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Advertising Law

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9th Circuit Rejects $10.6M Settlement in Kellogg False Claim Suit

The 9th Circuit recently set aside the $10.6 million settlement in a consumer class action in which the plaintiffs alleged that Kellogg made false claims that its Frosted Mini-Wheats cereal could improve children's cognitive development.

A class of plaintiffs filed suit in 2009 in which they challenged certain misleading statements like "Does your child need to pay more attention in school? . . . A recent clinical study showed that a whole grain and fiber-filled breakfast of Frosted Mini-Wheats helps improve children's attentiveness by nearly 20%."

The parties reached a settlement totaling $10.6 million. Kellogg agreed to establish a $2.75 million fund for distribution to class members (claims could be made for $5 per box of cereal, up to $15), donate $5.5 million worth of products to charity, pay $2 million class counsel fees, and refrain from certain ad claims for a period of three years.

Despite a federal court judge's approval, the 9th Circuit tossed the settlement on appeal from objectors.

The charitable distribution "neither identifies the ultimate recipients . . . nor sets forth any limiting restriction on those recipients," the court said, ruling that the cy pres portion of the settlement was not "sufficiently related" to the plaintiff class or to the class's underlying false advertising claims.

A cy pres award must qualify as "the next best distribution" to giving the funds directly to the class members, the panel explained. Although it called the $5.5 million payment designated to feeding the indigent a "noble goal," it "has 'little or nothing to do with the purposes of the underlying lawsuit or the class of plaintiffs involved,'" the court said. "The settlement provides no assurance that the charities to whom the money and food will be distributed will bear any nexus to the plaintiff class or to their false advertising claims."

Further, the settlement terms failed to specify how the $5.5 million of food would be valued. Wholesale value? At retail? Could Kellogg also use the value of the distribution as a tax deduction because it was going to charity? And would the fund be in addition to an existing Kellogg donation or could it come from previously budgeted funds? Lacking answers to these questions, the court called the settlement "unacceptably vague."

The settlement also failed to pass muster given the "excessive" attorneys' fees, the panel said, which amounted to $2,100 per

hour. “The settlement yields little for the plaintiff class,” the court concluded. “In comparison, the $2 million award is *extremely* generous to counsel.”

Vacating approval of the settlement, the court remanded the case to the district court.

To read the opinion in *Dennis v. Kellogg Co.*, click here.

Why it matters: This case demonstrates how courts are applying greater review and scrutiny to proposed class action settlements. With regard to the cy pres donation, the court repeatedly emphasized that the terms of such a provision must have a sufficient nexus to the underlying claims of the plaintiffs. Despite Kellogg’s argument that cy pres relief was proper because it involved “the nutritional value of food,” the court disagreed. “The gravamen of this lawsuit is that Kellogg *advertised* that its cereal *did* improve attentiveness. Those alleged misrepresentations are what provided the plaintiffs with a cause of action under [false advertising laws], not the nutritional value of Frosted Mini-Wheats. Thus, appropriate cy pres recipients are not charities that feed the needy, but organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising,” the court said.

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Court Tosses LinkedIn Suit – Again

Plaintiffs alleging privacy violations against LinkedIn had their suit dismissed with prejudice last week.

Multiple class action lawsuits were filed against the online professional network by plaintiffs claiming that they suffered economic and emotional harm when LinkedIn shared their browsing history with third-party advertisers.

Third parties could theoretically de-anonymize a user’s unique LinkedIn ID number and associate it with a user’s profile page, determining his or her identity, the plaintiffs argued. Once the correlation was made, a third party would be able to examine a user’s browser history.

Although U.S. District Court Judge Lucy H. Koh determined that the plaintiffs had articulated a concrete harm for purposes of standing to bring suit, she ruled that they failed to state a claim for relief.

LinkedIn is not covered by the Stored Communications Act because it does not function as a “remote computing service” or an “electronic communication service” pursuant to the statute, she said.

Further, the California law has “a high bar” for an invasion of privacy claim, she said, which the plaintiffs failed to meet.

“Although plaintiffs postulate that [third parties] could, through inferences, de-anonymize this data, it is not clear that anyone has actually done so, or what information, precisely, these third parties have obtained,” she wrote.

The plaintiffs also failed to allege reliance on a specific representation or advertising in registering for or using the LinkedIn site, Judge Koh noted. Although the plaintiffs quote from the company’s privacy policy, they “never allege they were aware of the privacy policy, let alone saw or read it,” she said. Even an argument that their privacy was violated by an omission in the privacy policy – i.e., that LinkedIn failed to tell its users that it was sharing information with third parties – wasn’t sufficient where the plaintiffs failed to establish their familiarity with the privacy policy, the judge concluded.

Judge Koh dismissed the suit with prejudice.

To read the decision in *Low v. LinkedIn*, click here.

Why it matters: Judge Koh also declined to accept the plaintiffs’ argument that their personal information has independent economic value, citing rulings in other privacy suits. Although the plaintiffs put forth technical reports in support of their theory, the judge said she remained “unconvinced.” She also noted that the plaintiffs had failed to claim any diminution in value of their personal information because it had allegedly been disclosed by LinkedIn. For example, the plaintiffs did not allege they made any

attempt to sell their personal information and were unable to do so or offered a lower price. The alleged decrease in the value of plaintiffs' personal information did not constitute cognizable damages, Judge Koh ruled.

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Actions Can Imply Consent in Publicity Rights Suits, Court Says

In a decision that bodes well for future defendants in suits alleging violation of publicity rights, the 9th Circuit affirmed the dismissal of a putative class action suit brought against photo agency Corbis.

Former *Partridge Family* actress Shirley Jones alleged that Corbis violated her publicity rights by licensing images of her for commercial use in various media by numerous entities.

Jones argued that the database illegally inhibited her ability to control the use of her name, image and likeness.

But in an unpublished opinion, a panel of the 9th Circuit disagreed, ruling that Jones had failed to establish an issue of fact regarding lack of consent.

To establish a violation of California's publicity rights statute, "the plaintiff must prove that the defendant appropriated his or her likeness without consent," the court said. "Jones admitted that she intended for the photographs at issue [taken on the red carpet at an event] to be distributed to media outlets and was not surprised that the photographers would use a third-party distributor. She also admitted that she had not placed limits on how such photographs could be distributed."

The court concluded that Jones has provided "no reason why Corbis should have questioned her apparent consent to her photographs being distributed."

To read the opinion in *Jones v. Corbis Corp.*, click here.

Why it matters: This decision provides an argument for defendants in suits alleging a violation of publicity rights. Consent to use a name or likeness can be implied from the party's conduct and circumstances, particularly within the "well-known and established customs of the industry," the court said.

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Consumer Awareness of Behavioral Advertising Rises – But So Does Concern

A new study found that public awareness of the advertising industry's self-regulatory program remains low, although it rose over last year.

In its 2012 U.S. Online and Mobile Privacy Perceptions Report, TRUSTe found that just 14% of consumers are aware of the industry's ad choices program and the accompanying icon, an improvement over just 5% awareness last year. A total of 94% of those surveyed said they consider privacy an important issue.

The study found that 60% of consumers are more concerned this year than last about privacy, and an increasing number (83%, up from 70% the year before) are aware of behaviorally targeted advertising. Of those who are aware of targeted ads, 58% said they don't like it.

But consumers are also taking action to protect their privacy, according to the study results. A total of 85% of smartphone users reported they won't download mobile apps they do not trust, while 49% said they check for independent privacy certification or seals, an increase of over 41% in 2011. And 61% are inclined to do more business with a site that allows them to opt out of being tracked, the study found.

Negative feelings about online behavioral advertising decreased – from 69% to 40% – when those surveyed were assured that their personally identifiable information is not linked to their browsing behavior.

“Our 2012 findings show that managing consumer concerns through good privacy practices must remain on the forefront in order to stem mistrust,” Chris Babel, TRUSTe CEO, said in a statement. “With increased understanding about choices, the survey also shows that consumers react more positively to the potential value of new online technologies, such as [online behavioral advertising].”

To read the TRUSTe study, click here.

Why it matters: The results of the study confirm that consumers are concerned about privacy and taking affirmative steps to protect their information. For example, 35% of respondents said they stopped doing business with a company or using its Web site because of privacy concerns, and 90% said they use browser controls to protect their privacy, including deleting cookies.

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IAB Plans to Self-Regulate Mobile Platform

Responding to the Federal Communications Commission’s request for comment on mobile privacy, the Interactive Advertising Bureau said it plans to self-regulate the mobile platform.

Given the constantly changing world of technology, industry self-regulation will better serve consumers than government regulation, the IAB said in written comments submitted to the agency.

“In the right regulatory environment, the mobile marketplace will continue to mature, and adoption will continue to rapidly spread as consumers gain trust in the ecosystem,” wrote Michael Zaneis, senior vice president and general counsel for the IAB. “Enforceable self-regulation will help ensure that all parties in the ecosystem together will provide consumers with transparency and choice as they embrace smart mobile devices.”

The comments were filed in response to a request by the FCC seeking guidance on issues of mobile privacy.

The industry currently regulates behavioral advertising online, but the principles do not specifically address mobile devices such as smartphones.

The upcoming principles “will provide transparency and consumer control for precise location information, mobile multi-site data, and mobile cross-app data, encompassing all parties in the mobile device ecosystem,” the group wrote.

Given the strength and flexibility of self-regulation, the IAB said it opposed establishing “prescriptive requirements for the form or substances of consumers’ notice and control.” Companies “need to be able to adapt their communications as technology and communications evolve,” the group wrote, and the imposition of a “one size fits all” legal standard across all media channels “could have unintended consequences.”

“Unlike formal regulations, which can quickly become outdated in the face of evolving technologies, a self-regulatory code of conduct can allow industry to respond rapidly to new challenges presented by the evolving Internet ecosystem. . . . By putting the information and choice directly in consumers’ hands, the [self-regulatory system] is able to provide consumers with the ability to opt in or out of collection based on individual services and trusted relationships as opposed to one global device opt-in that diminishes the functionality and consumer experience on the device,” the IAB said.

To read the IAB’s comments to the FCC, click here.

Why it matters: The IAB said it is “nearly complete” with the extension of the self-regulatory principles to the mobile platforms. It remains to be seen, however, whether the FCC will look favorably upon these principles and deem them sufficient to address the concerns and achieving the goals enunciated in its request for comment. The FCC will look for industry adherence to ensure that

such goals and objectives are being met.

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