SECTION OF

# ANTITRUST LAW

**Promoting Competition**
**Protecting Consumers**

**The Advertising Disputes & Litigation and Consumer Protection Committees'**

**RECENT LITIGATION DEVELOPMENTS**

**[Cases from March 30 to April 11, 2017]**

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## RECENT DECISIONS

### Lanham Act and Other Competitor Actions

The U.S. District Court for the Southern District of California denies defendant National Strength and Conditioning Association's ("NSCA") motion for interlocutory appeal because the NSCA failed to establish that "this [was] an exceptional case warranting an override of the general policy disfavoring piecemeal appeals." The plaintiff, CrossFit, Inc. ("Crossfit"), sued the NSCA, alleging claims of false advertising under the Lanham Act and the California Business and Professions Code, unfair competition, and common law trade libel. The first three causes of action can be pursued only if the speech is considered commercial speech. The NSCA moved for summary judgment on these claims, asserting that the speech at issue was not commercial speech. The Court denied the motion and NSCA moved for certification of the issue of whether a court may consider more than just the speech itself in determining whether it does more than propose a commercial transaction. After recounting the standard for certification, the court found that NSCA failed to meet the third prong, namely that "'an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" The Court found this element not met because Crossfit would still proceed to trial on its common law trade libel claim, which essentially required the same evidence and proof as the Lanham Act claims. As such, even if NSCA were successful on appeal, it would not shorten or hasten the resolution of the litigation. Therefore, the court denied the motion. (*Crossfit, Inc. v. Nat'l Strength and Conditioning Ass'n*, No. 14cv1191, 2017 WL 1215830 (S.D. Cal. Apr. 3, 2017)).

The U.S. District Court for the District of Massachusetts denies plaintiff/counterclaim defendant Spruce Environmental Technologies, Inc.'s motion for partial summary judgment in a lawsuit alleging false advertising of fans used in radon extraction. Spruce and competitor Festa Radon Technologies Co. accuse each other of violating the Lanham Act and Massachusetts consumer protection statutes by falsely advertising their respective or the other's radon extraction fans. Specifically, Spruce alleges that Festa falsely advertised the color of Spruces fans, Festa's Energy Star certification, and Festa's Home Ventilating Institute ("HVI") certification; Festa claims that Spruce falsely advertised Spruce fans' compliance with outdoor use standards. The

court denied summary judgment on Festa's representation of Spruce's fan color, finding genuine issues of material fact as to the advertisement picture's falsity, materiality, and likelihood of Spruce's harm. The court also denied summary judgment on the Energy Star claim on the grounds that Spruce offered no evidence on injury, and that Spruce was barred from judgment on the claim due to unclean hands, as the court had enjoined Spruce a year previously from claiming its own fans were Energy Star certified. As for Spruce's HVI membership claims, the court precluded summary judgment because it found that material issues of fact existed as to the falsity and materiality of Festa's HVI certification labels, which were allegedly difficult to read. Finally, the court denied summary dismissal of Festa's claim that Spruce advertised its fans as compliant with certain outdoor standards, where experts raised questions as to whether fan testing showed Spruce's compliance. Therefore, the court denied Spruce's motion for partial summary judgment. (*Spruce Envt'l Techs., Inc. v. Festa Radon Techs., Co.*, No. 15-11521, 2017 WL 1246327 (D. Mass. Apr. 3, 2017)).

**State Consumer Protection Laws**

The U.S. District Court for the District of Columbia grants the plaintiff's motion to remand to the Superior Court for the District of Columbia the Animal Legal Defense Fund's ("ALDF") case against Hormel Foods Corporation alleging that Hormel violated the District of Columbia Consumer Protection Procedures Act ("DCCPPA"). Specifically, ALDF claims that Hormel's "Natural Choice" advertising campaign misled consumers because "Hormel's meat products are not 'natural' in the way that its advertising campaign implies." In its decision to remand the case, the court rejected three jurisdictional arguments by Hormel. First, the court found that federal question jurisdiction did not exist in this case because the plaintiff sought relief under a D.C. statute and nothing in the complaint "necessarily raises" a federal question. Second, the court rejected Hormel's argument that the cost of complying with the requested injunctive relief and the cost of attorneys' fees raised the "amount in controversy" above the federal threshold requirement, and, therefore, found that the court did not have diversity jurisdiction because Hormel did not demonstrate that the amount in controversy exceeds $75,000. Third, the court held that it did not have jurisdiction over this case pursuant to the Class Action Fairness Act, because ALDF did not bring the case as a class action. (*Animal Legal Defense Fund v. Hormel Foods Corp.*, No. 16-1575, 2017 WL 1283411 (D.D.C. Apr. 5, 2017)).

The U.S. District Court for the Middle District of Florida grants in part and denies in part the defendant-money processor's motion to dismiss. Plaintiff alleged that the defendant overcharged him for processing his online payment. He alleged, among other things, violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). Plaintiff's complaint was based on a violation of Florida Statute Section 560.204 which prohibits a person from engaging in the activity or money transmitter without first obtaining a license. The court dismissed the counts regarding violation of this statute because there is no private right of action to enforce this statute and violation of this statute was not a per se FDUTPA violation. (*Cross v. Point and Pay, LLC*, No. 6:16-cv-1182, 2017 WL 1196676 (M.D. Fla. Mar. 31, 2017)).

The U.S. District Court for the District of New Jersey denies in part and grants in part a motion to dismiss filed by FedEx Ground Package Systems in a suit brought by its New Jersey independent

contract delivery drivers alleging that FedEx made misrepresentations about the nature of the employment and the value of the "proprietary and entrepreneurial interest in the delivery routes." The court found that the plaintiffs did not waive statutory claims under the New Jersey Consumer Fraud Act ("NJCFA") despite the existence of a Pennsylvania forum selection clause because the Third Circuit generally does not construe a plaintiff's general assent to a choice of law provision as a waiver of the right to pursue statutory claims. The court, then, dismissed plaintiffs' claims under the NJCFA because employment relationships are not governed by that law. Business opportunity schemes are similarly not cognizable claims under the NJCFA. The court, however, denied dismissal of the plaintiffs' common law fraud claims, finding that the alleged misrepresentations were made to induce the plaintiffs to enter into the contracts and, thus, were not barred by the economic loss doctrine. (*Carrow v. Fedex Ground Package Sys., Inc.*, No. 16-3026, 2017 WL 1217119 (D.N.J. Mar. 30, 2017)).

**Consumer Class Actions**

The U.S. District Court for the Southern District of California grants the defendant's motion to dismiss the plaintiff's second amended class action complaint. Plaintiff claims that the defendant is engaging in unfair competition because it is selling a lotion as an unapproved drug. The lotion has a claim on the bottle that it improves skin's firmness in as little as two weeks. The court dismissed the claim and held that the plaintiff had no standing and fails to establish that the amount in controversy exceeds $5,000,000. The court explained that the plaintiff did not plausibly allege the causation or reliance necessary to establish standing. The court further stated that the plaintiff had not provided the court plausible facts from which it could infer that $5,000,000 amount in controversy was on the table. Finally, the court denied the plaintiff's request to amend and dismissed the action with prejudice because the court "may exercise its discretion to deny leave to amend due to undue delay," "repeated failure to cure deficiencies by amendments previously allowed," as well as "undue prejudice to the opposing party." (*Franz v. Beiersdorf, Inc.*, No. 14cv2241, 2017 WL 1237902 (S.D. Cal. April 4, 2017)).

The U.S. District Court for the District of Connecticut grants summary judgment to defendant Direct Energy Services, LLC. Defendant is an electricity supplier that purchases energy from wholesalers and contracts with consumers to sell it to them at a certain price. Plaintiff alleged defendant's energy pricing scheme that offered consumers fixed rate contracts for a certain term and variable monthly rates thereafter violated the state unfair trade practices laws of Connecticut and Massachusetts. The court rejected these allegations, finding that the contract language was not deceptive and accurately disclosed the details of the pricing program. The court, therefore, granted summary judgment to the defendant as to all claims, rendering moot the plaintiff's class certification motion. (*Richards v. Direct Energy Servs., LLC*, No. 3:14-CV-1724, 2017 WL 1234105 (D. Conn. Mar. 31, 2017)).

## RECENT FILINGS

### Consumer Class Actions

Putative nationwide class action, with California-only subclass, filed against AM Retail Group, Inc. d/b/a Wilson's Leather in the U.S. District Court for the Southern District of California, alleging causes of action for unjust enrichment and violations of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act, as well as other similar state consumer protection statutes. Plaintiff asserts that the defendant falsely advertises its leather products as being sold at a discount in its retail outlet stores. According to plaintiff, the "ticket" price defendant compares its "sale" price to is a fake price at which the product is never sold, including during the three months prior as required by California law. (*John v. AM Retail Group, Inc.*, No. 3:17-cv-00727 (S.D. Cal. complaint filed Apr. 11, 2017)).

Putative nationwide class action, with California-only subclasses, filed against Odwalla, Inc. and The Coca-Cola Company, alleging claims for violation of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act, removed from the Superior Court of California (Los Angeles County) to the U.S. District Court for the Central District of California. Plaintiff asserts that the defendants misleadingly label their juice products as "no sugar added." According to the plaintiff, the defendants' products do not comply with federal regulations governing the use of a "no sugar added" claim because the products do not resemble or substitute for a food that normally contains added sugars. (*Wilson v. Odwalla, Inc., et al.*, No. 2:17-cv-02763 (C.D. Cal. complaint removed on Apr. 11, 2017)).

Putative nationwide class action filed in the U.S. District Court for the Central District of California against Asahi Beer U.S.A. regarding the advertising of "Asahi Super Dry" beer. Plaintiff alleges that advertising and labeling of the beer – including Japanese characters on the product label – convey that Asahi beer is made in Japan, when, in fact, it is made in Canada. Plaintiff alleges violations of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act, as well as breaches of implied warranty, fraud, intentional and negligent misrepresentation, breach of contract, and unjust enrichment/quasi-contract. (*Shalikar v. Asahi Beer U.S.A., LLC*, No. 2:17-CV-02713 (C.D. Cal. complaint filed Apr. 10, 2017)).

Putative action filed in the U.S. District Court for the Northern District of California against Comcast Corp. related to advertising for "Comcast Gateway" routers. Plaintiff alleges that Comcast's advertising conveys that the routers provide hybrid wireless and modem services for customers at a high level of performance when, in fact, the routers are functionally unreliable and defective such that using them results in consumers receiving subpar Internet service at a level well below the quality promised by the defendant. Plaintiff alleges violations of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. (*Trout v. Comcast Corp.*, No. 3:17-CV-01912 (N.D. Cal. complaint filed Apr. 6, 2017)).

Putative nationwide class action filed in the U.S. District Court for the Central District of California against Mazda Motor of America, Inc. alleging violations of California's Unfair

Competition Law and Consumer Legal Remedies Act, as well as the Magnuson-Moss Warranty Act. According to the complaint, the defendant markets and sells a navigation software that purports to offer "real-time" or live traffic alerts as an add-on tech package to its 2016 model year cars. Plaintiff alleges that purchasers and lessees were unable to access the software as advertised and that the defendant failed to notify consumers of the lack of functionality. (*Lewand v. Mazda Motor of Am, Inc.*, No. 17-cv-00620 (C.D. Cal. complaint filed on Apr. 5, 2017)).

Putative nationwide class action filed in the U.S. District Court for the Eastern District of Michigan against MusclePharm Corp. alleging breach of express and implied warranties, and negligent and intentional misrepresentation. According to the complaint, the defendant deceptively represented that its dietary supplement "MusclePharm Glutamine" would "Enhance Muscle Growth & Recovery" and lead to "Faster Recovery," and that it would "Aid in Muscle Growth," "Reduce catabolism and support an anabolic environment," and "Minimize[] muscle catabolism (breakdown)." Plaintiff alleges that scientific studies have demonstrated that glutamine supplementation is ineffective and fails to deliver any of the represented benefits. (*Yeldo v. MusclePharm Corp.*, No. 17-cv-11011 (E.D. Mich. complaint filed on Mar. 30, 2017)).