ANTITRUST LAW

Promoting Competition
Protecting Consumers

The Advertising Disputes & Litigation and Consumer Protection Committees'

RECENT LITIGATION DEVELOPMENTS

[Cases from to December 17, 2016 to January 10, 2017]

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RECENT DECISIONS

Lanham Act and Other Competitor Actions

The U.S. District Court for the District of Minnesota denies the motion to dismiss or, in the alternative, to transfer venue filed by defendants Battle Sports Science, LLC and Active Brands Company, LLC. This case involves the defendants' sale of a line of "Oxygen" mouthguards, which compete with plaintiff Shock Doctor's "Max Airflow" mouthguards. Plaintiff filed suit, alleging that the defendants' advertising claims are false in violation of the Minnesota Deceptive Trade Practices Act. Prior to the plaintiff filing its complaint, defendant Battle Sports filed suit against Shock Doctor in Nebraska alleging similar claims concerning the same products. On Battle Sports' motion, the court in Nebraska agreed to transfer venue to the District of Minnesota in order to consolidate the litigations. Accordingly, in the instant case, the Minnesota court denied Battle Sports' motion to transfer venue in order to maintain the consolidated litigations in that district. (*Shock Doctor, Inc. v. Battle Sports Sci., LLC*, No. 16-2908, 2017 WL 74284 (D. Minn. Jan. 6, 2017)).

Consumer Class Actions

The U.S. District Court for the Central District of California grants defendant Stein Mart, Inc.'s motion to compel and denies its motion for a protective order in a putative class action alleging that the "compare at" prices on the defendant's product labels were misleading and deceptive. The court granted the defendant's motion to compel the plaintiff's responses to discovery requests seeking ISPs, and her email addresses and phone numbers used because it would show communication with Stein Mart and to match the plaintiff to a loyalty rewards program. The court also granted the motion to compel information regarding retailers with whom plaintiff has held a rewards or loyalty program membership. The court found that the account numbers and enrollment dates were in the plaintiff's control and, thus, she needed to produce them. The court further granted the motion to compel information regarding the plaintiff's purchases at Stein Mart, and stated that the response "to the best of her recollection" is insufficient because "if a party cannot furnish details, he should say so under oath, say why and set forth the efforts he used to

obtain the information." Finally, the court compelled production of plaintiff's credit card statements, which the court found that plaintiff could obtain from third parties. The court denied the defendant's motion for a protective order, stating that there was no basis to limit discovery to private label merchandise. (*Sperling v. Stein Mart, Inc.*, No. 15-cv-1411, 2017 WL 90370 (C.D. Cal. Jan. 10, 2017)).

The U.S. District Court for the Northern District of California grants in part and denies in part defendant Samsung Electronics America, Inc.'s motion to dismiss a putative class action complaint regarding allegedly defective "Ultra Slim" wall mounts for televisions. The plaintiff alleges that plastic disks in Samsung's Ultra Slim wall mounts are susceptible to breaking at any time, even if the applicable TV is installed correctly, which can cause televisions to fall. Plaintiff alleges that Samsung conceals and fails to disclose the risk of wall mount failures despite the existence of online consumer complaints about the wall mounts breaking, and that Samsung falsely represents on packaging the weight and type of TV that the wall mount can safely hold. The court granted Samsung's motion to dismiss as to the plaintiff's California Consumer Legal Remedies Act, Song-Beverly Act (based on implied warranty of merchantability), and Unfair Competition Law ("UCL") claims chiefly on the grounds that the plaintiff failed to allege that Samsung knew of the defect at the time plaintiff purchased her wall mount and failed to plead sufficient facts giving rise to a fraudulent concealment claim. The court granted the plaintiff leave to amend her Song-Beverly Act claim and UCL claim to the extent it relied on a Song-Beverly Act violation. (*Coleman-Anacleto v. Samsung Elecs. Am., Inc.*, No. 16-CV-02941, 2017 WL 86033 (N.D. Cal. Jan. 10, 2017)).

The U.S. District Court for the Northern District of California grants Facebook's motion to dismiss the plaintiffs' class action claims that Facebook's Terms of Service violate two provisions of New Jersey's Truth-in-Consumer Contract, Warranty, and Notice Act (the "TCCWNA"). The court found that Facebook's Terms of Service contain an enforceable California choice-of-law clause and, therefore, the court held that the TCCWNA is inapplicable. Plaintiffs concede that they agreed to Facebook's Terms of Service providing that "[t]he laws of the State of California will govern . . . without regard to conflict of law provisions." The court explained that California choice-of-law clause is enforceable because California has a substantial relationship to defendant and California law is not contrary to fundamental New Jersey policy. (*Palomino v. Facebook, Inc.*, No. 16-cv-04230, 2017 WL 76901 (N.D. Cal. January 9, 2017)).

The U.S. Court of Appeals for the Third Circuit vacates a district court's order granting summary judgment in favor of defendant Ambit Energy LP. Defendant is a private energy supplier from whom Pennsylvanians can obtain electricity. Plaintiff filed a putative class action complaint alleging, among other things, that the defendant breached the parties' contract by "charging rates that did not meet the contractual obligation to provide a competitive rate based on market factors." The district court granted summary judgment to the defendant, holding that the plaintiff could not show that the defendant breached a contractual duty in setting its prices because the contract "unambiguously" afforded the defendant discretion to set the prices. The Third Circuit disagreed, finding the contract ambiguous as to the discretion afforded the defendant in setting rates for the variable rate energy plan. The court, therefore, remanded to the district court to

determine whether a motion to dismiss should be granted in light of the ambiguity. (*Silvis v. Ambit Energy L.P.*, No 16-1979, 2017 WL 75761 (3rd Cir. Jan. 9, 2017)).

The U.S. District Court for the District of Colorado grants the defendants' motion for summary judgment as to all plaintiffs and all claims in a putative class action alleging violations of the Colorado Consumer Protection Act ("CCPA") and Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), as well as claims for breach of contract, unjust enrichment, and declaratory judgment. Plaintiffs alleged that the defendant-car rental companies tricked them into buying added-on loss damage waiver ("LDW") without their consent and without proper statutory disclosures. The court granted the defendants' request for summary judgment for several reasons. First, the court found that one plaintiff lacked standing because he received a full refund in connection with the LDW insurance. Second, the court determined that the statutory claims under the CCPA and FDUTPA failed because the remaining plaintiffs failed to establish a causal nexus between the defendants' actions and plaintiffs' injury. Specifically, the court noted that "no such causal nexus may be demonstrated when the defendant has expressly disclosed the matter the plaintiff complains of, but the plaintiff failed to read the defendant's disclosure, as in this case." Third, the court granted summary judgment for the defendants on the plaintiffs' breach of contract claim on the basis that "[t]here is no evidence that Dollar did not perform the rental agreement as written. The fact that Plaintiffs may not have wanted to purchase LDW does not mean that the contract was breached." Finally, the court found that the plaintiffs' unjust enrichment claim was moot because there was a written agreement between the parties, and the plaintiffs' declaratory judgment claim was moot because the court granted summary judgment as to all other claims. (*Friedman v. Dollar Thrifty Auto. Grp., Inc.*, No. 12-cv-02432, 2017 WL 104904 (D. Colo. Jan. 5, 2017)).

The U.S. District Court for the Central District of California grants the plaintiffs' motion to remand a putative class action to California state court on the grounds that it lacks subject matter jurisdiction under the Class Action Fairness Act ("CAFA"). Plaintiffs brought claims against AutoZone for breach of contract, fraud, and violations of California's Consumer Legal Remedies Act ("CLRA"), False Advertising Law 9"FAL"), and Unfair Competition Law ("UCL"). The claims were premised on allegations that AutoZone's consumer rewards program, which offered consumers $20 credit for every five purchases of $20 or more, was illusory and deceptive because the credits expired after twelve months, reward dollars expired after three months, and, due to the nature of automotive service, "the vast majority of [AutoZone's] customers would not and do not make five separate purchases of $20 for automotive goods and services in a twelve-month span." The plaintiffs seek to represent a class of California rewards members for whom reward credits or dollars had expired. In remanding the action, the court found that AutoZone failed to show, by a preponderance of admissible evidence, that the $5,000,000 amount-in-controversy requirement for CAFA jurisdiction was satisfied. AutoZone relied on declarations stating the number of California rewards program members who have had all or a portion of a $20 reward expire during the putative class period. AutoZone multiplied the number of such members by $20 to arrive at the amount in controversy. The court found that the declarations were insufficient because they did not state the average amount of the members' $20 rewards that had expired or "even suggest why the Court might award all affected . . . Members the full $20 of each expired

award." The court also found that the declarations did not provide sufficient admissible evidence because they did not attach the records that the declarant reviewed nor attempted to establish the authenticity of such records. Based on that reason alone, the court found that it "may disregard the records and any information contained within them." (*Hughes v. AutoZone Parts, Inc.*, No. CV1608009, 2017 WL 61917 (C.D. Cal. Jan. 4, 2017)).

The U.S. District Court for the Central District of California grants the motion of several intervenors to intervene and transfer the putative class-action filed in California district court to New York, where an earlier-filed putative class action was pending. The California plaintiffs alleged a variety of claims for false advertising and violations of other consumer protection laws based on alleged misleading advertising by the defendant-hair product company. The allegations in California case were essentially the same as those in the New York case. The court granted the motion based on the first to file rule, because the putative class action filed in California was filed later than the similar putative class action in New York. The court found that permissive intervention was proper under Fed. R. Civ. P. 24(b) and found persuasive that the intervenors' claims filed in New York sought certification of a nationwide class that asserted essentially the same false advertising and other claims that the California Plaintiffs asserted. The court, then, determined that transfer was appropriate under the first to file rule, because: (1) the New York case was filed first; (2) the plaintiffs were essentially potential class members of the class sought in the New York case; (3) the claims asserted were virtually the same in both cases; and (4) no recognized exceptions to application of the rule applied. (*Manier v. L'Oreal USA, Inc.*, No. 2:16-CV-06886, 2017 WL 59066 (C.D. Cal. Jan. 4, 2017)).

The U.S. District Court for the Central District of California enters judgment in favor of the defendant-manufacturer on an equitable claim after the jury finds in favor of defendant on the legal claim. The plaintiff, on behalf of a class, brought claims for violation of California's consumer protection statutes against the manufacturer of "Oscillo," a homeopathic product that represented that it relieves "flu-like" symptoms. Plaintiff claimed that the statements were false because the active ingredient was diluted. After a seven-day trial, the jury returned a verdict in favor of the defendant on the plaintiff's legal claim under the California Legal Remedies Act, finding the representations were not false. The court, in deciding the equitable claim under the Unfair Competition Law, found that, under the Seventh Amendment, a court cannot disregard a jury's finding of fact and must follow the jury's implicit or explicit factual determinations when the underlying claims are the same. Thus, the court entered judgment in favor of the defendant on the equitable claim. (*Lewert v. Boiron, Inc.*, No. CV 11-10803, 2017 WL 25457 (C.D. Cal. Jan. 3, 2017)).

The U.S. Court of Appeals for the Ninth Circuit affirms certification of eleven statewide consumer classes challenging defendant ConAgra's "Wesson" cooking oils as being falsely labeled as "100% Natural" when the oils are made from bioengineered ingredients. In affirming the district court, the Ninth Circuit rejected the Third Circuit's requirement of an "ascertainability" showing (contemporaneous, objective indicia of class membership) as a prerequisite to class certification (what the Ninth Circuit refers to as an "administrative feasibility" prerequisite). Couched in "traditional tools of statutory construction" and constraining itself to a limited role when applying

a Federal Rule that was subject to significant consideration and review, the Ninth Circuit ruled that the text of Fed. R. Civ. P. 23(a) does not include an "administrative feasibility" prerequisite to class certification. The Ninth Circuit addressed each of the grounds recognized by the Third Circuit in its seminal *Carrera v. Bayer Corp.* decision as supporting an administrative feasibility prerequisite (managing administrative burden, protecting absent class members, ensuring actual notice to all class members, avoiding fraudulent claims, and ensuring due process rights of the defendant) and found each insufficient to overcome the plain language of Rule 23. The Ninth Circuit recognized that consideration of administrative feasibility may fit within the more traditional class certification issue of superiority. (In a separate, non-published decision [2017 WL 53421], the Ninth Circuit addressed typicality, predominance, and superiority and, recognizing and applying the significant deference afforded to the district court over such issues, summarily ruled that the class certification decision was not an abuse of discretion.) (*Briseno v. ConAgra Foods, Inc.*, -- F.3d --, 2017 WL 24618 (9th Cir. Jan. 03, 2017)).

RECENT FILINGS

Lanham Act and Other Competitor Actions

Complaint for declaratory and injunctive relief filed by the Praxis Project in the U.S. District Court for the Northern District of California against Coca-Cola Co. and the American Beverage Association, alleging violations of California's Unfair Competition Law and False Advertising Law. According to the complaint, defendant Coca-Cola engaged in false and misleading marketing of its sugar-sweetened beverages by representing that the beverages are not linked to obesity, diabetes, and cardiovascular disease. Plaintiffs cite to statements by Coca-Cola executives and agents, as well as statements made by defendant American Beverage Association (allegedly funded by Coca-Cola), which purportedly downplayed the link between sugar-sweetened beverages and obesity-related chronic diseases. (*Praxis Project v. Coca-Cola Co., et al.*, No. 17-cv-00016 (N.D. Cal. complaint filed on Jan. 4, 2017)).

Consumer Class Actions

Putative nationwide and California-only class action filed against Dorel Juvenile Group, Inc. in the U.S. District Court for the Central District of California, alleging violation of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. Plaintiff claims that Dorel's "Cosco Apt 40" and "Cosco Apt 50 Convertible" car seats cannot accommodate children up to the advertised height and weight limits. (*Henryhand v. Dorel Juvenile Grp., Inc.*, No. 2:17-cv-180 (C.D. Cal. complaint filed on Jan. 9, 2017)).

Putative nationwide class action, with New York-only subclass, filed against Gerber Products Co. d/b/a Nestlé Nutrition, Nestlé Infant Nutrition, and Nestlé Nutrition North America in the U.S. District Court for the Eastern District of New York, alleging causes of action for violation of New York's General Business Law, fraudulent concealment, intentional misrepresentation, negligent misrepresentation, and unjust enrichment. Plaintiff asserts that the defendants misleadingly and falsely label their "Gerber Good Start Gentle" infant formula as reducing the risk of allergies

generally and unqualifiedly reducing the risk of atopic dermatitis, specifically. According to the plaintiff, the FDA has warned the defendants that little scientific evidence exists to support these claims and any such claims made must be qualified. (*Manemeit v. Gerber Products Co., et al.*, No. 2:17-cv-00093 (E.D.N.Y. complaint filed Jan. 6, 2017)).

Putative Massachusetts class action filed in the U.S. District Court for the Northern District of California against Premier Nutrition Corporation related to advertising for its "Joint Juice" glucosamine hydrochloride products. Plaintiff alleges that products advertised to support and nourish cartilage, lubricate joints, and improve joint comfort do not perform as advertised. Plaintiff alleges violations of Massachusetts' Consumer Protection Act. (*Schupp v. Premier Nutrition Corp*., No. 3:17-CV-00054 (N.D. Cal. complaint filed Jan. 5, 2017)).

Putative nationwide class action, with California-only subclass, filed against Nestlé USA, Inc. in the U.S. District Court for the Central District of California, alleging violations of California's consumer protection laws, breach of implied warranty, common law fraud, intentional misrepresentation, negligent misrepresentation, breach of contract, and quasi-contract/unjust enrichment/restitution. Plaintiff asserts that the packages for the defendant's "Raisinets" candy products mislead consumers into believing they are receiving more candy than they in fact are getting. According to the plaintiff, the Raisinet packages are only 60% full and contain 40% illegal, nonfunctional slack-fill. (*Hafer v. Nestle U.S.A., Inc.*, No. 2:17-cv-00034 (C.D. Cal. complaint filed Jan. 3, 2017)).

Putative nationwide class action removed to the U.S. District Court for the Central District of California against Proctor & Gamble related to marketing for its "Pampers Natural Clean" baby wipes. Plaintiffs alleged that the product label falsely conveys that the wipes are natural when, in fact, they contain unnatural and potentially harmful ingredient phenoxyethanol, as well as dimethicone and ethylhexl glycerin. Plaintiffs allege violations of California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law, and Florida state law, as well as breach of express warranty and unjust enrichment. (*Brenner v. Proctor & Gamble Co.*, No. 8:16-1093 (C.D. Cal. case removed Dec. 29, 2016)).

Putative nationwide class action filed in the U.S. District Court for the Northern District of Ohio against Ontel Products Corp. alleging violations of the Ohio Consumer Sales Practices Act and California's False Advertising Law, Unfair Competition Law, and the Consumer Legal Remedies Act. According to the complaint, the defendant deceptively labeled and marketed its "Five Second Fix" product as a premium alternative to conventional household glues and superglues, including through claims such as "Permanently Repair[s] Plastic, Metal, Wood, Glass and More[.]" Plaintiff alleges that the product is defective, unfit for its ordinary and intended purpose, and incapable of performing as advertised, and that the defendant actively concealed this information in its marketing. (*Machel v. Ontel Prods. Corp.*, No. 16-cv-03095 (N.D. Ohio complaint filed on Dec. 29, 2016)).

Putative nationwide and California-only class action filed against Dole Packaged Foods, LLC in the U.S. District Court for the Central District of California, alleging violation of California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law, among other

laws. Plaintiff claims that Dole falsely advertises that several of its snack products, including its oatmeal and parfait products, are "healthy," as they contain a substantial amount of sugar. (*Ramirez v. Dole Packaged Foods, LLC*, No. 8:16-cv-2260 (C.D. Cal. complaint filed on Dec. 27, 2016)).