SECTION OF

ANTITRUST LAW

Promoting Competition
Protecting Consumers

The Advertising Disputes & Litigation and Consumer Protection Committees'

RECENT LITIGATION DEVELOPMENTS

[Cases from April 12 to 30, 2017]

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RECENT DECISIONS

Lanham Act and Other Competitor Actions

The U.S. District Court for the Northern District of Illinois grants in part and denies in part plaintiff Dyson, Inc.'s summary judgment motion in an action against Sharkninja Operating LLC and Sharkninja Sales Company (collectively, "Sharkninja") regarding Sharkninja's vacuum advertising. Dyson brought claims under the Lanham Act, the Illinois Deceptive Practices Act, and Illinois common law stemming from Sharkninja's advertisements based on tests conducted by a laboratory using ASTM F608. Ruling on Dyson's motion, the court denied Dyson's motion for summary judgment based on its argument that that the laboratory tests were not "independent" because Sharkninja had paid the laboratory nearly $3 million over three years. The court held that Dyson failed to put forth evidence that the payments were material to the laboratory or affected its judgment. With respect to Sharkninja's comparison to Dyson's "best vacuum" advertising, the court denied the motion because Sharkninja identified what it believed was Dyson's "best vacuum" in its advertising, but Dyson put forth no evidence that a different vacuum became its "best vacuum" during the relevant time period. (*Dyson, Inc. v. Sharkninja Operating LLC*, No. 1:14-cv-09442, 2017 WL 1493677 (N.D. Ill. Apr. 26, 2017)).

The U.S. District Court for the District of Oregon grants in part and denies in part the defendant's motion to dismiss the plaintiff's complaint alleging, among other things, violations of the Lanham Act and the Oregon Unlawful Trade Practices Act. The dispute centers on the defendant's marketing of jointly-developed chemical analysis products and technologies, allegedly in violation of an agreement between the parties in which the defendant granted the plaintiff an exclusive and perpetual license to use such products and technologies for certain purposes. The court first dismissed with prejudice the count in the complaint alleging false advertising in violation of the Lanham Act, finding that the plaintiff "is not within the zone of interests protected by the statute" because it failed "to allege an injury to a commercial interest in reputation or sales." Next, the court dismissed with prejudice the plaintiff's claim for violation of the Oregon Unlawful Trade Practices Act on the basis that the plaintiff did not have standing to bring a case under the statute because it is "limited to consumer actions and Plaintiff is not a consumer of Defendant's products." The court also rejected the defendant's alternative request to transfer venue to the District of New

Jersey, finding that on balance of multiple factors (convenience to the parties and witnesses, cost of litigation, local interest in the controversy, ease of access to evidence), the defendant "failed to make a showing that would overcome the deference awarded to Plaintiff's choice to litigate this matter in its home forum." (*Pulse Health, LLC v. Akers Biosciences, Inc.*, No. 3:16-cv-01919, 2017 WL 1371272 (D. Or. Apr. 14, 2017)).

State Consumer Protection Laws

The U.S. Court of Appeals for the Fourth Circuit affirmed the dismissal of Wall & Associates, Inc.'s ("Wall") false advertising and related claims against a group of Better Business Bureaus. Wall had alleged that the Better Business Bureau defendants falsely advertised their letter grade business rating system as uniform and objective when the system was truly subjective and arbitrary, and that Wall was harmed by consumers believing the alleged misrepresentations. The court, however, found that Wall failed to identify any loss of sales or goodwill resulting directly from reliance on any false or misleading misrepresentations about the letter grade rating system. Therefore, the court affirmed the dismissal of Wall's action for failure to state a claim on the grounds that Wall failed to adequately allege proximate cause between its alleged injury and the defendants' alleged conduct. (*Wall & Assocs., Inc. v. Better Business Bureau of Cent. Virginia, Inc.*, No. 16-1819, 2017 WL 1437215 (4th Cir. Apr. 24, 2017)).

The U.S. District Court for the District of Columbia denies the plaintiffs' motion to remand and grants the defendant's motion to dismiss the plaintiffs' representative claims that a specialized online education program offered by the defendant is of poor quality. Plaintiffs asserted violations of the District of Columbia Consumer Protection Procedures Act ("CPPA"), unjust enrichment, fraudulent misrepresentation, and negligent misrepresentation. The case was filed initially in the D.C. Superior Court. Defendant removed the action to the federal court under the Class Action Fairness Act ("CAFA"). The court found the defendant had established that the CAFA's requirements were satisfied. The court further found that the plaintiffs' claims were all time-barred by the CPPA's three-year statute of limitations. (*Bradford v. George Washington Univ.*, No. 16-858, 2017 WL 1383653 (D.D.C. Apr. 18, 2017)).

Consumer Class Actions

The U.S. Court of Appeals for the Ninth Circuit affirms dismissal of a consumer class action false advertising complaint against SanMedical International, a manufacturer of over-the-counter supplements. Plaintiff sued under California consumer protection laws, alleging that the defendant falsely advertised its product, "SeroVital," as clinically tested and as providing a 682% mean increase in Human Growth Hormone, and falsely advertised peak growth hormone levels as beneficial to, among other things, skin, muscles, bones, and energy. The district court ruled that the plaintiff sued under a theory that defendant lacked substantiation for these advertisements, but that lack-of-substantiation allegations are reserved to the government. A private plaintiff must allege facts that disprove the advertisements. The district court ruled that plaintiff failed to do that. The Ninth Circuit agreed. First, California consumer protection laws do not provide a private cause of action demanding substantiation for advertising. Second, the plaintiff's allegations that the product attribute claims were false were conclusory and provided no facts to support or prove

falsehood. "Instead, each . . . is simply an allegation that defendant's marketing claims lack scientific substantiation." The Ninth Circuit rejected the plaintiff's attempt to incorporate federal Lanham Act law, in which the burden of proof shifts to a defendant to substantiate its "establishment claims," *i.e.*, advertisements that claim to be supported by testing or scientific research. Rather, under California law the burden of proof remains with a private plaintiff to allege that advertising is false or misleading, not merely unsubstantiated. (*Kwan v. SanMedical Int'l, LLC*, -- F.3d --, No. 15-15496, 2017 WL 1416483 (9th Cir. Apr. 21, 2017)).

The U.S. Court of Appeals for the Ninth Circuit reverses and remands several orders by the district court dismissing claims, denying certification, denying summary judgment in the plaintiff's favor, and granting summary judgment in the defendant Gerber Products Company's favor. Plaintiff brought a class action alleging that labels on certain baby food products included claims about nutrient and sugar content that were impermissible under Food and Drug Administration ("FDA") regulations, which were incorporated into California law. The Ninth Circuit first found the district court erred in dismissing the unjust enrichment claims and denying class certification because the class was not ascertainable based on two recent decisions of the Ninth Circuit that were decided after the district court's ruling. The Ninth Circuit also found the district court erred in finding that there was no genuine dispute of material fact regarding the plaintiff's deception claims for violation of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. The court found that, although the plaintiff's deception claims were unusual, even technically correct labels can be misleading. The plaintiff's theory of deception did not rely on proving Gerber's labels were false but rather that the combination of (a) the presence of the claims on Gerber's products (in violation of the FDA regulations) and (b) the lack of claims on competitor products (in compliance with the FDA) made Gerber's labels likely to mislead the public into believing that Gerber's products were of a higher quality than its competitors' products. The court found that, while it may be literally true that Gerber's products are "As Healthy As Fresh," due to external facts – that Gerber does not comply with FDA regulations that otherwise prevent its competitors from making the same claim – Gerber's labels mislead in their implications. The court found that a reasonable jury observing Gerber's labels and comparing them to those of its competitors could rationally conclude that Gerber's labels were likely to deceive members of the public. (*Bruton v. Gerber Prods. Co.*, No. 15-15174, 2017 WL 1396221 (9th Cir. Apr. 19, 2017)).

The U.S. District Court for the District of New Jersey grants defendant Bayer Healthcare LLC's motion for summary judgment in this putative class action regarding dietary supplements. Here, the plaintiffs filed the action on behalf of themselves and all others similarly situated who purchased "Phillips' Colon Health" ("PCH"), which is a probiotic dietary supplement that plaintiffs alleged was falsely and misleadingly advertised as helping certain digestive health symptoms, when, in fact, the plaintiffs allege that they did not. The court reasoned that the plaintiffs' consumer protection claims hinged on whether they have presented proof of falsity regarding Bayer's claims that PCH promotes overall digestive health and prevents against certain digestive health symptoms, rather than merely showing that the claims are unsubstantiated. The court found that the plaintiffs failed to meet their burden of showing that the challenged advertising is actually false. Plaintiff's expert offered only a lack of substantiation theory (or, "[a]t worse, [. . .] pure speculation in light of the fact that [plaintiffs' expert] never clinically tested his views"), and his interpretation of certain of the studies to which he pointed did not prove actual falsity because they related to a different condition from those in a healthy population. The final study

to which the plaintiffs referred only tested adults between 65 and 80, so did nothing to demonstrate that PCH does not curb digestive symptoms in people outside this age group. Thus, the court granted summary judgment, finding that "Plaintiffs failed to present competent evidence to create a genuine issue of material fact that Bayer's claims that PCF promotes overall digestive health and helps defend against occasional constipation, diarrhea, gas, and bloating are actually false or misleading." (*In re Bayer Phillips Colon Health Probiotics Sales Practices Litig.*, No. 11-cv-3018, 2017 WL 1395483 (D.N.J. Apr. 17, 2017)).

Federal Trade Commission (FTC) Litigation Decisions

The U.S. District Court for the District of Columbia grants defendant Federal Trade Commission's ("FTC") motion for summary judgment in an action challenging the validity of a November 2016 opinion letter by the FTC finding that telemarketing calls using soundboard technology are subject to the general prohibition placed on traditional robocalls, and mandated that telemarketing companies that use soundboard technologies come into compliance with the relevant rules by May 12, 2017. (The November 2016 letter reversed FTC policy announced in 2009 that calls made using soundboard technology were not subject to robocall regulation.) Plaintiff, a trade association that represents manufacturers and users of soundboard technology, alleged that the November 2016 opinion letter was invalid because (1) it amounted to a "legislative rule" that should have been enacted only after a notice and comment period pursuant to the Administrative Procedure Act ("APA"), and (2) it is an unconstitutional restriction on speech because it distinguishes between different types of callers. Initially, the court observed that the November 2016 letter is a final, reviewable action by the FTC because it has an "immediate and practical impact" on the telemarketing industry, "sets the manner in which" the industry does business, and "determines the rights and obligations" of the affected parties. However, after making these observations, the court rejected both substantive arguments put forth by the plaintiff. First, the court found that the November 2016 letter is an "interpretive rule" rather than a "legislative rule" because "it communicates to the telemarketing industry the agency's view that an existing regulation now applies to a particular form of telemarketing technology as currently used by the industry." The court further noted that the fact that the November 2016 letter substantially deviates from the FTC's position in 2009 "did not change the fundamental character of the agency's action and transform an interpretive rule into a legislative rule." Next, the court rejected the plaintiff's argument that the November 2016 is an unlawful content-based restriction on speech as applied to entities that engage in charitable fundraising (because callers requesting first-time charitable donations are regulated differently than callers soliciting donations from prior donors or members). The court found that the regulation is content-neutral and, therefore, subject to intermediate scrutiny because it "distinguishes calls based on who the recipient is . . . not on what is being said." Under this test, the court held that the FTC's restriction on first-time charity donation calls as applied in the soundboard technology context is permissible under the First Amendment because it is "'narrowly tailored to serve a significant government interest' and 'leave[s] open ample alternative channels' of communication." (*Soundboard Ass'n v. FTC*, No. 17-cv-00150, 2017 WL 1476116 (D.D.C. Apr. 24, 2017)).

The U.S. Court of Appeals for the Second Circuit affirms the district court's imposition of civil contempt sanctions over challenges of a failure of due process and affirms the district court's denial of a motion to compel discovery. These affirmed decisions were part of subsequent proceedings in a matter brought by the FTC against BlueHippo Funding in which a final stipulated judgment and permanent injunction order ("Consent Order") had been entered, and a contempt order for violation of the Consent Order and an award of sanctions had later been imposed. The FTC sued BlueHippo for its sales and marketing practices of selling consumers computers on credit if the consumer made thirteen consecutive payments and signed an installment contract. If the thirteen payments were made, the consumer would then get the computer and the balance of the purchase price would be financed and paid over time. Skipping one of the first thirteen payments forfeited the financing option and turned the purchase into a lay-away or converted the payments already made into store credit. In the contempt proceedings, the FTC was entitled to a presumption that consumers relied on BlueHippo's misrepresentations. Accordingly, the FTC then was entitled to seek full compensation for consumers, calculated using BlueHippo's gross receipts as a "baseline." BlueHippo could then rebut the baseline amount by showing that certain amounts should be offset. BlueHippo argued that it should get an offset for consumers who did not rely on the misrepresentations, *i.e.*, get an offset by rebutting the consumer reliance presumption to which FTC was entitled. At issue now, BlueHippo sought – but was not permitted to pursue – discovery to support its position that consumers in some states were not misled, and, therefore, that an offset was appropriate for sales to such consumers. The Second Circuit ruled that, because the FTC was entitled to the presumption of consumer reliance and the injury to consumers occurred at the moment of BlueHippo's misrepresentations, the district court did not exceed its discretion by denying the discovery. Such discovery was irrelevant to establish offsets, which would be shown by such things as payments already made to compensate injured consumers, *i.e.*, actual offsets to BlueHippo's gross receipts. BlueHippo also argued that it was entitled to due process – beyond notice and an opportunity to be heard – in the underlying proceedings imposing civil sanctions for violation of the Consent Order. The Second Circuit concluded that the sanctions imposed were civil compensatory sanctions and that the underlying Consent Order was simple (not detailed or complex) and, accordingly, notice and an opportunity to be heard is all that is required to comply with due process. (*FTC v. Rensin*, -- Fed. App'x --, 2017 WL 1363866 (2d Cir. Apr. 12, 2017)).

Consumer Financial Protection Bureau (CFPB) Litigation Decisions

The U.S. Court of Appeals for the District of Columbia affirms the district court's denial of a petition filed by the Consumer Financial Protection Bureau ("CFPB"). The CFPB had filed a petition seeking an order requiring the Accrediting Council for Independent Colleges and Schools ("ACICS") to comply with its Civil Investigative Demand ("CID"). ACICS is a non-profit organization that accredits for-profit colleges in the United States. The stated purpose of the agency's investigation was to determine whether ACICS had engaged in unlawful acts or practices in connection with its accreditation processes. The district court denied the petition, holding that the CFPB did not have the statutory authority under the Consumer Financial Protection Act to regulate the accrediting process of for-profit colleges. The Court of Appeals affirmed on more narrow grounds, holding that the CID failed to advise ACICS of the nature of the conduct constituting the alleged violation and the provision of law applicable to such violation. The court, therefore, affirmed the district court's denial of the CFPB's petition to enforce the CID. (*CFPB v.*

Accrediting Council for Indep. Colleges & Sch., No. 16-5174, 2017 WL 1422488 (D.C. Cir. Apr. 21, 2017)).

RECENT FILINGS

Consumer Class Actions

Putative nationwide class action, with California-only subclass, filed against Kiss My Face, LLC in the U.S. District Court for the Central District of California, alleging causes of action for, among other things, fraud, negligent misrepresentation, and violations of California's Unfair Competition Law, Consumer Legal Remedies Act, and False Advertising Law. Plaintiff asserts that the defendant mislabels its sunscreen, body lotion, and body wash products as "naturally nourishing," "nourish naturally," "100% Natural Minerals," or "Natural Mineral Protection." According to the plaintiff, these statements are false because the products contain the artificial and synthetic ingredients phenoxyethanol, ethylhexyglycerin, and/or glycerin. (*Ikeda v. Kiss My Face, LLC*, No. 8:17-cv-00751 (C.D. Cal. complaint filed on Apr. 26, 2017)).

Putative nationwide class action, with Illinois-only subclass, filed against Wilson Sporting Goods, Co. in the U.S. District Court for the Northern District of Illinois, alleging causes of action for, among other things, violation of Illinois consumer protection law. Plaintiff asserts that the defendant falsely labels its baseball bats in its premium "DeMarini" line as being compliant with USSSA standards. According to the plaintiff, these bats do not comply with USSSA standards and are unsuitable for use in leagues requiring USSSA-compliant bats. (*Sheeley v. Wilson Sporting Goods, Co.*, No. 1:17-cv-03076 (N.D. Ill. complaint filed Apr. 24, 2017)).

Putative nationwide class action filed in the U.S. District Court for the Southern District of Florida against Tabatchnick Fine Foods, Inc. regarding advertising of its soups as "all natural." In particular, the plaintiff alleges that the soups contain GMO soy, GMO soy-derivatives, GMO corn, GMO corn-derivatives, and GMO canola. Plaintiff alleges, among other things, violation of the Florida Deceptive and Unfair Trade Practices Act, and negligent misrepresentation. (*Rasmaran v. Tabatchnick Fine Foods, Inc.*, No. 0:17-CV-60794 (S.D. Fla. complaint filed Apr. 24, 2017)).

Putative nationwide, California, Florida, and Indiana class action filed in the U.S. District Court for the Northern District of California against Google Inc. and Huawei Device USA regarding advertising claims for "Google Nexus" phones. In particular, the plaintiffs allege that the defendants falsely advertise the superb battery life and performance of the phones, when, in fact, the phones carry a bootloop defect and a battery drain defect. Plaintiffs allege, among other things, violation of California's Unfair Competition Law, Consumer Legal Remedies Act, False Advertising Law, the Florida Deceptive and Unfair Trade Practices Act, and the Indiana Deceptive Consumer Sales Act. (*Makchareonwoodhi, et al v. Google, Inc., et al.*, No. 5:17-CV-02185 (N.D. Cal. complaint filed Apr. 19, 2017)).

Putative nationwide class action filed in the U.S. District Court for the Northern District of California against Comcast Corp. and Comcast Cable Communications LLC alleging violations of California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies

Act. According to the complaint, the defendants falsely advertise their cable television service packages for much lower prices than it actually charges because it excludes from the advertised price of packages certain allegedly "invented fees," like the Broadcast TV Fee and the Regional Sports Fee. Plaintiff alleges that the defendant's marketing materials and responses to customer inquiries directly state or imply that all monthly non-equipment fees are government-related when such fees are actually discretionary programming double-charges. (*Loomis v. Comcast Corp, et al.*, No. 17-cv-02110 (N.D. Cal. complaint filed on Apr. 14, 2017)).

Putative nationwide class action filed in the U.S. District Court for the District of Minnesota against DealDash, Inc. alleging violations of Minnesota's Consumer Fraud Act, False Statement in Advertisement Act, and Unlawful Trade Practices Act. According to the complaint, the defendants deceptively offer consumers the chance to win brand name merchandise for a small fraction of the retail price, but actually offer consumers cheap, generic brands that do not sell in substantial volumes anywhere except DealDash and its affiliates. Plaintiff further alleges that the defendant deceptively advertises recent "Winners" by downplaying costs expended and overstating the value of products won. (*Pstikyan v. DealDash, Inc.*, No. 17-cv-01164 (D. Minn. complaint filed on Apr. 13, 2017)).