SECTION OF

ANTITRUST LAW

Promoting Competition
Protecting Consumers

PRIVATE ADVERTISING LITIGATION (PAL)
RECENT LITIGATION DEVELOPMENTS
[Cases from September 2 to 13, 2010]

Prepared for the PAL Committee by Dan Blynn of Kelley Drye & Warren LLP; Ellie Boragine of Weil Gotshal & Manges; Hesham Sharawy of Keller and Heckman; Dale Giali of Howrey LLP; Alan Veronick of Arnold & Porter; and Aaron Blynn of Genovese Joblove & Battista, PA.

RECENT DECISIONS

Lanham Act

A jury sitting in the U.S. District Court for the Central District of California finds that defendant Welch Foods Inc. intended to deceive consumers by marketing a white grape and pomegranate juice as "100 percent white grape pomegranate juice," and by including pictures of pomegranates on the front label, when the product had relatively little pomegranate juice. The jury, however, found that plaintiff POM Wonderful LLC was not injured by the deception. (*POM Wonderful LLC v. Welch Foods Inc.*, No. 09cv567 (C.D. Cal. Sept. 13, 2010)).

The U.S. District Court for the District of Columbia, in an action alleging, *inter alia*, false light, unfair trade practices, and violations of the Lanham Act, grants the individual defendant, Sonya Jenkins's motion to dismiss. The court held that the plaintiff offered no "facially plausible" allegation, contention, or implication that Ms. Jenkins, the Vice President of Human Resources for the Washington Times, would be responsible for the conduct resulting in the plaintiff's alleged injuries. (*Miniter v. Sun Myung Moon*, No. 09-C-2330 (RMU), 2010 WL 3488232 (D.D.C. Sept. 7, 2010)).

The U.S. District Court for the Northern District of California grants the plaintiff's unopposed motion for $245,754 in attorney's fees and $28,754 in costs incurred prosecuting claims under the Copyright Act and Lanham Act. The fee and cost award followed the court's grant of summary judgment and award of statutory damages of $650,000 based on defendant's willful infringement. (*Symantec Corporation v. Logical Plus, Inc.*, No. C 06-7963 (N.D. Cal. Sept. 7, 2010)).

The U.S. Court of Appeals for the Federal Circuit holds that the district court erred in dismissing the defendants' counterclaims as to the validity and enforceability of plaintiff's trademark and abused its discretion by excluding defendants' evidence of damages in relation to their Lanham Act unfair competition counterclaims. (*Green Edge Enters., LLC v. Rubber Mulch Etc., LLC*, Nos. 2009-1455, 2009-1479, 2010 WL 3464414 (Fed. Cir. Sept. 7, 2010)).

State Consumer Protection and Other Statutes

The Court of Appeals of Indiana affirms grant of summary judgment in favor of the Indiana state lottery with respect to the class action plaintiffs' claims under Indian's Deceptive Consumer Sales Act on grounds that the lottery's listing on its website of remaining prizes available for scratch-off games was a permissible promotion and advertisement of lottery under state law. (*Koehlinger v.*

State Lottery Comm'n of Ind., No. 49A02-1003-CT-247, 2010 WL 3478555 (Ind. Ct. App. Sept. 7, 2010)).

The U.S. District Court for the Southern District of Ohio, in a class action alleging that the defendant made false and deceptive representations regarding the efficacy of its Vicks DayQuil Cold and Flu Symptom Relief Plus Vitamin C, and that its Vicks NyQuil Cold and Flu Symptom Relief Plus Vitamin C products prevent, treat, or relieve the symptoms of the cold or flu, in violation of Ohio's and New Jersey's consumer protection statutes, as well as the Food, Drug & Cosmetics Act, grants the defendant's motion to dismiss the complaint with prejudice. The court held that plaintiffs had no standing, alleged no actual injury, failed to allege causation, obtained exactly what they bargained for, and had no private right of action under the Food, Drug & Cosmetics Act. (*Loreto v. Procter & Gamble Co.*, No. 09-C-815, 2010 WL 3471752 (S.D. Ohio Sept. 3, 2010)).

Trademarks

The Massachusetts Appeals Court affirms a jury verdict in the amount of $3.35 million plus $3.3 million in prejudgment interest in favor of the parents of a child who injured his hand on an escalator in China, against the U.S. trademark holder under whose license the escalator was manufactured. In a case of first impression in Massachusetts, the court held that a trademark licensor who participates substantially in the design, manufacture, or distribution of the licensee's products may be held liable as an apparent manufacturer. (*Lou v. Otis Elevator Co.*, 77 Mass. App. Ct. 571 (Mass. App. Ct. Sept. 3, 2010)).

Class Actions

The U.S. Court of Appeals for the Second Circuit vacates the district court's certification of a class and denial of summary judgment in a putative class action against a drug manufacturer for violations of RICO, state consumer protection laws, and common-law fraud based on the drug manufacturer's alleged misrepresentations to physicians about the efficacy and safety of one of its drugs. The putative class was composed of unions and insurers who paid for the prescriptions written to their insureds. Plaintiffs alleged that, as a result of the misrepresentations, they were required to pay for prescriptions that would not otherwise have been issued (a "quantity effect" theory) and that they had to pay excessive prices for those prescriptions. The court held that (1) plaintiff's excessive price theory was not susceptible to generalized proof to support the requisite finding of causation and (2) the district court erred in failing to consider individual claims under the plaintiff's quantity effect theory of injury when it ruled on the defendant's summary judgment motion. (*UFCW Local 1776 v. Eli Lilly and Co.*, Docket No. 09-0222-cv, 2010 WL 3516183 (2d Cir. Sept. 10, 2010)).

The U.S. District Court for the Northern District of California denies the defendant's motion to dismiss California consumer protection law claims in a putative class action alleging false advertising regarding the health benefits of omega-3 fatty acids in shelled walnuts. The court rejected the defendant's National Labeling and Education Act preemption argument, determining that plaintiff's claims that defendant's labels are "false or misleading in any particular" do not fall within the scope of the express preemption provision. The court rejected the defendant's preemption argument for the additional reason that the state law claims seek to impose labeling requirements

identical to federal law, which also takes the claims outside the scope of the express preemption provision. (*Zeisel v. Diamond Foods, Inc.*, No. C 10-1192 (N.D. Cal. Sept. 3, 2010)).

The U.S. District Court for the Central District of California grants the defendant's motion to dismiss California consumer protection law claims in a putative class action alleging false advertising regarding the trans fat and cholesterol content of margarine and graham crackers. The court held that the plaintiffs' state law claims, purporting to enjoin labeling statements that expressly are permitted under federal law relating to trans fat and cholesterol, are expressly preempted by the National Labeling and Education Act. (*Red v. The Kroger Co.*, No. 10cv1025 (C.D. Cal. Sept. 2, 2010)).

RECENT FILINGS

Federal Law

POM Wonderful LLC filed a complaint against the Federal Trade Commission in the U.S. District Court for the District of Columbia, seeking a declaratory judgment that the FTC (1) exceeded its authority by requiring the pre-approval of the Food and Drug Administration of health-related claims on food products based on the substantiation of two well-controlled clinical studies; (2) violates the First and Fifth Amendment rights of advertisers by requiring compliance with these new standards; and, (3) in establishing the standards, failed to comply with notice and comment rulemaking procedures. (*POM Wonderful LLC v. FTC*, No. 10cv1539 (D.D.C. complaint filed Sept. 13, 2010)).

Class Actions

Putative nationwide class action filed against ConAgra Foods, Inc. in the U.S. District Court for the Central District of California. The complaint pleads under California consumer protection laws and alleges that the defendant falsely and misleadingly markets its Fleishmann's Margarine and Healthy Choice frozen meal products as healthy, although they contain partially hydrogenated vegetable oil, which contain dangerous levels of trans fat, a toxic food additive. (*Park v. ConAgra Foods, Inc.*, No. 10cv6582 (C.D. Cal. complaint filed Sept. 2, 2010)). [This complaint is very similar to one filed and quickly dismissed in April 2010 by the same court. *See Lee v. ConAgra Foods, Inc.*, No 10cv421 (C.D. Cal. complaint filed April 6, 2010).]

Putative nationwide class action filed against LG Electronics USA, Inc. in the U.S. District Court for the District of New Jersey, alleging that LG Electronics "rigged" energy efficiency tests on its Kenmore Elite brand of refrigerators, and mislabeled the refrigerators as "ENERGY STAR®-Compliant." Plaintiff claims that LG Electronics' conduct violates New Jersey's Consumer Fraud Act. (*Walsh, et al. v. LG Elecs. USA, Inc.*, No. 2:10-cv-04499 (D.N.J. complaint filed on Sept. 2, 2010)).