ABA Section of Antitrust Law Consumer Protection Committee: Consumer Protection Update for the Month of April 2012

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AGENDA

1. FTC Developments
2. State AG Trends and Developments
3. NAD Developments
4. Private Litigation and State Law Developments

Defending Liberty
Pursuing Justice

1. FTC Developments

FTC v. Broadway Global Master, In-Arabia Solutions Inc., and Kirit Patel, (E.D. Cal.)

- Defendants were using various coercive tactics to collect debts on payday loans. Their **tactics** included making the following **misrepresentations**:
  - The consumer is delinquent on the loan;
  - Defendants are law enforcement or affiliated with a government agency;
  - The consumer is legally obligated to pay Defendants;
  - The consumer will be arrested or imprisoned for failure to pay Defendants; and
  - Defendants can or will take legal action against the consumer, including filing a lawsuit.

FTC v. Broadway Global Master, et al. (con't)

- FTC sought a **permanent injunction** and other **equitable relief** pursuant to Sections 13(b) and 19 of the FTC Act and also claims under Section 814 of the Fair Debt Collection Practices Act ("FDCPA").
- Relief:
  - TRO to prohibit Defendants from attempting to collect, collecting or assigning any debt they contend are owed them;
  - Defendants must provide notice of TRO on any website they used to collect debts;
  - Defendants' assets frozen and defendants prohibited from cashing any check or making any deposit derived from the alleged deceptive debt collection practices;

FTC v. Broadway Global Master, et al. (con't)

- Relief con't
  - Document preservation order; and
  - Defendants prohibited from releasing any consumer data.
- TRO was to expire on 4/18/12 with hearing on Preliminary Injunction on that day. TRO has been extended as hearing postponed.

FTC v. Hope for Car Owners, LLC, and Patrick Freeman (E.D. Cal.)

- Defendants were marketing and selling car loan debt relief services. Their **tactics** included the following **misrepresentations**:
  - Conveying that they would renegotiate or lower the consumers' car loan payments;
  - Boasting of their successes in securing lower loan payments for consumers;
  - Portraying that they had relationships with various motor vehicle lenders;
  - Providing a time frame for renegotiating or having modified the consumers' motor vehicle loan terms; and
  - Offering of either a full or partial refund to consumers for their services.

FTC v. Hope for Car Owners, LLC (con't)

- The FTC sought a **preliminary injunction** and other **equitable relief** pursuant to Section 13(b) of the FCT Act.
- The court held a hearing on the TRO on April 4. The Court issued the TRO which prevented Defendants from collecting any fees for solicited services to allegedly reduce or modify a consumers' vehicle car loan debt. The Court also set a date for a hearing on the FTC's preliminary injunction.
- Prior to the hearing, on April 16th, the parties presented to the court a Stipulated Preliminary Injunction.

FTC v. Hope for Car Owners, LLC, and Patrick Freeman (E.D. Cal.)

- The court entered the Stipulated Preliminary Injunction which provided the following relief:
  - Prohibition of marketing vehicle debt loan relief services or any product to provide such relief;
  - Prohibition of collecting any fees or payments for Defendants' marketed vehicle debt loan relief services or products;
  - Disablement of all websites used to market Defendants' deceptive services;
  - Suspension of all domain registrations;
  - Prohibition of disclosing consumer data; and
  - Preservation of all documents and records.

FTC v. Washington Data Resources, et al., (M.D. Fla.)

- Defendants (three corporate defendants and six individual defendants) engaged in marketing and selling of mortgage loan modification services to financially distressed homeowners using a combination of direct mail and script telemarketing.
- Their **tactics** included the following misrepresentations:
  - Conveying that in "in all or virtually all instances" they can reduce mortgage payments;
  - Portraying that they were either an agency of or affiliated with the government; and
  - Indicating that homeowners that agreed to the "program" were retaining legal counsel to assist with the loan modification.

FTC v. Washington Data Resources, et al., (con't)

- The FTC alleged violations of Section 5 of the FTC Act and the Telemarketing Sales Rule which both prohibit "unfair or deceptive acts or practices in or affecting commerce."
- In November 2009, a TRO was entered against each defendant.
- In early October 2011, there was a 7-day bench trial. Prior to trial the corporate defendants entered into a Consent Order with the FTC. Only the individual plaintiffs stood trial.

FTC v. Washington Data Resources, et al., (con't)

- The court found:
  - The 7 defendants formed a "comprehensive and continuing enterprise ('the Enterprise')";
    - The Enterprise consisted of a law firm, administrative services company, a marketing company, a payment collector, and an employee leasing company;
    - The Enterprise "operated solely as a middle-man, intermediary, or 'expediter' between the homeowner and lender and charged approx. $2,000 for their services;
  - The Enterprise was responsible for 1,938 homeowners, 555 of whom obtained a loan modification
    - Success rate ranging between 29% and 48%;
  - The Enterprise made material representations likely to mislead consumers into believing:
    - $2,000 fee would result in loan modification. The deceptive "net impression" was of a loan guarantee; and
    - They were retaining a law firm in their home state to assist with the loan modification.

FTC v. Washington Data Resources, et al., (con't)

  - Each of the Individual defendants directly participated in or had authority in controlling the Enterprise's deceptive practice.
- The FTC Act's Section 13(b) Equitable Relief:
  - Permits disgorgement measured by a defendants' unjust enrichment but prohibits a monetary award measured by the consumers' loss.
    - Enterprise's net revenue (**gross receipts – refunds = disgorgement**)
    - Individual defendants are only personally liable for portion of Enterprise's net revenue when they were actively participating in or directing the Enterprise
    - FTC must prove net revenue and then burden shifts to defendants to show the inaccuracy of the FTC's figure
  - Permanent Injunction awarded
    - FTC proved "cognizable danger" of a recurrent violation

2. State AG Trends and Developments

State AG Trends and Developments

Texas AG Charges Three U.S. Publishers with Antitrust Law Violations

- April 11, 2012 – Texas charged three of the largest book publishers and Apple Inc. with colluding to fix the sales prices of electronic books.
- To enforce the price fixing scheme, the publishers and Apple relied on contract terms that forced all e-book outlets to sell at the same price.
- Texas was joined by AK, AZ, CO, CT, IL, IA, MD, MO, OH, PA, PR, SD, TN, VT, and WV.

State AG Trends and Developments

Oklahoma-based Company Sued over "Do Not Call" Violations

- April 26, 2012 – Pennsylvania announced that an Oklahoma-based company must pay civil penalties and investigation costs stemming from violations of Pennsylvania's "Do Not Call" registry.
- According to the suit, the company hired a non-profit organization to call consumers and warn them about dangers of internet pornography and child predators, while also using the call to market services of the for-profit company.

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3. NAD Developments

NAD Developments

Case #5446 – Who Prefers Lasagna?

- Nestle USA challenged ConAgra's claim that its Marie Callender's lasagna was "Preferred over the leading Meat Lasagna."
- Nestle argued that ConAgra's ads were misleading since it was an "apples to oranges" comparison.
- ConAgra argued that prior NAD decisions allowed comparative advertisements of such different products within certain limitations.
- The NAD agreed with Nestle's challenges. ConAgra agreed to discontinue use of such advertisements.

NAD Developments

Case #5445 – Active vs. Passive

- LG Electronics challenged Samsung's claims that its "active" 3D televisions are superior to those using "passive" 3D technology, such as LG's.
- With both passive and active 3D technology, the viewer's brain combines the images to create the 3D effect.
- The NAD concluded that evidence provided by Samsung was not sufficient to provide a reasonable basis for message conveyed by the advertisements.
- Samsung agreed to comply with the decision.

4.Private Litigation and State Law Developments

Private Litigation – Motion to Dismiss Cases

Young v. Johnson & Johnson, No. 11-4580 (JAP), 2012 U.S. Dist. LEXIS 55192 (D.N.J. Apr. 19, 2012).

- Defendant was J&J, a manufacturer of butter/margarine substitutes (Benecol).
- Alleged to made false statements: "Proven to Reduce Cholesterol," and contains "NO TRANS FAT."
- These were allegedly false because the product contained "partially hydrogenated oil," which is "highly unhealthy" and, in fact, contains trans fats.
- Paid a premium; denied benefit of the bargain.

Young v. Johnson & Johnson (cont'd)

- Rule 12(b)(6) and 12(b)(1) motions to dismiss.
- Plaintiff did not allege that he suffered any "adverse health consequences" from consuming Benecol, or that he actually consumed it.
- Package disclosed that the product "contained an extremely low level of trans fat."
- FDA reg provides that trans fat levels less than 0.5 grams per serving "shall be expressed as zero." 21 C.F.R. § 101.9(c)(2)(ii).

Young v. Johnson & Johnson (cont'd)

- Plaintiff's purchase of Benecol "were not made pursuant to a contract…"
- Failed to show that J&J did not deliver the advertised benefits.
- Complaint relies on plaintiff's subjective views.
- Expressly preempted by the Nutrition Labeling and Education Act. 21 U.S.C. §343-1.
  - State cannot impose labeling requirements not identical to that required under the Act.
  - FDA requires that trans fat levels below 0.5 grams per serving "shall be expressed as zero."

Private Litigation – Motion to Dismiss Cases

- *Young's* preemption analysis cites to *Carrea v. Dreyer's Grand Ice Cream, Inc.*, No. 10-01044, 2011 U.S. Dist. LEXIS 6371 (N.D. Cal. Jan. 10, 2011), *aff'd*, *Carrea V. Dreyer's Grand Ice Cream, Inc.*, No. 11-15263, 2012 U.S. App. LEXIS 6851 (9th Cir. Apr. 5, 2012).
- Plaintiff challenged a "0g Trans Fat" statement located on the front of the box.
- Also argued that "Classic" and "Original Vanilla" implied that it was more wholesome than competing products.

Carrea v. Dreyer's Grand Ice Cream (cont'd).

- The product contains less than 0.5 grams of fat per serving; therefore, the label must express the amount as zero. Expressly preempted.
- "Implausible" that a reasonable consumer would interpret "Classic" and "Original" to imply that it is better than competitors.
- Allegations fail to satisfy the "reasonable consumer" standard of *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008).

Private Litigation – Motion to Dismiss Cases

- *Osness v. Lasko Products, Inc.*, No. 11-3846, 2012 U.S. Dist. LEXIS 50420 (E.D.Pa. Apr. 2012).
- Total of 10.4 million box fans that were subject to two voluntary recalls by the CPSC in 2006 and 2011.
- Defect related to fires caused by electrical failures in fan motors.
- Plaintiff did not allege that this defect manifested in her fan.

Osness v. Lasko Products, Inc. (cont'd)

- Alleged that defendant knew of defect but failed to disclose it, and delayed the recalls.
- Both recalls occurred after the 2 year warranty expired.
- The defendant did not offer to replace the fan or provide a full refund of the purchase price.
- Fix was a "fan protection cord adaptor."
- Damages based on diminution in value.

Osness v. Lasko Products, Inc. (cont'd)

- Under FED. R. CIV. P. 9(b), plaintiffs' "knowledge" allegations too conclusory under PA & Illinois law.
- Does not specify when or how plaintiff learned of the defect, or when purchased.
- Plaintiff also did not allege that she discovered a defect within the 2 year warranty period.
- Discusses *Duquesne Light* and *Abraham.*
- Distinguishes manifestation class cert opinion *(Wolin).*
- Failed to demonstrate that warranty was unconscionable. Knowledge allegations insufficient.
- Also dismissed Illinois warranty claim for lack of notice.

Private Litigation – Class Certification Cases

- *Robinson v. Hornell Brewing Co.,* No. 11-2183, 2012 U.S. Dist. LEXIS 51460 (D.N.J. Apr. 11, 2012)).
- Defendant sold Arizona ice tea with "All Natural" ingredients, even though the tea contained high fructose corn syrup.
- Sought certification of a Rule 23(b)(2) class on behalf of New Jersey residents.
- Requested equitable relief to enjoin the defendant from claiming that its products was all natural.

Robinson v. Hornell Brewing Co. (cont'd).

- Plaintiff failed to demonstrate that he had Article III standing.
- C. J. Simandle did not reach the Fed. R. Civ. P. 23 analysis.
- Plaintiff testified that he had no intention of ever purchasing any Arizona product in the future.
- Plaintiff's "dog bite" analogy did not work.

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Private Litigation – Arbitration

- *Sutter v. Oxford Health Plan LLC*, No. 11-1773, 2012 U.S. App. LEXIS 6618 (3d Cir. Apr. 3, 2012).
- Healthcare plan and physician executed a "primary care physician agreement."
- Contract contains a "broad arbitration clause," but does not mention class actions.

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Sutter v. Oxford Health (cont'd.)

No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

Sutter, 2012 U.S. App. LEXIS 6618, at *2.

Sutter v. Oxford Health (cont'd.)

- Physician files class action against insurer for allegedly prompt & accurate payments.
- Filed in N.J. state court; defendant's motion to compel arbitration granted.
- Parties posed to the arbitrator question whether class actions permitted under the contract.
- Concluded that it authorized class arbitration.
- Defendant filed motion to vacate in district court.
- Denied, affirmed. Appealed again after class award.

Sutter v. Oxford Health (cont'd.)

- In new appeal, Oxford relies on *Stolt-Nielsen* (parties' intent to class arbitration cannot be inferred solely from an agreement to arbitrate; must be a contractual basis).
- Sought vacatur under §10(a) of the FAA (arbitrator exceeded power).
- Court distinguished *Stolt-Nielsen* on the facts. There was a contractual agreement to arbitrate here:
  - Does not explicitly refer to class arbitration.
  - "No civil action" language is broad enough to include class actions.
  - The second phase – "all such disputes" – sends the message that all cases, including class actions, go to arbitration. A class action could not be filed in a court.

Private Litigation – Lanham Act

- *Rosetta Stone Ltd. v. Google, Inc*., No. 10-2007, 2012 U.S. App. LEXIS 7082 (4th Cir. Apr. 9, 2012).
- Rosetta Stone sued Google because it allowed other advertisers to use Rosetta's trademarks as "key words" for Internet searches and in ad text.
- In 2009, Google changed its policy to permit the limited use of trademarks in ad text.
- Rosetta argued that this mislead consumers into purchasing counterfeit Rosetta Stone products.
- Causes of action included direct trademark infringement under the Lanham Act, contributory and vicarious trademark infringement, trademark dilution, and unjust enrichment.

Rosetta Stone Ltd. v. Google (cont'd)

- The district court granted Google's motion for summary judgment.
- Lanham Act claim was dismissed because (a) there was no GIMF as to whether Google's use of Rosetta Stone's trademarks created a likelihood of confusion, and (b) based on the "functionality doctrine."
- The Fourth Circuit reversed with respect to the direct infringement, contributory infringement, and dilution claims. Affirmed the dismissal of vicarious infringement and unjust enrichment claims.

Rosetta Stone Ltd. v. Google (cont'd)

- Likelihood of Confusion Analysis:
  - Sole issue was whether there was sufficient evidence for fact finder to conclude that Google's use of Rosetta's trademark was likely to produce confusion.
  - Cited to a nine factor test, which is "an inherently factual issue."
  - District court did not consider all factors; not reversible error in and of itself.
  - But for the factors that were considered, did not apply proper MSJ standard.
  - Google's intent to create confusion; evidence of actual confusion.

Rosetta Stone Ltd. v. Google (cont'd)

- Functionality Doctrine Analysis:
  - Google relied on this doctrine to argue that any use of Rosetta's trademark was not infringing.
  - Generally prohibits a trademark holder to use the trademark laws when another merely describes the product's "functional features." Province of patent laws.
  - But the words "Rosetta Stone" are not essential for the functioning of Rosetta's language-learning products. It is simply a "source identifier."
  - The product would function no differently if it was labeled something other than "Rosetta Stone."
  - Because these words did not relate to the functionality of Rosetta Stone, Google could not rely on this defense. In other words, because the phrase is "non-functional," it can be enforced by Rosetta through the trademark laws.