SECTION OF

ANTITRUST LAW

Promoting Competition
Protecting Consumers

The Advertising Disputes & Litigation and Consumer Protection Committees'

RECENT LITIGATION DEVELOPMENTS

[Cases from February 16 to March 5, 2017]

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RECENT DECISIONS

State Consumer Protection Laws

The U.S. District Court for the District of Columbia grants the Organic Consumers Association's and other plaintiffs' motion to remand a case alleging misleading labeling by General Mills to the District of Columbia Superior Court. Plaintiffs claim that General Mills violates the District of Columbia Consumer Protection Procedures Act by labeling and advertising certain granola products as "natural," "healthy," "100% Natural," or "Made with 100% Natural Whole Grain Oats" when the products allegedly contain glyphosate, a chemical pesticide that the plaintiffs claim is potentially harmful to human health. After the plaintiffs filed a complaint in D.C.'s Superior Court, General Mills removed the case to federal court, asserting federal question jurisdiction based on the claim's alleged dependence on the federal Food, Drug, and Cosmetic Act. The court found that, although the plaintiffs" claim may "implicate" federal food labeling regulations, the issues to be decided are not "federal issues" within the meaning of Supreme Court precedent. The court found that the plaintiffs' claim does not necessarily depend on whether glyphosate is "safe," and that the federal tolerance level for the substance could be raised only as a defense. Furthermore, the court held that the plaintiffs' claim does not require the application of federal regulations about misbranding or the use of the term "healthy" in the absence of a challenged implied nutrient claim, or the application of an informal FDA policy regarding the use of the term "natural." Therefore, the court granted the plaintiffs' motion to remand the case to Superior Court. (*Organic Consumers Ass'n v. General Mills, Inc.*, No. 1:16-cv-1921, 2017 WL 706168 (D.D.C. Feb. 22, 2017)).

Consumer Class Actions

The U.S. District Court for the Southern District of California denies the plaintiff's third motion for preliminary approval of a settlement in a putative class action concerning jeans that bore the labeling statement "Made in USA" despite having components that were not made in the United States. The court previously had found that the proposed class meets the certification requirements, so it addressed only whether the settlement was fundamentally fair, adequate, and reasonable. The court found that many factors weighed in favor of settlement, but that deficiencies in the substance of the settlement prevented the court from approving it. In particular, the *cy pres*

award was not adequate. Plaintiff proposed a contribution to Step Up Women's Network, which the court found troubling because there was not a sufficient nexus between the objectives of the consumer protection statutes at issue in the case and the organization (the organization focuses on helping women in society). Moreover, a scholarship at a college that might help one or two people to study consumer science "fails to provide reasonable certainty that any class member will be benefitted by the award." Moreover, gift codes were an inadequate settlement benefit because the value of a $20 gift code was less than its face value, and the underlying claims were not frivolous. A minor change allowing class members to receive more than one gift card depending on number of units purchased did not cure this issue. Tote bags, while worth more than the amount the defendant saved by selling jeans with foreign made component parts, were not sufficiently valued by the record to show if they had value to class members. Finally, a clear sailing provision stating that the plaintiff's attorneys would seek no more than $175,000 in fees and that the defense would not oppose this provision is a "red flag indicating that the settlement may have been unfairly reached." (*Hofmann v. Dutch LLC*, No. 3:14-cv-2418, 2017 WL 840646 (S.D. Cal. Mar. 2, 2016)).

The U.S. District Court for the Northern District of California grants in part and denies in part the defendant's motion to dismiss the fifth amended class action complaint. The plaintiff, on behalf of a putative class, challenged the allegedly deceptive advertising practices for bedding sold by the defendants, claiming they grossly inflated the thread count of several bedding products. Defendants moved to dismiss claims regarding products not purchased by the plaintiff because the plaintiff failed to allege that those products were similar enough with respect to construction and advertising to the bedding he actually purchased. At oral argument, the plaintiff's counsel stated that testing showed a similar construction among the product lines. The court granted the defendants' motion and gave the plaintiff leave to amend to allege facts regarding similar construction. The court denied the motion to dismiss based on the statute of limitations and found that whether the discovery rule applies will be aided by factual development. The court denied the motion to dismiss concerning the omission claims, finding the plaintiff adequately alleged a duty to disclose based on an affirmative representation and active concealment. (*Rushing v. Williams-Sonoma, Inc.*, No. 16-cv-01421, 2017 WL 766678 (N.D. Cal. Feb. 28, 2017)).

The U.S. District Court for the Southern District of New York grants the defendant's motion to dismiss a putative consumer class action alleging violations of the Florida Deceptive and Unfair Trade Practices Act, as well as claims for common law fraud, negligent misrepresentation and unjust enrichment. Defendant Burberry Limited operates a number of outlet stores where the price tags for its merchandise include both a "Manufacturer's Suggested Retail Price" as well as the current price of the item at the outlet store. Plaintiff purchased several shirts from a Burberry outlet store. In his complaint, the plaintiff alleged that the "Manufacturer's Suggested Retail Price" pricing practice was deceptive because the defendant "never intended, nor did it ever, sell the items" at that price, and that the plaintiff "would not have purchased the Burberry Outlet Products, or would not have paid the price he did, if he had known he was not truly receiving a bargain, or receiving a discount." Defendant moved to dismiss on the basis that the plaintiff failed to state a claim because he did not identify any "actual damages" that he suffered. The court agreed and dismissed all four counts in the complaint on the basis that the plaintiff failed to allege injury. In its opinion, the court noted that the law does not allow the plaintiff "to allege 'actual

damages' based solely on his claim that he would not have chosen to purchase the good but for the defendant's misrepresentation or that he believed he was getting a better bargain than turned out to be the case. 'Actual damages' requires a connection between the misrepresentation and the price that is charged by the defendant or the quality of the good." (*Belcastro v. Burberry Ltd.*, No. 16-CV-1080, 2017 WL 744596 (S.D.N.Y. Feb. 23, 2017)).

The U.S. District Court for the District of Oregon grants defendant Nike, Inc.'s motion to dismiss the plaintiff's putative class action complaint with leave to amend. Plaintiff purchased products from the defendant's outlet store, which contained two prices: a suggested retail price and a discount price. Plaintiff subsequently filed suit, claiming the dual price tags were misleading to reasonable consumers in violation of California's consumer protection laws. Defendant moved to dismiss on various grounds, arguing that the plaintiff failed to sufficiently plead the defendant's alleged fraudulent pricing scheme with particularity as required by Fed. R. Civ. P. 9(b), and that she had not demonstrated she had standing to seek the requested injunctive relief. The court agreed, finding unclear the exact theory upon which the plaintiff claimed that she and other consumers were deceived by the dual price tags, and dismissed the complaint with leave to amend. (*Taylor v. Nike, Inc*., No. 3:16-CV-00661, 2017 WL 663056 (D. Or. Feb. 17, 2017)).

The U.S. District Court for the District of Maryland grants in part and denies in part a motion to dismiss in a putative class action suit against XOOM Energy, a retail electricity and natural gas provider and ACN, a multi-level marketing company that partnered with XOOM Energy to sell energy services to consumers through ACN's independent business owners and other sales channels. Plaintiffs accused the defendants of a bait-and-switch scheme, whereby the defendants told potential customers that, if they switched to XOOM from their local, regulated utilities or other energy suppliers, they would receive competitive market rates along with large savings on their energy bills. Instead, after signing with the defendants, XOOM raised rates well beyond the customers' prior utility bills. The court held that the plaintiffs stated claims for common law fraud and fraudulent misrepresentation as well as violations under the Maryland Consumer Protection Act and New Jersey Consumer Fraud Act because XOOM failed to disclose that its prices increased substantially after an introductory period, were substantially higher than XOOM's competitors, and were rarely lower than its competitors. The court dismissed certain breach of contract and negligent misrepresentation claims for lack of privity. (*Todd v. XOOM Energy Maryland, LLC*, No. 15-0154, 2017 WL 667198 (D. Md. Feb. 16, 2017)).

Federal Trade Commission (FTC) Litigation Decisions

The U.S. District Court for the Northern District of Illinois grants the FTC's motion for a preliminary injunction and continuation of an asset freeze against Credit Bureau Center, LLC ("CBC") and several other entities and individuals involved in Internet advertising of credit monitoring services and online credit scores. The FTC alleged that the defendants used "affiliates" that engaged in unfair and deceptive practices to sell the defendants' services. The court summarized the more limited requirements for a preliminary injunction motion filed by the FTC compared to the standard Fed. R. Civ. P. 65 requirements. The FTC need only prove a reasonable chance of prevailing on the merits and the balance of the private and public equities favor the injunction. The court held that private equities are not "controlling," but are given serious

consideration when the FTC can establish irreparable harm. The court applied a "sliding scale" based on the likelihood the FTC would prevail on the merits and the balance of the harm to the public compared to private interests. The court found serious public injury and was concerned that the receiver controlled only $2.1 million in frozen assets compared to as much as 10 million dollars in aggregate consumer injury. The court found that CBC, the company offering various services, did not provide convincing evidence of injury caused by the preliminary injunction or asset freeze. The court's analysis of the merits indicated that the primary defendants could be found liable for the misrepresentations by the "affiliates" either on the grounds of circumstantial evidence that they avoided knowledge of the deceptive conduct, or ratification of the deceptive conduct. The court also found that one affiliate had authority to use "advertisements" to drive traffic to CBC's websites and that the affiliates were, in fact, agents of CBC. The evidence included instructions to increase traffic to the CBC website. (*FTC v. Credit Bureau Center, LLC*, No. 17 C 194, 2017 WL 680344 (N.D. Ill. Feb. 21, 2017)).

RECENT FILINGS

Consumer Class Actions

Putative nationwide class action, with an Illinois-only subclass, filed against Wal-Mart Stores, Inc. in the U.S. District Court for the Northern District of Illinois, alleging causes of action for breach of express warranty, unjust enrichment, and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. Plaintiff asserts that the defendant falsely and misleadingly label its pita chip products as "All Natural." According to the plaintiff, the defendant's pita chips contain enriched wheat flour, niacin, thiamine mononitrate, and folic acid, which plaintiff alleges are synthetic, artificial, and/or heavily processed unnatural ingredients. (*Terrazzino v. Wal-Mart Stores, Inc.*, No. 1:17-cv-01731 (N.D. Ill. complaint filed on Mar. 3, 2017)).

Putative nationwide class action, with multi-state and Illinois-only subclasses, filed against Lifeway Foods, Inc., in the U.S. District of the Northern District of Illinois, alleging causes of action for breach of express warranty, unjust enrichment, negligent misrepresentation, and violation of the consumer protection laws of Illinois, California, Florida, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New York, Rhode Island, and Wisconsin. Plaintiff asserts that the defendant misleadingly and falsely advertises and labels its kefir product, a cultured milk smoothie, as 99% lactose free. According to the plaintiff, the kefir product actually contains up to 4% lactose, as shown in a study funded by the defendant. (*Block v. Lifeway Foods, Inc.*, No. 1:17-cv-01717 (N.D. Ill. complaint filed on Mar. 3, 2017)).

Putative class action filed in the U.S. District Court for the Northern District of California against Craft Brew Alliance, Inc. regarding advertising for "Kona Brewing Company" beer. According to the plaintiffs, the defendant misled consumers into believing that the beer was brewed in Hawaii when it fact it was brewed in Oregon, Washington, Tennessee, and New Hampshire. Plaintiffs allege violations of California's False Advertising Law, Consumer Legal Remedies Act, and Unfair Competition Law. (*Cilloni v. Craft Brew Alliance, Inc.*, No. 5:17-CV-01027 (N.D. Cal. complaint filed Feb. 28, 2017)).

Putative class action filed in the U.S. District court for the Eastern District of California against Nature's Elite Inc., Gold Elements Valencia, Inc., and Premier Retail Group regarding advertising for "Gold Elements" skincare products. Plaintiffs allege that the defendants falsely claim that the products are capable of providing non-surgical results comparable to a facelift, with results lasting fifteen years. Plaintiffs allege violations of the California Consumer Legal Remedies Act, False advertising Law, and Unfair Competition Law. (*Young v. Nature's Elite, Inc.*, No. 2:17-CV-00421 (E.D. Cal. complaint filed Feb. 24, 2017)).

Putative nationwide class action filed in the U.S. District Court for the Northern District of Illinois against Rust-Oleum Corp. alleging violations of, among other things, the Oregon Unlawful Trade Practices Act and the Wisconsin Deceptive Trade Practices Act. According to the complaint, the defendant misrepresented that its "Painter's Touch Ultra Cover 2X Spray Paint" was designed with "double cover technology" to provide "twice the coverage in a single pass," so that "your project will be done in half the time at half the cost of competitive brands." Plaintiff alleges that the product's name, labeling, packaging, website, and brochures are all misleading, and cites to a decision by the National Advertising Division recommending that the defendant discontinue the relevant claims. (*Leggett v. Rust-Oleum Corp.*, No. 17-cv-01449 (N.D. Ill. complaint filed on Feb. 24, 2017)).

Putative nationwide class action filed in the U.S. District Court for the Central District of California against HSBC Bank USA alleging violations of California's False Advertising and Unfair Competition Laws. According to the complaint, the defendant falsely advertised that it would provide consumers $100 when they refer other consumers to HSBC and they open an advanced or premier account. Plaintiff alleges that they opened an account that met all applicable requirements, including a $10,000 funding requirement, and referred his wife, but nonetheless was unable to obtain the promised funds. (*Wolff v. HSBC Bank USA, Nat'l Ass'n.*, No. 17-cv-01552 (C.D. Cal. complaint filed on Feb. 24, 2017)).