Some Restrictions Apply: Ninth Circuit Restricts Scope of Nationwide False Advertising Claims

February 1, 2012 by Neil Austin

In a ruling that may restrict the future viability of false advertising class actions, the Ninth Circuit recently overturned a lower court decision certifying nationwide class status to individuals who purchased or leased an Acura vehicle equipped with an optional "collision mitigation braking system" between August 2005 and December 2008. See *Mazza v. American Honda Motor Company* – opinion here. According to plaintiffs, advertisements for the $4,000 system were misleading in that they failed to disclose certain important facts, including that the system did not work in inclement weather (when collisions have been known to occur).

As certified, the class consisted of individuals who purchased their Acura vehicle in one of 44 states. Plaintiffs filed suit in federal court in California and sought false advertising relief solely under California's consumer protection law. Plaintiffs argued that California law should apply to all class members' claims, regardless of the point of actual purchase, because the defendant is headquartered in California and because the consumer protection law of that state is not materially different from the consumer protection laws of the other 43 states in which class members purchased the collision mitigation system.

The Ninth Circuit disagreed, holding that material differences existed in the states' consumer protection laws and that, consequently, the lower court erred in certifying a nationwide class. The appeals court noted, by way of examples, that California law *does not* require a plaintiff to prove *scienter* – intentional or reckless wrongdoing – and *does* require plaintiffs to prove that they

actually relied on the allegedly misleading ads. Other states require scienter (e.g., Colorado, New Jersey, and Pennsylvania) or do not require reliance (e.g., Florida and New York).

The opinion strikes a states' rights note that is something of an oddity in a false advertising opinion, reflecting the view that states' consumer protection laws reflect judgments about business protection as well as consumer protection:

In our federal system, states may permissibly differ on the extent to which they will tolerate a degree of lessened protection for consumers to create a more favorable business climate for the companies that the state seeks to attract to do business in the state. In concluding that no foreign state has "an interest in denying its citizens recovery under California's potentially more comprehensive consumer protection laws," the district court erred by discounting or not recognizing each state's valid interest in shielding out-of-state businesses from what the state may consider to be excessive litigation.

It remains to be seen whether other federal appeals courts will go the way of the Ninth Circuit in restricting nationwide false advertising class actions. The decision currently applies only to federal district courts in the Ninth Circuit (western United States). If not, the issue may one day require the Supreme Court's attention. If so, expect plaintiffs' counsel to seek to retain the power of the class action by bundling claimants based on an analysis of each state's consumer protection law – e.g., separate classes for claimants from states requiring: (1) scienter and reliance, (2) scienter but no reliance, (3) no scienter but reliance, and (4) no scienter and no reliance. Of course, the Ninth Circuit left open the door for *other* material differences, so these combinations may prove too broad. Time will tell. In the meantime, the viability of false advertising class actions in the Ninth Circuit has taken a significant hit.
