's knowledge of its falsity or ignorance of its truth; his intent that it should be acted upon by the person and in the manner reasonably contemplated; the hearer's ignorance of its falsity; his reliance on its truth; his right to rely thereon; his consequent and proximate injury.

Id. at 590. (All of which must be proved by clear and convincing evidence).

39. Literally, "parent of the country." BLACK'S LAW DICTIONARY 769 (6th ed. 1991).
40. MISS. CODE ANN. § 75-24-9 (1972 & Supp. 1999).
41. *Id.* at § 75-24-9.
42. *Id.* at § 75-24-11.
43. *Id.* at § 75-24-19(1)(b) (Supp. 1999).

MUTPA in favor of "[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes . . . ."[44]

This provision differs significantly from the federal Lanham Act in two respects. First, the MUTPA provides that as a condition precedent to a private action, a consumer must first make "a reasonable attempt to resolve any claim through an informal dispute settlement program approved by the Attorney General."[45] Second, only consumers are granted standing to sue; businesses may not bring private actions under the Act based on competitive harm.[46]

Another important procedural issue is the availability of attorneys' fee awards. Previously, MUTPA contained a "prevailing party" attorneys' fee provision.[47] However, in the 1994 session, the Mississippi Legislature amended the Act to only provide for such awards to a "prevailing defendant."[48] Additionally, the standard for awarding attorneys' fees was raised from merely being a "prevailing party," to requiring the "prevailing defendant" to demonstrate that the action was actually "[f]rivolous or filed with the purpose of harassment or delay."[49]

III. MISSISSIPPI CODE SECTION 97-23-3

"Advertising is legalized lying."[50]

Mississippi's general false advertising statute, Mississippi Code section 97-23-3, has been in effect since 1942. However, it has been considered in only five reported cases, and many questions remain unresolved regarding its interpretation and effect. The statute contains a broadly worded and lengthy prohibition that reads:

> Any person who, with intent to sell or in any way dispose of merchandise, securities, service, or anything offered by such person, directly or indirectly, to the public for sale or distribution, or who, with intent to increase the consumption of or demand for such merchandise, securities, service or other thing, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, makes, publishes, disseminates, circulates or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated or placed before the public within the state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet or letter, or by a label affixed to the

44. *Id.* at § 75-24-15(1) (1972 & Supp. 1999).

45. *Id.* at § 75-25-15(2) (Supp. 1999).

46. This is the exact opposite of the provision in the Lanham Act. Under the Lanham Act's false advertising and unfair competition provisions, only competitors and *not* consumers may file suit. *See, e.g.*, Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1383 (5th Cir. 1996) ("[M]ost courts that have addressed the issue agree that in light of the procompetitive purpose language found in [section 45 of the Lantham Act], 'consumers fall outside the range of "reasonable interests" contemplated as protected by the false advertising prong of Section 43(a) of the Lanham Act'" (quoting Serbin v. Ziebart Int'l Corp., 11 F.3d 1163, 1177 (3d Cir.1993)).

47. MISS. CODE ANN. § 75-24-15(2) (1972), *amended by* MISS. CODE ANN. § 75-24-15 (Supp. 1999).

48. MISS. CODE ANN. § 75-24-15(3) (Supp. 1999).

49. *Id. See also* Wilson v. William Hall Chevrolet, Inc., 871 F. Supp. 279, 280 (S.D. Miss. 1994).

50. H.G. Wells, *quoted in* MICHAEL JACKMAN, CROWN'S BOOK OF POLITICAL QUOTATIONS 2 (1982).

merchandise or its container, or in any other way, an advertisement of any sort regarding merchandise, securities, service or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, including but not limited to representing himself as selling at wholesale unless he is actually selling at wholesale those items so represented, and which such person knew, or might on reasonable investigation have ascertained to be untrue, deceptive or misleading, shall be punished by a fine of not more than five hundred dollars ($500.00), and the offending person, whether found guilty or not, may be held civilly responsible in tort for damages to persons or property proximately resulting from a violation of this section. This section shall not apply to any owner, publisher, printer, agent or employee of a newspaper or other publication, periodical or circular, or to any agent of the advertiser who in good faith and without knowledge of the falsity or deceptive character thereof publishes, causes to be published, or participates in the publication of such advertisement. Firms with the word "wholesale" in their corporate title are not in violation of this section so long as they identify the sales as being made by their retail division.[51]

A. Requirements for a Claim

This long statute is difficult to digest in full form. However, upon closer examination it becomes apparent that the statute imposes a six-part standard for liability. That standard may be paraphrased as follows:

(1) the intent to sell or increase consumption of goods, service or anything offered to the public;
(2) the causing of the distribution of advertising;
(3) which concerns something offered to the public;
(4) containing representations of fact;
(5) which are untrue, deceptive or misleading; and
(6) which proximately cause damages.[52]

The statute criminalizes such conduct by instituting a five hundred dollar fine against offenders.[53] More importantly, however, the statute also provides that "[w]hether found guilty or not, [the offender] may be held civilly responsible in tort for damages to persons or property proximately resulting from a violation of this section."[54] When the Mississippi Supreme Court first addressed the statute, the requirement of proximate cause played a central role.[55]

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51. MISS. CODE ANN. § 97-23-3 (1972).

52. The issue of what exactly constitutes "damages" for purposes of the statute has not been addressed by Mississippi courts. Interestingly, former Mississippi Attorney General Bill Allain suggested that the City of Belmont, Miss., might have had a claim under the statute against a movie theater that advertised a movie as R-rated when in fact it was X-rated. Prisoner Expenses and False Advertising of Movies, Miss. Att'y Gen. Op. (May 12, 1980), *available in* 1980 WL 28510, *1. This opinion raises two questions. First, how has the *city*, as opposed to the movie *patrons*, been damaged by such false advertising? Second, is merely being misled as to a movie's content a legally cognizable "damage?"

53. MISS. CODE ANN. § 97-23-3 (1972).

54. *Id.*

55. *See* Dixieland Food Stores, Inc. v. Kelly's Big Star, Inc., 391 So. 2d 633 (Miss. 1980).

B. The Requirements of Materiality and Proximate Cause

In *Dixieland Food Stores, Inc. v. Kelly's Big Star, Inc.*,[56] Kelly's Big Star ("Big Star") sued Dixieland Food Stores ("Dixieland") because of an allegedly false advertising campaign. The campaign consisted of newspaper ads, mailed circulars and a five-foot poster.[57] In the ads, Dixieland listed 172 grocery items available for purchase together with the prices charged for those items by both stores.[58] The original version of the ads mistakenly stated in small print that a notary public had purchased the items at issue.[59] In fact, the notary public had merely accompanied and observed a Dixieland employee making the actual purchases.[60] Despite the fact that the price comparisons were themselves truthful,[61] a Smith County jury awarded Big Star $250,000.00 in damages.[62]

On appeal, the Mississippi Supreme Court reversed and rendered a judgment for Dixieland, noting that:

> It is not even suggested, and there was no proof submitted, that any customers switched from Big Star to [Dixieland] because of a statement in the one ad that [the notary public] "purchased" the compared goods. As the later advertisements correctly stated, [the notary public] merely accompanied a [Dixieland] employee who did the purchasing. Further, as stated earlier, the portion of the advertisement concerning [the notary public's] role in the price comparison test was an insignificant part of the ad, was placed in a small area in an inconspicuous spot, and only verified that the ad was correct according to him. It is very significant that the correctness and accuracy of the prices listed in the advertisement were not challenged in the lawsuit.
>
> Therefore, . . . we have reached the inescapable conclusion that [Big Star] wholly failed to show any causal connection between the inaccuracy of the advertisement and any damages alleged to have been sustained. It is true that the advertisement published . . . and circulars contained a statement which was technically untrue. However, under the facts contained in this record, there is no proof that any customers were in any way misled or deceived by this misstatement.[63]

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56. *Id.*
57. *Id.* at 635.
58. *Id.* at 634.
59. *Id.* at 634-35.
60. *Id.* at 635.
61. In fact, it appeared that the price comparisons were wrong by a mere $0.205 out of a total bill of $244.18. The supreme court noted that "[t]here [was] no testimony that indicated this minor discrepancy was intentional, and . . . may have been [an error] on the part of Big Star's own cashier." *Id.* at 634.
62. *Id.* at 633.
63. *Id.* at 636. In a federal case, *Burley v. Homeowners Warranty Corp.*, 773 F. Supp. 844 (S.D. Miss. 1990), the plaintiffs contended that a homeowner's warranty brochure and literature contained statements that misled them concerning arbitration of claims submitted under a homeowner's warranty program. Specifically, the plaintiffs argued that they had earlier submitted their claims to arbitration because they were misled by a representation in the brochure that if they requested arbitration, they "didn't have to accept the arbitrator's decision, but [the] builder [would be] obligated to comply with his ruling if [they did] accept it . . . ." *Id.* at 862. The plaintiffs did in fact arbitrate their claims twice, and lost each time. *Id.* However, the defendants never brought an action to confirm the arbitration award. *Id.* As a result, Federal District Judge Lee held that the plaintiffs had not sustained any damage as a result of any alleged misrepresentation in the advertising and denied the plaintiff's request to amend their complaint. *Id.*

Burley's holding effectively follows the Mississippi Supreme Court's finding in *Dixieland Food.* Mere false or misleading advertising is not actionable absent proximate cause and damage. Dixieland Food Stores, Inc. v. Kelly's Big Star, Inc., 391 So. 2d 633, 636 (Miss. 1980).

Thus, *Dixieland Food* stands for two important propositions regarding Mississippi Code section 97-23-3 claims. First, an untruth in advertising must be material. More importantly, however, the untruthful or misleading parts of the advertisement must be the proximate cause of actual damage.

C. Is Actual Falsehood Required?

As discussed above, the Court in *Southwest Starving Artists Group, Inc. v. State ex rel. Summer*[64] held that actual falsehood was not necessary to state a false advertising claim under the MUTPA.[65] Under the MUTPA, as long as the advertisement is misleading as a whole, it may be actionable. At least one federal district court has employed the same standard with respect to false advertising claims under Mississippi Code section 97-23-3.[66]

In *Watson v. First Commonwealth Life Insurance Co.*,[67] the plaintiff asserted various claims surrounding an advertisement for student loans. Watson claimed the advertisement was misleading because its primary purpose was to sell life insurance, a fact not disclosed in the ad.[68] The advertisement read: "Could you use $25,000 for your child's education? GUARANTEED STUDENT LOANS (It's *NOT* Too Late for Fall Semester) NO COSIGNERS NOCOLLATERAL NORED TAPE, Also Plus Loans, CALL DAVE BARLOW, 6364613, 24 Hours Daily, 7 Days Weekly."[69]

On the defendant's motion for summary judgment, Federal District Judge Barbour dismissed Watson's fraud claim, but found that the case "[was] sufficient under [Mississippi Code section] 97-23-3 only because the statute allows recovery for advertising which is merely 'misleading' as opposed to fraudulent."[70] *Watson* thus stands for the well-established proposition that advertising which is literally true, but misleading as a whole, is actionable under the statute.

D. Must the False or Misleading Advertising be Done Intentionally?

Deer Creek Construction Co. v. Peterson,[71] appears to have adopted a fraud-type standard for false advertising claims under Mississippi Code section 75-25-5(2)(i).[72] However, the level of *scienter* necessary to state a claim under Mississippi Code section 93-23-3 remains unclear.

The statute itself provides some indication with its use of the word "intent." For example, it provides, in part, that:

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64. 364 So. 2d 1128 (Miss. 1978).
65. *Id.* at 1131; *see supra* at section II B.
66. *See* Watson v. First Commonwealth Life Ins. Co., 686 F. Supp. 153 (S.D. Miss. 1988).
67. *Id.*
68. *Id.* at 154-55.
69. *Id.* at 154.
70. *Id.* at 155; *cf.* Sistrunk v. Cuna Mut. Ins. Soc'y, 733 F. Supp. 1080, 1084 (S.D. Miss. 1989) ("Closely related to Sistrunk's claim for fraud is his cause of action . . . predicated on an alleged violation of [Mississippi Code section] 97-23-3").
71. 412 So. 2d 1169 (Miss. 1982).
72. *Id.* at 1173.

> Any person who, with *intent* to sell . . . merchandise, securities, service, or anything offered by such person, . . . or who, with *intent* to increase the consumption of or demand for such merchandise, securities, service or other thing, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, makes, publishes, disseminates, circulates or places before the public [false or misleading advertising].[73]

Unfortunately, even a careful parsing of the statute yields no obvious answer as the word "intent" appears to be tied to the intent to *sell*, not necessarily the intent to *mislead.* Yet, this poorly drafted statute is certainly open to more than one reasonable interpretation.

Although the Mississippi Supreme Court has not resolved this issue, it has given us some indication of its position. In *Dixieland Food Stores, Inc. v. Kelly's Big Star, Inc.*,[74] the court addressed the fact that an advertised grocery price comparison was incorrect by $0.205 out of a total bill of $244.18.[75] The Supreme Court noted that "[t]here [was] no testimony that indicate[d] this minor discrepancy was intentional, and . . . may have been [an error] on the part of Big Star's own cashier."[76]

E. If Truthful and Not Misleading, Advertising Need Not Include All the Details of the Advertised Transaction.

In a recent reported federal case concerning Mississippi Code section 97-23-3, Federal District Judge Tom Lee confronted the issue of whether a homeowner's warranty brochure violated the statute.[77] In *Burley v. Homeowners Warranty Corp.*,[78] the plaintiffs contended that the defendant's brochures "contained misleading representations as to what would constitute a 'major construction defect' that would be covered" under the homeowner's warranty.[79] Based on this contention, the plaintiffs sought leave to amend their complaint to add a claim under Mississippi Code section 97-23-3.[80]

Judge Lee, in denying the plaintiffs' requested amendment, held:

> Plaintiffs' real objection is not that the brochure and other documents provided are misleading regarding the coverage that would be granted; rather, plaintiffs are simply dissatisfied with the coverage actually provided under the contract. That will not support the cause of action proposed to be added by amendment to the complaint.[81]

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73. MISS. CODE ANN. § 97-23-3 (1972) (emphasis added).
74. 391 So. 2d 633 (Miss. 1980).
75. *Id.* at 634.
76. *Id.*
77. *See* Burley v. Homeowners Warranty Corp., 733 F. Supp. 844 (S.D. Miss. 1990).
78. *Id.*
79. *Id.* at 861.
80. *Id.*
81. *Id.* at 862.

Implicitly, this indicates that as long as advertising is truthful and not misleading, it need not contain all the terms of the underlying transaction.

Judge Lee's holding in *Burley* foreshadowed the Mississippi Supreme Court's recent decision in *Sweatt v. Murphy.*[82] In *Sweatt,* the plaintiff tenant was injured on leased property when the porch swing on which he was sitting fell because of a break in the hook securing the swing to the ceiling.[83] Sweatt sued his landlord for alleged violations of the Mississippi Residential Landlord and Tenant Act,[84] negligence, and breach of contract.[85] Sweatt later sought leave from the trial court to amend his complaint to add a false advertising claim under Mississippi Code section 97-23-3.[86] Specifically, Sweatt contended that a newspaper advertisement for the leased premises was false and/or misleading with respect to the safety and condition of the house.[87] The ad in question merely stated: "Inviting 3 [bedroom] home. 1 [block] from beach. [Fireplace], hardwood floors, Cent[ral heat/air], porch w[ith] swing, etc. Avail[able] 4/1 $750/month [plus deposit]. 8647903."[88]

As in *Burley*, the *Sweatt* trial court denied the plaintiff's request to add a false advertising claim to his complaint.[89] On appeal, in affirming the lower court's decision, the Mississippi Supreme Court held:

> None of the specific defects which, Sweatt alleges, existed in the house were in any way misrepresented in this advertisement. The advertisement merely described, in general terms, the nature of the house, and no representations were made in the ad regarding the electrical outlets, allegedly defective porch swing, 'malfunctioning bathroom fixtures,' nor any of the other defects alleged by [Sweatt]. Sweatt is unable to demonstrate any false or misleading representations in the advertisement, and the trial judge correctly refused to permit Sweatt to amend his complaint in this regard.[90]

Based on the decisions in *Burley* and *Sweatt*, it appears that Mississippi courts are reluctant to require that advertisements exhaustively disclose every detail of a proposed transaction. This is a positive development, otherwise many breach of warranty actions, bad faith actions, sales disputes, and a myriad of other actions would be transformed into statutory false advertising claims under Mississippi Code section 97-23-3—a result the legislature likely did not intend.

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82. 733 So. 2d 207 (Miss. 1999).
83. *Id.* at 208.
84. MISS. CODE ANN. §§ 89-8-1 to 89-8-27 (1972 & Supp. 1999).
85. Sweatt v. Murphy, 733 So. 2d 207, 207-12 (Miss. 1999).
86. *Id.* at 212.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

IV. CONCLUSION

Advertising is "the lubricant for the free-enterprise system."[91]

In the past, many false advertising disputes have been heard in federal court under various federal acts. Counsel should be aware, however, that the Mississippi Code provides two viable alternatives.

With the growth of modern media and the proliferation of e-commerce, advertising is taking on an even greater role in our economy. In today's litigious society, it is increasingly important for attorneys to advise their clients about the laws' requirements with respect to advertising. Marketing personnel often have one goal in mind: sales. However, a prudent business will ensure that counsel also plays a role in advertising decisions.

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91. LeoArthur Kelmenson, *quoted in* MICHAEL MCKENNA, THE STEIN & DAY DICTIONARY OF DEFINITIVE QUOTATIONS 11 (1983).