Advertising Law

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Long-Running False Advertising Class Action Resolved with $3.3 Million Payment

Brain Research Labs, LLC (BRL) has successfully resolved the lawsuits relating to its dietary supplement product Procera AVH. Manatt partners Robert Platt and Bruce Kelson and associate Adrianne Marshack represented BRL and affiliated individuals and entities in California and New Jersey class action litigation, with assistance from partner Benjamin Shatz and counsel Kenneth Friedman.

The principal California case began in May 2009 with the filing of a putative statewide false advertising class action in Marin County Superior Court. The complaint asserted claims under the Unfair Competition Law, False Advertising Law and Consumer Legal Remedies Act, based on allegations that, among other things, Procera was falsely advertised as a "dietary supplement" (as opposed to a "drug") under applicable regulatory definitions and that BRL failed to warn that the product contained unsafe ingredients.

Just a few weeks later, plaintiff's class counsel posted a YouTube video and appeared in a local television news report, in which he made various statements to the effect that the product contained dangerous drugs with the potential to cause extensive harm or even death, and invited viewers to join him to "put out of business those that have cheated you." We advised BRL to file a defamation lawsuit, assisted the company in finding separate counsel for that purpose, and closely monitored the matter. The defamation action, filed in San Francisco Superior Court, later survived class counsel's inevitable Anti-SLAPP motion to strike, with the court finding that the defamation claims had a strong likelihood of success and also that there was evidence of hatred or ill will toward BRL to warrant a finding of malice.

In early 2010, the parties engaged in mediation and appeared to have agreement on the outlines of a global settlement, but class counsel later rejected the tentative agreement and thereafter made only increasingly unrealistic offers. In the class action, we then moved for and won a "convenience" transfer to Orange County Superior Court. Thereafter, we moved to disqualify class counsel based on the inherent conflicts between class counsel's personal interests and the interests of the class in light of the pending defamation suit. The court declined to grant the disqualification motion at that time, but we won a crucial stay of the litigation, later extended to over a full year, while that ruling was appealed. Then, in early 2012, we moved for and won dismissal of the class action complaint based on the doctrines of equitable abstention and primary jurisdiction – on the grounds that the dietary supplement "regulatory" issues raised in the complaint should be resolved by the FDA and/or the California Department of Public

Health, and not by the court in the context of a private false advertising class action. Over the course of over three years, class counsel obtained essentially no meaningful discovery from our client BRL.

In the meantime, in late 2011, a separate consumer class action regarding the marketing and alleged false advertising of Procera was filed in New Jersey federal court. Shortly thereafter, in January 2012, the California Court of Appeal issued its ruling upholding the trial court's denial of the Anti-SLAPP motion in the California defamation case. We later reached a nationwide settlement with class counsel in the New Jersey class action, and in March 2012 obtained preliminary approval of the settlement, which among other things, enjoined any other false advertising litigation involving Procera from going forward.

In light of these various developments, class counsel in the California class action (and their liability carrier) finally settled the defamation case, agreeing to pay $3.3 million to BRL and to voluntarily dismiss the California class action. Class counsel's request for dismissal of the California class action, filed in May 2012, stated that it was based on the injunction we obtained as a result of the settlement in the New Jersey case.

In the remaining New Jersey class action, the federal court granted final approval to the nationwide class action in early August 2012. The 62-page opinion noted that recovery to the class was "modest" yet fair – and even cut the amount of attorney's fees to New Jersey class counsel.

Why it matters: Given BRL's status as a start-up venture with limited funding, this was "bet the company" litigation. The company now survives with a strengthened balance sheet, clean litigation docket, full release of historical claims, prospects for movement of the product into major retail channels, and good possibilities for sale of the company or other strategic transactions.

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FTC Issues Record Fine Against Google

Google will pay $22 million to the Federal Trade Commission – the largest fine ever levied against a defendant for violating an existing consent order.

In April 2011, Google reached a settlement with the agency over charges that it allegedly used deceptive tactics and violated its own privacy policy when it launched its social networking feature, Buzz. When Buzz launched, Google's privacy policy stated that "When you sign up for a particular service that requires registration, we ask you to provide personal information. If we use this information in a manner different than the purpose for which it was collected, then we will ask for your consent prior to such use." Despite this promise, roughly 31.2 million Gmail users had their information shared without advance permission, the agency said.

The consent order broke new ground for the agency when it required that Google implement a comprehensive privacy program that, among other things, compelled the company to obtain prior consent from users before sharing information with third parties. In addition, Google was barred from future misrepresentations about its privacy or confidentiality policies. Thereafter, Google represented to its users that Safari would block the installation of all tracking cookies.

After that promise was made, a graduate student revealed last fall that Google was monitoring user browsing habits by using hidden code to install cookies and circumvent Safari's no-tracking browser settings. Although the installation of the cookie itself was arguably not a deceptive practice, the FTC argued that the failure to honor that statement constituted a violation of last year's consent decree.

According to the agency's complaint, Google also deceived its users by stating in its policy that it was a member of the Network Advertising Initiative and had complied with its self-regulatory code, which requires members to disclose how they collect and store data.

Google agreed to pay the record fine, the largest penalty ever for violation of a Commission order, although it denies that it violated the terms of the 2011 settlement. According to a report in *The Wall Street Journal*, the $22.5 million fine was calculated by aggregating the number of iPad, iPhone, and Mac users at a rate of $16,000 per day.

"This settlement is intended to provide a strong message to Google and other companies under order that their actions will be under close scrutiny and that the Commission will respond to violations quickly and vigorously," four of the Commissioners said in an accompanying statement.

To read more about the settlement, including the FTC's complaint, the proposed settlement, and statements from the Commission and dissenting Commissioner Rosch, click here.

Why it matters: The large settlement sum is a reminder that defendants must abide by the terms of consent decrees and settlements. "The record-setting penalty in this matter sends a clear message to all companies under an FTC privacy order," Jon Leibowitz, Chairman of the FTC, said in a press release about the fine. "No matter how big or small, all companies must abide by FTC orders against them and keep their privacy promises to consumers, or they will end up paying many times what it would have cost to comply in the first place." But the consent decree also fanned the flames of the current controversy over whether defendants can deny liability in agreements with federal agencies. Commissioner Thomas J. Rosch issued a dissenting statement, bemoaning Google's denial of liability in the consent decree. "Condoning a denial of liability in circumstances such as these [imposing a record fine] is unprecedented," he said. "It arguably cannot be concluded that the consent decree is in the public interest when it contains a denial of liability."

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Jiffy Lube Agrees to $47M Tune-Up in Spam Text Suit

Jiffy Lube agreed to pay $47 million in services (or the equivalent of $35 million cash) to settle multiple class actions brought by recipients of spam texts.

The case was filed last year by a group of plaintiffs who alleged they received spam text messages from the oil change company in violation of the Telephone Consumer Protection Act. The text message read: "JIFFY LUBE CUSTOMERS 1 TIME OFFER: REPLY Y TO JOIN OUR ECLUB FOR 45% OFF A SIGNATURE SERVICE OIL CHANGE! STOP TO UNSUBMSG&DATA RATES MAY APPLY T&C: JIFFYTOS.COM."

One year later the parties filed a joint motion seeking preliminary approval of a settlement.

Jiffy Lube agreed to provide $17.29 discount certificates off any service to the estimated 2.3 million class members. After an 18-month period, the offer expires but the certificates can still be redeemed for $12.97 in cash. The company will also pay $5,000 to each class representative, $4.75 million to class counsel, and cover the administrative costs of settlement.

In addition, the defendant agreed "to ensure that informed written consent be obtained by affirmative action on the part of the consumer through a clear statement regarding the receipt of text message advertisements." Jiffy Lube will also be required to retain proof of all consumer consent to receive text messages ads.

Calling the proposed settlement "an exceptional result," the parties requested the court's preliminary approval of the deal.

To read the proposed settlement in *In re Jiffy Lube*, click here.

Why it matters: Class action suits alleging violations of the TCPA are proliferating and can result in sizable settlements, as evidenced by the parties' agreement in the Jiffy Lube settlement. Marketers should be sure to receive prior, express consent from recipients before sending text messages or face their own potentially costly lawsuit.

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Coppertone's Claims Burned Consumers, Suit Alleges

A false advertising suit was filed against Merck & Co., the makers of Coppertone sunscreen, alleging the products deceptively promised "full defense" against the sun.

Three plaintiffs argued in their New Jersey federal complaint that Coppertone's sunscreen products fail to protect against the cancer causing longer rays of ultraviolet-A radiation despite its "full defense" claim. Calling the products "sunblock" and claiming they were waterproof, sweatproof, and would provide all-day protection was also misleading because the protection diminished over time and after exposure to water and sweat, the plaintiffs alleged.

According to the complaint, "[T]he level or degree of UVA protection, to the extent provided, was significantly less than the level of protection provided against the burning effect of UVB rays and [no] protection was being provided against the longer UVA rays. . . . [T]hese products did not block all or anywhere close to all of the sun's harmful rays."

All three plaintiffs relied upon the sunscreen's labeling and advertising, they alleged, seeking trebled damages, restitution, and injunctive relief from Merck, which they said reaped "enormous profits" from Coppertone products.

To read the complaint in *Brody v. Merck & Co.*, click here.

Why it matters: Sunscreen labeling has been a "hot" topic lately. Last summer the Food and Drug Administration announced major changes in the labeling and marketing requirements of over-the-counter sunscreen products, the first new rules in 30 years. The changes addressed claims like "broad spectrum," "waterproof," "sweatproof," and "sunblock." The new rules were set to take effect earlier this year, but the FDA pushed implementation an additional six months to give manufacturers more time to come into compliance. While the rules have yet to take effect, the plaintiffs referenced them in their complaint as support for their argument that Merck knew or should have known its labeling and advertising of "sunblock," "sweatproof," and "waterproof" sunscreen was deceptive.

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Blockbuster Settles for Policy Changes, No Cash

Avoiding a cash payout, Blockbuster agreed to amend its privacy policy to settle a class action suit alleging violations of the Video Privacy Protection Act.

Under the VPPA, video service providers must destroy customers' personally identifiable information "as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected." The class action brought by Baseem Missaghi alleged Blockbuster maintained information in violation of the Act and created a "digital dossier" of customers.

But unlike the $9 million Netflix agreed to pay to settle similar suits, Blockbuster will not make a cash payment to class members. The company agreed to pay administrative costs of the settlement, $750 to named class members, and up to $140,000 for class counsel.

Instead of a cash payout, the company agreed to change its practices and update its privacy policy. Specifically, the company will inform customers that accounts are continuous unless affirmatively terminated, provide information to customers about how to terminate their accounts, and honor the requests of former customers to separate or "decouple" their rental history from their personal information.

According to the plaintiffs' motion for preliminary approval, the settlement provides the class "immediate, industry-leading injunctive relief," and preserves class members' claims for damages if they choose to pursue those separately. Blockbuster denied the allegations of the complaint and has argued that it could not be liable for monetary damages under the VPPA because it purchased the personally identifiable information at issue "free and clear" from all claims and encumbrances through a judicially approved bankruptcy sale.

U.S. District Court Judge John Tunheim in Minnesota granted preliminary approval to the settlement. A final approval hearing is set for Nov. 27.

To read the proposed settlement in *Missaghi v. Blockbuster*, click here.

Why it matters: The suit against Blockbuster was just one of a spate of VPPA cases filed over the last year. In addition to the Netflix settlement, Redbox, another video service provider, recently scored a victory in a VPPA class action. In that case, the 7th Circuit held that consumers cannot recover damages under the Act when a business keeps their rental histories longer than allowed by law.

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FTC Pays Back Consumers Duped by Sweepstakes Scam

Consumers who were tricked into paying a fee to collect a nonexistent multimillion-dollar sweepstakes prize will soon receive refund checks from the Federal Trade Commission.

“Your identification as recipient for reported cash award entitlements totaling over $2,500,000.00 has been confirmed! We are so pleased at having the honor of informing you of this wonderful news” read the mailers received by hundreds of thousands of consumers. Some mailers included official-looking seals and fake government agency names like the “Office of the President Official Notification.”

But consumers who contacted the defendants behind the mailers were told to send in a $20 “processing fee” by a given deadline in order to collect their prize. Those who sent in the money received information about entering a sweepstakes – not the $2.5 million.

The agency filed a complaint against National Awards Service Advisory and numerous other defendants. It reached a settlement under which the defendants are banned from the prize promotion business as well as making misrepresentations about any product or service. They are also prohibited from selling customers’ personal information and were ordered to pay various monetary judgments.

More than $183,000 was returned to 503 consumers. The amount varied depending on the total of each consumer’s loss, the agency said.

To read the FTC’s complaint and consent agreement with the defendants, click here.

Why it matters: In a press release about the payout, the FTC said the action was part of its “ongoing crackdown” on “last dollar scams” – those that prey on financially strapped consumers. Companies that run a sweepstakes should remember to clearly and conspicuously disclose both a free means of entry (including no charges for taxes, shipping or handling, or “processing” as the defendants did here) and the chances of winning, among other requirements.

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