ANTITRUST LAW

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The Advertising Disputes & Litigation and Consumer Protection Committees'

RECENT LITIGATION DEVELOPMENTS

[Cases from April 13 to April 29, 2016]

Prepared for the ADL and CP Committees by Dan Blynn, Shahin Rothermel, Laura Arredondo-Santisteban, and Sam Boro of Venable LLP; Dale Giali, Elizabeth Crepps, and Rebecca Johns of Mayer Brown LLP; Peter Farnese of Beshada Farnese Law; Sherrie Schiavetti, Katie Townley, Donnelly McDowell, Devon Winkles, and Jennifer Wainwright of Kelley Drye & Warren LLP; Lauren Valkenaar of Norton Rose Fulbright; Doug Brown and Samantha Duke of Rumberger Kirk & Caldwell; Erik King of Lockheed Martin; Mike Sherling, Judicial Law Clerk, Maryland Court of Special Appeals; Darren McCartney of Walters McCartney PLLC; Tiffany Ge of Frost Brown Todd LLC; Hal Hodes and Linda Bean of the National Advertising Division; and Eugene Benick of NOVA Business Law, LLP.

RECENT DECISIONS

Lanham Act and Other Competitor Actions

The U.S. District Court for the Northern District of New York denies defendant Chobani's motions for reconsideration of two separate injunctions restraining it from making claims that General Mills and Dannon yogurt products contained "bad stuff," which implied that the products were not safe for consumers. Chobani moved for reconsideration, arguing that the preliminary injunction should be modified, eliminated, or clarified because it was overbroad and enjoined hypothetical future speech on which the court had not heard evidence. The court rejected Chobani's arguments because the injunction described the prohibited speech in reasonable detail to withstand a challenge. Finally, the court noted that, if any of Chobani's hypotheticals came to pass, the preliminary injunction may be revised because the court retains equitable discretion. (*General Mills, Inc. v. Chobani, LLC*, No. 3:16-cv-58, 2016 WL 1639903 (N.D.N.Y. Apr. 25, 2016), and *Chobani, LLC v. The Dannon Company, Inc.*, No. 3:16-cv-30, 2016 WL 1664908 (N.D.N.Y. Apr. 26, 2016)).

The U.S. District Court for the District of Massachusetts grants in part and denies in part defendant Festa Radon Technologies Company's motion for a preliminary injunction on its counterclaim against plaintiff Spruce Environmental Technologies. Plaintiff, a seller of radon mitigation fans, alleged that the defendant's advertisements contained false and misleading statements in violation of the Lanham Act and Massachusetts state law. The court ordered the defendant to cease making representations with respect to the certification of its radon fans. Defendant filed a counterclaim asserting that the plaintiff's advertisements violated the Lanham Act, and sought a preliminary injunction to stop the plaintiff from advertising that (1) the plaintiff's fans were certified for outdoor use under certain safety standards, and (2) two of its models were "Energy Star Rated." Plaintiff argued that the statements regarding its certification were true, presenting the court with a letter sent by two Intertek employees that authorized it to label its fans for outdoor use. In light of this evidence, the court held that the defendant was unlikely to show that the advertising statements that the plaintiff made concerning outdoor use were literally false; as a result, it denied

the defendant's motion for injunctive relief with respect to those claims. Defendant's potential success in the marketplace was irrelevant to the issue of whether it would face irreparable harm and hardship in the absence of injunctive relief. (*Spruce Envt'l Techs., Inc. v. Festa Radon Techs., Co.*, No. 15-cv-11521, 2016 WL 1611433 (D. Mass. Apr. 21, 2016)).

The U.S. District Court for the District of New Jersey denies a motion to dismiss by defendants Revcontent LLC and its founder and CEO, John Daniel Lemp, in a Lanham Act case alleging deceptive native advertising filed by plaintiff, Congoo, LLC, d/b/a Adblade, a different native advertising platform. The court held that the defendants were not immune under the federal Communications Decency Act because the plaintiff alleged that the defendants were an information content provider because they published their own native advertising, and were, thus, partly responsible for the creation of the content. Similarly, the plaintiff stated a claim under the Lanham Act by alleging that the defendants published deceptive advertisements and misrepresented the nature and qualities of their services. However, the court found that disputed facts about the role of the defendants in the creation of the deceptive ads precluded the granting of injunctive relief. (*Congoo, LLC v. Revcontent LLC*, No. 16-cv-401, 2016 WL 1547171 (D.N.J. Apr. 15, 2016)).

The U.S. Court of Appeals for the Ninth Circuit vacates judgment in favor of Gaspari Nutrition ("GNI") and remands for further proceedings on all six of ThermoLife International, LLC's Lanham Act claims, as well as its unfair competition claim. ThermoLife alleged that GNI, a competitor in the dietary supplement market, violated the Lanham Act, and Arizona's unfair competition law, by falsely advertising its testosterone boosters as "safe," "natural," "legal," and compliant with the Food, Drug & Cosmetic Act ("FDCA"), as amended by the Dietary Supplement Health Education Act ("DSHEA"). The district court excluded four of ThermoLife's experts as unreliable. The court granted summary judgment because (1) the FDCA precluded or preempted all but one of ThermoLife's claims, and (2) ThermoLife could not establish the elements of falsity, materiality, and injury. In vacating the district court's judgment, the Ninth Circuit held that the FDCA generally does not preclude Lanham Act claims for false labeling of food. Further, the court stated that ThermoLife did not need to demonstrate a FDCA violation to prevail on its claims that GNI falsely advertised its products as "legal" or "DSHEA-compliant." The court also held that the district court improperly excluded the opinions of two of ThermoLife's experts on the issue of the safety of GNI's products, as well as one expert's survey evidence of the materiality. The court, however, upheld the district court's exclusion of ThermoLife's expert opinion on injury because it was based on a "novel and wholly subjective methodology." The court also found that ThermoLife's expert's damages calculation was unreliable because it included sales revenue for the five years before the first allegedly false statement. Finally, the court concluded that the district court erroneously ruled that there were no triable issues of falsity, materiality, and injury on ThermoLife's Lanham Act claims based on GNI's statements that its products were "legal," "DSHEA-compliant," "safe," and "natural." (*ThermoLife Int'l., LLC v. Gaspari Nutrition Inc*., No. 14-cv-15180, 2016 WL 1460171 (9th. Cir. April 14, 2016)).

Consumer Class Actions

The U.S. Court of Appeals for the Ninth Circuit affirms the district court's order dismissing a putative class action against defendant Wal-Mart Stores, Inc. and Walmart.com. Plaintiff brought claims under California's Unfair Competition Law, False Advertising Law, and Consumer Legal

Remedies Act; New Jersey's Consumer Fraud Act; and New York's deceptive acts and practices law. Plaintiff claimed that Wal-Mart sold two forms of headache relief, each with the same active ingredients in the same amounts, but charged more for one of the products, and also packaged the products in different colors. The Ninth Circuit held that the plaintiff's claims were properly denied because he did not assert that the proximate presentation of the two products with different colors and prices was sufficient to run afoul of those laws because the ingredients and their amounts are listed on the products' packages. (*Boris v. Wal-Mart Stores, Inc.*, No. 14-cv-55752, 2016 WL 1622207 (9th Cir. Apr. 25, 2016)).

The U.S. District Court for the Northern District of California grants the defendant-dietary supplement company's motion to dismiss the plaintiff's second amended complaint with prejudice. Plaintiff alleged violations of California's Unfair Competition Law, Consumer Legal Remedies Act, and False Advertising Law, as well as a violation of the Magnuson-Moss Warranty Act, breach of express warranty, and breach of implied warranty. Plaintiff claimed that the defendant's representations regarding its "JavaSLIM Green Coffee Extract" supplement were false because, contrary to its advertising claims, the product did not provide rapid or significant weight loss, was never clinically proven to provide any of the promised benefits, and was not based on any breakthrough in weight loss research. Specifically, the plaintiff alleged that the purported clinical proof of the product's key ingredient was a falsified study that was later the target of an FTC enforcement action and, in reality, showed that the product does not work. In moving to dismiss, the defendant argued that the plaintiff's claims were premised on an alleged lack of substantiation, and that the court previously had dismissed such claims with prejudice as not cognizable. Second, the defendant contended that the plaintiff failed to allege sufficient facts to plausibly state a claim that the defendant's representations are false or misleading. The court held that private litigants may not bring claims on the basis of a lack of substantiation, absent affirmative proof of the falsity of the substance of those claims. Second, the court held that the plaintiff cannot rely solely on the FTC's allegations in a separate action to plead the falsity of the defendant's statements. Because the plaintiff failed to state a claim that the defendant's advertising claims were false, the court also dismissed, with prejudice, the plaintiff's omission and breach of warranty claims. (*Aloudi v. Intramedic Research Group, LLC*, 2016 WL 1569981 (N.D. Cal. April 19, 2016)).

The U.S. District Court for the Eastern District of California denies the plaintiff's motion for class certification under Fed. R. Civ. P. 23(b)(3) in an action alleging that Best Buy and other defendants violated California's Unfair Competition Law by misrepresenting the battery life of laptops sold in Best Buy's stores. The court initially found that, except for certain types of laptops manufactured by Dell and Acer, the plaintiff satisfied the four criteria for class certification under Fed. R. Civ. P. 23(a) – numerosity, commonality, typicality, and adequacy of representation. The court also denied the defendants' requests to exclude certain expert testimony offered by the plaintiff with respect to proper testing of battery life and appropriate damages calculations. The court agreed with the plaintiff on the issue of the proposed class definition because the class was narrower than the definition proposed in the complaint. However, the court denied the plaintiff's motion to certify a damages class under Fed. R. Civ. P. 23(b)(3), finding that, because the plaintiff's proposed damage calculation method was not tied to the sales price of the laptop, the plaintiff "failed to present a damages model that is tied to his theory of liability." The court granted the plaintiff leave to amend his request for class certification within 40 days of the order. (*Herron v. Best Buy Stores, LP*, No. 2:12-cv-02103, 2016 WL 1572909 (E.D. Cal. Apr. 19, 2016)).

The U.S. District Court for the Northern District of California grants Apple's motion to dismiss a putative class action alleging deceptive advertising about a "Wi-Fi Assist" feature on certain Apple products. The iOS 9 operating system automatically activated a Wi-Fi Assist feature on iPhones and other Apple products, which boosted Internet speeds, but required use of cellular data at times. Plaintiffs claimed that Apple misrepresented to consumers that Wi-Fi Assist was automatically downloaded with the iOS 9 system; that Wi-Fi Assist would switch devices from using Wi-Fi internet to cellular data; and that the feature would likely result in data overuse charges if not disabled. Plaintiffs alleged violations of California's Unfair Competition Law and False Advertising Law. The court held that the plaintiffs failed to plead actual reliance on the advertising in question and, therefore, failed to establish standing for the claims. The court granted Apple's motion to dismiss. (*Phillips v. Apple Inc.*, No. 15-cv-04879, 2016 WL 1579693 (N.D. Cal. Apr. 19, 2016)).

The Appellate Court of Illinois affirms in part and reverses in part the trial court's dismissal of the plaintiff's complaint against a law firm and its shareholders. Plaintiff alleged that the defendants violated Illinois' Attorney Act, Legal Business Solicitation Act, Consumer Fraud Act, Uniform Deceptive Trade Practices Act., as well as the Lanham Act, as a result of advertisements of attorneys that became inactive in the state. The trial court dismissed the complaint without articulating its reasoning. The Appellate Court held that the plaintiff's complaint failed to state a claim under the Attorney Act and the Legal Business Solicitation Act. The court further held that the timeliness of the plaintiff's Lanham Act claims is governed by the three-year statute of limitations set forth in the Illinois Consumer Fraud and Deceptive Business Practices Act and that the Lanham Act claims did not fall under the doctrine of continuing violation for the purposes of applying the three year-statute of limitations. The court also held that the Consumer Fraud and Deceptive Business Practices Act does not apply to the practice of law, including claims based on attorneys' alleged false or misleading advertisements for legal services. (*Hullverson & Hullverson, L.C. v. Hullverson*, No. 5-15-0226, 2016 IL APP (5th) 150226-U (Ill. App. Apr. 15, 2016)).

The U.S. District Court for the Southern District of California grants final approval of a class action settlement and a motion for attorney fees and costs. The plaintiff alleged that the defendant, a propane supplier, misrepresented its billing methods and overcharged customers for propane in violation of California's False Advertising Law and Unfair Competition Law. The court found the settlement amount reasonable, because it provided for recovery by class members in two categories, large volume purchasers and low volume purchasers. The large volume purchasers would receive approximately 75% of their calculated net overcharges, while the low volume purchasers would receive 84%. The only remaining class representative could be defeated on summary judgment based on the statute of limitations and in class certification based on the individual issues associated with the alleged overcharges; these factors weighed in favor of approving the certification. The court approved 30% of the common fund as a reasonable attorney fee and $20,000.00 in costs, with a $5,000 incentive payment to the class representative. (*Fontes v. Heritage Operating, L.P.*, No. 14-cv-1413, 2016 WL 1465158 (S.D. Cal. Apr. 14, 2016)).

Consumer Financial Protection Bureau (CFPB) Decisions

The U.S. District Court for the District of Columbia denies a petition filed by the CFPB seeking an order requiring the Accrediting Council for Independent Colleges and Schools ("ACICS") to comply with the CFPB's Civil Investigative Demand ("CID"). The CFPB issued a CID to ACICS, an accreditor of for-profit colleges, following a separate CFPB investigation that revealed various deceptive practices by for-profit colleges related to their private student-lending activities. ACICS refused to comply with the CID, arguing that the CFPB did not have statutory authority to conduct an investigation into the accreditation process of for-profit schools. The court agreed with ACICS, finding that the CFPB's investigative authority was limited to inquiries to determine whether there had been a violation of consumer financial laws, none of which regulate or implicate the accrediting process of for-profit colleges. Therefore, the CFPB's petition to enforce the CID was denied, and the case was dismissed. (*CFPB v. Accrediting Council for Indep. Colls. and Schs.*, No. 15-cv-1838, 2016 WL 1625084 (D.D.C. Apr. 21, 2016)).

The U.S. Court of Appeals for the Ninth Circuit affirms in part and vacates and remands in part the district court's award of summary judgment to the CFPB against attorney Chance Edward Gordon. The CFPB alleged that the defendant violated the Consumer Financial Protection Act by misrepresenting that his home loan modification program would benefit clients and that his program was affiliated with the government. The defendant appealed, arguing that, even if the marketing materials were deceptive, the agreements signed by his clients corrected any deceptive representations. The Ninth Circuit rejected this argument, stating that a later corrective written agreement does not eliminate a defendant's liability for making deceptive claims. The Ninth Circuit also rejected the defendant's jurisdictional arguments, including his argument that the improper appointment of CFPB Director Cordray divested the CFPB of Article III standing to bring the enforcement action in the first instance. (*CFPB v. Gordon*, No. 13-cv-56484, 2016 WL 1459205 (9th Cir. Apr. 14, 2016)).

National Advertising Division (NAD) Decisions

The NAD found that Bausch & Lomb Incorporated can support advertising claims, challenged by Johnson & Johnson Vision Care, Inc. ("JJVC"), that promote the presence of polyvinylpyrrolidone ("PVP"), a contact lens wetting agent, in the company's "Ultra" contact lenses. NAD recommended, however, that the company discontinue claims that the Ultra lenses contain "4 times more PVP" than JJVC's "OASYS" lenses. NAD also recommended that the advertiser discontinue claims that Ultra lenses have "best-in-class properties for best-in-class performance," and certain other comparative performance and preference claims. The parties disagreed about whether the wetting agent in the advertiser's lenses could be characterized as PVP. The challenger patented a technology that embeds its lenses with PVP and asserted that the advertiser's process for making Ultra lenses does not create PVP. Following its review of the evidence in the record, NAD determined that the advertiser could support the claim that PVP is present in Ultra lenses. However, NAD found that the advertiser's evidence was not sufficiently reliable to support the claim that Ultra lenses have "significantly more PVP (4x as much of the wetting agent) than [ACUVUE OASYS lenses]." Further, NAD determined that the evidence did not support the claim that Ultra lenses have "best-in-class properties for best-in-class performance," and recommended that the claim be discontinued. However, it noted that information in one chart was

accurate and that the professionals targeted by the advertisement were sufficiently sophisticated to understand the data. NAD further determined that additional comparative performance and preference claims were not supported because the advertiser's "refit" study methodology was materially flawed. (*Bausch + Lomb Incorporated (ULTRA Contact Lenses with MoistureSeal Technology),* NAD Report No. 5922 (Apr. 4, 2016)).

The NAD has recommended that General Mills, Inc., modify or discontinue certain broadcast advertisements for its "Progresso"-brand soups because the advertising conveyed the unsupported message that most or all of the ingredients are sourced from farms in rural, southern New Jersey. However, NAD found that the advertiser provided a reasonable basis for the claim, "Vineland, NJ: Home of Progresso." The Campbell Soup Company challenged various advertisements, including television commercials, each of which opens with the text "VINELAND, NJ – HOME OF PROGRESSO" displayed on the screen amidst a background of growing crops. One commercial begins with a tractor driving through a farm immediately followed by fresh vegetables and chicken on a cutting board. The challenger contended that the advertisements created the misleading impression that all or most of Progresso soup ingredients are sourced locally in Vineland. Following its review of the advertising and the evidence, NAD determined that the imagery and language of three of the commercials reasonably conveyed the unsupported message that most or all of Progresso's ingredients are sourced in Vineland. NAD recommended that General Mills modify or discontinue the spots. NAD also found that the advertiser demonstrated that Progresso was established in Vineland more than 70 years ago and that the majority of Progresso's soups are made there. Further, NAD determined that the advertiser provided a reasonable basis to support the claim that Vineland is the "home" of Progresso. However, NAD recommended that the advertiser discontinue the unqualified claim "Vineland, NJ . . . where Progresso Light soups are made," because Progresso Light soups are not all (or almost all) made in Vineland. (*General Mills, Inc. (Progresso Soup),* NAD Report No. 5940 (Mar. 23, 2016)).

KLF International, Inc., maker of the "Venus Factor Weight Loss System National," has said it will discontinue advertising claims that were a focus of an NAD inquiry. The claims appeared on the company's website and in promotional videos, and included statements that the product "Dramatically increase[es] your female metabolism;" can help you, "Drop up to three dress sizes in a week;" and that it lets you, "Strategically eat the foods you crave most, and still experience the slimmest, sexiest waistline of your life." NAD also considered product reviews and news articles on websites that appeared to be independent, but that may have had a material connection to Venus Factor. KLF advised NAD that the challenged claims were permanently discontinued and that some of the challenged claims were not made by KLF but rather were made by affiliates. KLF advised NAD that it has policies to ensure that its' affiliates advertising is truthful and accurate. In reliance on the advertiser's representation that the challenged advertising claims had been permanently discontinued or modified, NAD did not review the claims on their merits. For compliance purposes, NAD treated the voluntarily discontinued claims as though NAD recommended their discontinuance and the advertiser agreed to comply. (*KLF Int'l, Inc. (Venus Factor Weight Loss System for Women),* NAD Report No. 5938 (Mar. 15, 2016)).

RECENT FILINGS

Lanham Act and Other Competitor Actions

Lanham Act complaint filed in the U.S. District Court for the Southern District of Indiana against Clinical Drug Information, LLC regarding the listing of Penohytro pharmaceutical products in its "Medi-Span" database. Plaintiff, the marketer of "Donnatal" pharmaceutical products, alleges violations of the Lanham Act and tortious interference under Indiana common law. Specifically, the plaintiff alleges that the defendant listed Penohytro on the Medi-Span database as an FDA-approved generic alternative to the plaintiff's Donnatal product, despite knowing that Penohytro products do not have legal marketing status and are not FDA-approved alternatives to Donnatal. (*Concordia Pharms., Inc. v. Clinical Drug Information, LLC*, No. 1:16-CV-971 (S.D. Ind. complaint filed on Apr. 29, 2016)).

Consumer Class Actions

Putative nationwide class action filed in the U.S. District Court for the Northern District of California against The Quaker Oats Company, alleging violation of California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law. Plaintiff claims that Quaker Oats falsely and deceptively labels products containing glyphosate, a "synthetic biocide," as "natural," "100% natural," "heart healthy," and "part of a heart healthy diet." (*Cooper v. Quaker Oats Co.*, No. 3:16-cv-2364 (N.D. Cal. complaint filed on Apr. 29, 2016)).

Putative California-only class action filed in the California Superior Court (Riverside County) against Nutrigold, Inc. alleging claims for, among other things, violation of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. Plaintiff claims that the defendant's misrepresents its hydroxycitric acid supplement product as having weight loss, fat reduction, satiety, and appetite control properties. According to the plaintiff, these claims are contradicted by scientific studies. (*Mason v. Nutrigold, Inc.*, No. RIC 1605020 (Cal. Super. Ct. complaint filed on Apr. 27, 2016)).

Putative class action filed in the Florida Circuit Court (Okaloosa County) against The Henderson at Crystal Beach, LLC and Dunavant Gulf LLC, alleging violations of Florida's Deceptive and Unfair Trade Practices Act and unjust enrichment. Plaintiff claims that the defendants advertised the rate of their vacation suites during reservation, then charged higher rates at checkout by failing to disclose at the time of reservation that the nightly rates would be subject to an additional service fee. (*Izard v. Henderson at Crystal Beach, LLC, et al.*, No. 2016 CA 001443 F (Fla. Cir. Ct. complaint filed on Apr. 22, 2016)).

Putative class action filed in the U.S. District Court for the Central District of California against Trader Joes Co., alleging violation of California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law, as well as the consumer protection laws of 49 states and District of Columbia. Plaintiff claims that Trader Joe's under-fills its canned tuna products, which are therefore deceptively labeled as containing five ounces of tuna fish. (*Shaw v. Trader Joes Co.*, No. 2:16-cv-2686 (C.D. Cal. complaint filed on Apr. 19, 2016)).

Putative class action filed in U.S. District Court for the Northern District of California against S. Carter Enterprises and Kanye West, together doing business as Tidal, regarding conduct that allegedly induced consumers to subscribe to Tidal, a subscription-based music streaming service. Plaintiff alleges violations of California's False Advertising Law and Unfair Competition Law, as well as fraudulent inducement and unjust enrichment. In particular, the plaintiff alleges that West announced that his latest album would be available only on Tidal, causing West's fans to subscribe to the Tidal service, when, in fact, the album was ultimately available through other means. (*Baker-Rhett v. S. Carter Enterprises, et al.*, No. 4:16-cv-02013 (N.D. Cal. complaint filed on Apr. 18, 2016)).

Putative nationwide class action filed in the U.S. District Court for the Central District of California against Samsung Electronics America, Inc. alleging violations of the New Jersey Consumer Fraud Act and California's False Advertising Law, Unfair Competition Law, and Consumer Legal Remedies Act. According to the complaint, the defendant falsely marketed and advertised certain Samsung televisions as "LED TVs," "LED HDTVs" or "LED televisions" when the televisions were not actually "LED" but instead "LED-lit LCD" televisions. (*Dance v. Samsung Elecs. Am., Inc.*, No. 16-cv-00704 (C.D. Cal. complaint filed on Apr. 14, 2016)).

Putative nationwide class action filed in the U.S. District Court for the Central District of California against Toshiba American Information Systems Inc. alleging violations of California's False Advertising Law, Unfair Competition Law, and Consumer Legal Remedies Act. According to the complaint, the defendant falsely marketed and advertised certain Toshiba televisions as "LED TVs," "LED HDTVs" or "LED televisions" when the televisions were not actually "LED TVs" but instead "LED-lit LCD" televisions. The plaintiff alleged that LED-lit LCD televisions are fundamentally different than LED-display televisions, which use a technology requiring no independent light source and which do not use liquid crystal technology used in LCD televisions. The plaintiff further alleged that actual LED televisions are still years away from availability at prices accessible to mainstream purchasers. (*Martinez v. Toshiba Am. Info. Sys., Inc., et al.*, No. 16-cv-02551 (C.D. Cal. complaint filed on Apr. 13, 2016)).