SECTION OF

ANTITRUST LAW

Promoting Competition
Protecting Consumers

The Advertising Disputes & Litigation and Consumer Protection Committees'

RECENT LITIGATION DEVELOPMENTS

[Cases from February 1 to 15, 2017]

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RECENT DECISIONS

Lanham Act and Other Competitor Actions

The U.S. District Court for the Middle District of Pennsylvania grants plaintiff Scranton Products, Inc.'s motion for voluntary dismissal of its predominantly false advertising action against Bobrick Washroom Equipment. Scranton had alleged that Bobrick violated the Lanham Act's false advertising provisions and committed several related Pennsylvania common law torts by deceptively representing to construction industry participants that Scranton's toilet partitions are unsafe fire hazards. One business day before Bobrick's motion for leave to file counterclaims was fully briefed, Scranton filed the motion for voluntary dismissal with prejudice, based on advice of new management. Bobrick requested that the court defer ruling on the dismissal motion until Bobrick files a motion for attorneys' fees. The court held that granting Scranton's voluntary dismissal motion would not affect Bobrick's ability to later seek discovery, fees, and costs regarding Bobrick's counterclaims and Scranton's allegedly frivolous claims. Therefore, the court granted Scranton's motion for voluntary dismissal. (*Scranton Prods., Inc. v. Bobrick Washroom Equip., Inc.*, No. 3:14-CV-00853, 2017 WL 559702 (M.D. Pa. Feb. 10, 2017)).

The U.S. Court of Appeals for the Fourth Circuit affirms the district court's grant of summary judgment in a false advertising case brought by Verisign, Inc. against XYZ.COM LLC. Verisign and XYZ are both operators of top level Internet domains. Verisign is the exclusive operator of the ".com" and ".net" domains, while unsurprisingly, XYZ operates the ".xyz" domain, an example being https://abc.xyz. Verisign argued that XYZ made a series of allegedly false or misleading statements touting the popularity of its .xyz domain and warning that there were few desirable .com domain names. The Fourth Circuit held that Verisign failed to produce evidence that it suffered an actual injury as a direct result of XYZ's self-promoting statements that it had high registration numbers and that NPR had dubbed it the "next .com". Verisign's expert opined that these statements caused Verisign to lose profits by reducing Verisign's .net registrations (note that during this time period, Verisign's .com registrations continued to increase). The Fourth Circuit held that the district court did not abuse its discretion in rejecting this claim because Verisign conflated correlation with causation, *i.e.*, it demonstrated only a temporal, but not causal, link

between XYZ's statements and the drop-off in .net registrations. The Fourth Circuit also held that XYZ's statements about the availability of suitable .com domain names – that "99% of all registrar searches today result in a 'domain taken' page" and that it was "impossible to find the domain name that you want" – were either not false or misleading, or were mere puffery. Regarding the former, Verisign also failed to present evidence that the statement tended to mislead consumers. (*Verisign, Inc. v. XYZ.COM LLC*, 848 F.3d 292 (4th Cir. 2017)).

State Consumer Protection Laws

The U.S. District Court for the District of Columbia remands back to state court the plaintiff's representative private attorney general action under the D.C. Consumer Protection Procedures Act ("DCCPA"). Defendants, the manufacturers, marketers, and distributers of "Natural American Spirit" brand cigarettes, removed to federal court a non-profit organization's representative legal action under the DCCPA. The basis for removal was that the cost of complying with the injunction sought in the action exceeded $75,000. Specifically, the senior director of marketing for one of the defendants offered evidence that compliance would cost the company in excess of $900,000 before even considering damage to the brand. However, the court reasoned that the defendants' cost of compliance with the injunction had to be divided among the beneficiaries of the injunction for federal jurisdictional purposes. Using the defendants' figure of 60% of the estimated 3,297 relevant adult smokers, the costs of compliance to the defendant was calculated to be $454.96 per beneficiary – far below the $75,000 federal jurisdictional threshold. (*Breathe DC v. Santa Fe Natural Tobacco Co.*, -- F.Supp.3d --, No. 16-2378, 2017 WL 521513 (D.D.C. Feb. 8, 2017)).

The U.S. District Court for the Central District of California grants the defendants' motion for judgment under Fed. R. Civ. P. 52 as to equitable claims that were not submitted to the jury. The plaintiff-consumers sued the manufacturer of "Oscillo," which ostensibly is used to treat flu like symptoms, alleging that the advertisements were deceptive because the active ingredient was so diluted that the product could not be effective. Specifically, the plaintiffs alleged that the product was so diluted it was little more than a sugar pill. The jury rejected the plaintiffs' scientific evidence on this issue, and apparently on their own initiative, the jury stated on the verdict form that the advertisements "were not false." The court found that the provision in the Seventh Amendment was dispositive: "No fact tried by a jury shall be otherwise reexamined by any court of the United States, than according to the rules of the common law." The court reasoned that the express and implied findings of the jury regarding the efficacy of the product must be applied to the equitable claims and, therefore, granted judgment to the defendants as to all equitable claims. (*Lewert v. Boiron, Inc.*, No.: CV 11-10803, 2017 WL 25457 (C.D. Cal. Jan. 3, 2017)).

Consumer Class Actions

The U.S. District Court for the Western District of Pennsylvania grants a motion to dismiss filed by defendants Wyndham Hotel Group ("WHG") and Wyndham Hotels and Resorts ("WHR"), and denies a motion to dismiss filed by defendants Wyndham Hotel Management ("WHM) and Wyndham Worldwide Corporation ("WWC"). The putative class action plaintiff claimed that the hotel reservation website for which the defendants are responsible violated New Jersey consumer protection law by failing to disclose adequately the costs associated with a room reservation. In their motion to dismiss, WHM and WWC argued that the plaintiff had not sufficiently pled facts

that would support direct liability against them, and in particular, the complaint did not allege WHM and WWC operated the website at issue. The court agreed and granted the motion to dismiss without prejudice to the plaintiff to amend his complaint. Defendants WHG and WHR argued in their motion to dismiss that the plaintiff's consumer protection claim fails because, among other things, the website's disclosures were adequate and there was no ascertainable loss because the plaintiff had not averred that he received something less than promised. The court disagreed, finding that the plaintiff's allegations were sufficient to assert a quantifiable loss because his allegedly defeated expectations relate to the price he was led to believe he would pay for the product versus the price ultimately charged. (*Luca v. Wyndham Worldwide Corp*., No. 2:16-CV-00747, 2017 WL 623579 (W.D. Pa. Feb. 15, 2017)).

The U.S. Northern District of Illinois grants defendant CVS Health Corp.'s motion to dismiss the plaintiff's Illinois Uniform Deception Trade Practices Act ("UDTPA") and Consumer Fraud and Deceptive Business Practices Act ("ICFA") claims for failure to state a claim upon which relief can be granted. Plaintiff claimed that the Vitamin C in the defendant's supplements were manufactured in foreign countries, when the packaging is marked "Made in the USA." Plaintiff claimed this was false advertising and caused him to pay additional money for the items. The court determined the UDTPA claim for injunctive relief should be dismissed because the plaintiff could not show a likelihood to be misled in the future by the defendant's other labels. Plaintiff's ICFA claim was dismissed because the complaint lacked an allegation that the vitamins were sold at a higher price based on the "Made in the USA" representation. The claim that the plaintiff was willing to pay more for products manufactured in the United States failed to show proximate causation for the ICFA cause of action. The court dismissed these claims without prejudice, and allowed thirty days to re-plead. (*Demedicis v. CVS Health Corp.*, No. 16-cv-5973, 2017 WL 569157 (N.D. Ill. Feb. 13, 2017)).

The U.S. Court of Appeals for the Seventh Circuit issues a second opinion regarding the proper jurisdiction for a consumer class-action complaint against an alternative retail electric supplier, alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, breach of contract, and unjust enrichment. In an earlier opinion, the court determined that the district court erred when it dismissed the complaint for lack of subject matter jurisdiction on the basis that the Illinois Commerce Commission had exclusive jurisdiction over the dispute under Illinois law. The court found that, as a constitutional matter, state legislatures are not permitted to limit the jurisdiction of federal district courts. The court opted, however, to treat the defendant's subject matter jurisdiction challenge as a question of whether an Illinois state court could hear the case, and certified the question to the Illinois Supreme Court. After the Illinois Supreme Court issued its determination that the state courts would have jurisdiction over this case, the Seventh Circuit issued this second opinion in which it overturned the district court's alternative finding that it lacked jurisdiction based on the plaintiff's failure to state a claim. Specifically, the appellate court held that the district court did not properly address all the allegations in the complaint and, therefore, the dismissal was a reversible error. The case was then remanded back to the district court. (*Zahn v. N. Am. Power & Gas, LLC*, No. 15-2332, 2017 WL 526074 (7th Cir. Feb. 8, 2017)).

The U.S. District Court for the Northern District of California denies the plaintiffs' motion to remand back to California state court a putative class action alleging deceptive practices and other consumer claims against defendant in the marketing and sale of nutritional supplements.

Defendant removed to federal court under the Class Action Fairness Act of 2005. The court finds that the defendant had proffered uncontroverted evidence to establish, using a reasonable chain of logic, that the amount in controversy exceeds $5 million. The court further found that the plaintiffs offered nothing that points to a different conclusion. Thus, the court denied the plaintiffs' motion to remand. (*Sharpe v. Puritan's Pride, Inc.*, No. 3:16-cv-06717, 2017 WL 475662 (N.D. Cal. Feb. 6, 2017)).

The U.S. District Court for the Northern District of California grants, in part, and denies, in part, defendant General Mills' motion to dismiss injunctive relief claims in an amended consumer class action complaint. On behalf of California and New York consumer classes, the plaintiffs alleged that the label and advertising for "Cheerios Protein" is misleading. The court previously granted a motion to dismiss the injunctive relief claims because the plaintiffs did not allege an intention to purchase the product again. The amended complaint corrected that problem for the two California plaintiffs, who now alleged they would purchase the product in the future if the label matched what the product provided. No such allegations were made for the New York plaintiff. The court acknowledged that its injunctive relief power was limited to ordering that the label accurately reflect the product's contents, and that it could not order a change in the composition of the product. But, the court recognized that the defendant could change the composition of the product and, therefore, it is possible that the California plaintiffs could be confused in the future about the product in the absence of an injunction requiring accurate labels. Finally, the court ruled that the California plaintiffs' allegations, while sufficient to impart standing as to them, were not sufficient as to the New York plaintiff. Because the New York plaintiff did not allege a possibility of future purchases, she did not have standing to seek injunctive relief and that claim was dismissed as to her and the putative New York class. Because the New York plaintiff already had an opportunity to cure the defect, the dismissal of the New York injunctive relief claim was with prejudice. (*Coe v. General Mills, Inc*., No. 15-cv-5112, 2017 WL 476407 (N.D. Cal. Feb. 6, 2017)).

The U.S. District Court for the Central District of California grants defendants' Schwabe North America, Inc., and Nature's Way Products, LLC's motion for summary judgment in a putative class action alleging violations of Wisconsin's Unfair Trade Practices Act, and California's Unfair Competition Law and Consumers Legal Remedies Act. Plaintiff alleged that claims relating to mental sharpness, memory, and concentration on defendants' "Ginkgold" and "Ginkgold Max" ginkgo extract products were false and misleading. The court first found that the plaintiff had standing to sue on both products, despite not purchasing Ginkgold Max, because the products "are essentially identical." The court then granted summary judgment on the Wisconsin UTPA claim because the cause of action was based on the labeling claim "Clinical Ginkgo Extract," a claim that did not appear on the packaging that she purchased and, thus, she could not show that she relied on the alleged misrepresentation. Turning to the UCL and CLRA claims, the court noted that the relevant inquiry is whether a reasonable juror could find that plaintiff has proven defendants' claims are false or misleading despite the defendants' evidence to the contrary. The court assessed this "battle of the experts," and found that plaintiff failed to offer "principled critiques of each of the studies finding beneficial effects of" the products, and thus, "has not met her burden to established [sic] that 'a jury could logically conclude that the scientific evidence is unequivocal.'" (*Sonner v. Schwabe N. Am. Inc.*, No. 15-cv-1358, 2017 WL 474106 (C.D. Cal. Feb. 2, 2017)).

Federal Trade Commission (FTC) Litigation Decisions

The U.S. District Court for Nevada grants the FTC's motion for judgment in an enforcement action seeking injunctive and other equitable relief under Section 5(a) of the FTC Act and the FTC's Telemarketing Sales Rule based on the defendants' unfair and deceptive practices when selling magazine subscriptions. Defendants would call individuals at their place of business and tell them they would get a "surprise" if they participated in a survey – the "surprise" was that defendants were selling magazine subscriptions. Summary judgment was entered in favor of the FTC on liability, and the court issued a permanent injunction and awarded $191,219 in equitable relief against some of the defendants. The FTC appealed the monetary award and the Ninth Circuit reversed and remanded for a recalculation. The Ninth Circuit found error in the reliance on the defendant's expert by the court because his report was based on flawed assumptions. The Ninth Circuit found that the court should base its calculation on the injury to the consumers, not the net revenues received by the defendant. On remand, the court awarded the FTC over $23 million as monetary equitable relief. (*FTC v. Publishers Bus. Servs., Inc.*, No. 2:08-cv-00620, 2017 WL 451953 (D. Nev. Feb. 1, 2017)).

RECENT FILINGS

Consumer Class Actions

Putative California-wide class action filed against Sprint Communications, Inc. in the U.S. District Court for the Central District of California, alleging causes of action for violations of California's Unfair Competition Law and False Advertising Law. Plaintiff asserts that the defendant falsely advertised that it would cover consumers' termination fees, charge consumers half of their current phone bills, and provide consumers with prepaid Visa gift cards to induce them to switch from other telephone service providers. According to the plaintiff, Sprint did not cover her termination fee, charged her more than half of what she had been paying for her previous phone service, and did not provide her with the promised prepaid Visa gift cards. Plaintiff claims other consumers' expectations were similarly disappointed. (*Nixon v. Sprint Commc'ns, Inc.*, No. 2:17-cv-01149 (C.D. Cal. complaint filed Feb. 13, 2017)).

Putative nationwide class action, with Illinois, Florida, and Missouri subclasses, filed against AQ Textiles LLC, Creative Textiles Mills Pvt. Ltd., The TJX Companies, Inc. d/b/a TJ Maxx, Home Goods, Ross Stores, Inc., Macy's Retail Holdings, Inc., and Belk, Inc. in the U.S. District Court for the Southern District of Illinois, alleging causes of action for violations of Illinois, Florida, and Missouri's consumer protection statutes, breach of express warranty, and unjust enrichment. Plaintiffs assert that the defendants misrepresented the thread counts of their bed linen products. According to the plaintiffs, the defendants twist individual yarns together before using them in the weaving process, but improperly count them as separate yarns in violation of industry standard. Plaintiff claims that the defendants further the deception by using terms and fonts that reinforce the impression that the bed linens are of high quality. (*Kremmel, et al. v. AQ Textiles, LLC, et al.*, No. 3:17-cv-00147 (S.D. Ill. complaint filed Feb. 10, 2017)).

Putative nationwide class action filed in the U.S. District Court for the Southern District of New York against Harry & David, LLC, alleging violations of New York's Deceptive and Unfair Trade Practices Act and New York's false advertising law. According to the complaint, the defendant deceptively labeled and packaged its 10 oz. "Harry & David® Moose Munch® Gourmet Popcorn" products in non-transparent cylindrical cardboard boxes with excessive non-functional slack-fill in violation of federal and state law. Plaintiffs allege that the defendant's packaging and labeling of the products was intended to mislead consumers about the contents of the package and induce them into purchasing the product. (*Brown v. Harry & David, LLC*, No. 17-cv-00999 (S.D.N.Y. complaint filed Feb. 10, 2017)).

Putative class action filed in the U.S. District Court for the Southern District of Illinois against Inventure Foods regarding advertising for its "Boulder Canyon" snack chips. In particular, the plaintiffs allege that the labels for Boulder Canyon snack chips misleadingly listed evaporated cane juice as an ingredient, instead of sugar. Plaintiffs allege that use of "evaporated cane juice" led consumers to believe the product had less sugar than they actually contain, noting that the nutrition labels declare zero grams of sugar per serving. Plaintiffs allege violations of the Illinois Consumer Fraud Act and the Missouri Merchandising Practices Act, as well as unjust enrichment and breach of express warranty. (*Burton v. Inventure Foods, Inc*., No. 3:17-CV-00134 (S.D. Ill. complaint filed Feb. 8, 2017)).

Putative class action removed to the U.S. District Court for the Northern District of California against Dr. Pepper Snapple Group Inc. regarding advertising for "Canada Dry Ginger Ale." In particular, the plaintiff alleges that the defendant's "Made from real ginger" leads consumers to reasonably believe that the beverage is made from and contains real ginger root, and that consumers who drink the beverage will receive the health benefits associated with consuming real ginger root. Plaintiff further alleges that the ginger flavor in the beverage is made through an artificial process to create a chemical substance that tastes like ginger root. Plaintiff alleges violations of the California Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law, and well as fraud. (*Fitzhenry-Russell v. Dr. Pepper Snapple Grp. Inc*., No. 5:17-CV-00564 (N.D. Cal. complaint filed Feb. 3, 2017)).