Advertising Law

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SPECIAL FOCUS: "Slack Fill" Complaints Increasing in Volume

Local regulators in California have accused food producers and consumer products manufacturers of violating so-called "slack fill" requirements for product packaging and have commenced a wave of enforcement actions. "Slack fill" is defined as the difference between the actual container capacity and the product volume contained within. The laws under which these cases are brought, the California Fair Packaging and Labeling Act, Cal. Bus. & Prof. Code § 12601 et seq., and Cal. Health & Safety Code § 110375, are designed to protect consumers against the potential deception of so-called "nonfunctional slack fill" – a fancy term describing the empty space in a commodity package that has no legitimate cause or purpose and that might deceive consumers into thinking they are buying more than they are actually getting.

This void space is no small concern to regulators. Violations of the laws can give rise to significant civil, and even criminal, penalties. Regulators can seize products from shelves and force costly packaging and labeling changes. Moreover, as with many California consumer protection requirements, these laws also permit private litigants a basis for class action suits under the California Unfair Competition Law.

Slack fill laws have been on the books for decades, but have lain dormant for many years. Recently, however, there has been a resurgence in enforcement activity. For example:

- On December 22, 2011, the district attorneys of Yolo and Sacramento counties filed a complaint against Fleming Pharmaceuticals for allegedly packaging its "Ocean Saline Premium Saline Nose Spray" with significant "void space" that is not seen by consumers and for using false sidewalls or otherwise constructing the packaging so that the contents appear to be greater than they actually are. The complaint seeks a $2,500 civil penalty for each unlawful act.

- On December 22, 2011, the district attorneys of Yolo and Sacramento counties filed a complaint against Conagra Foods, Inc., for allegedly packaging its "Slim Jim" product with nonfunctional slack fill that is not visible to consumers and for allegedly providing

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Upcoming Events

February 13-14, 2012
Law Seminars International: Developing Applications for Mobile Devices
Topic: "Privacy: Practical Tips for Ensuring Regulatory Compliance"
Speaker: Linda Goldstein
San Francisco, CA
For more information

March 7-11, 2012
Engredea's Ingredients and Innovation Conference (co-located with ExpoWest)
Topic: "Talkin' 'bout the Regulations" and "Business 401 Workshop: Negotiating the Regulations"
Speaker: Ivan Wasserman
Anaheim, CA
For more information

March 12, 2012
PLI's Counseling Clients in the Entertainment Industry 2012 Seminar
Topic/Speaker: "Video Games and Computer Entertainment," Marc Roth
Topic/Speaker: "Television, Video & User-Generated Content," Kenneth Kaufman
New York, NY and via webcast
For more information

March 19-20, 2012
ACI's Legal & Regulatory Summit on Food & Beverage Marketing & Advertising
Topic: *"From Weight Loss to Healthy Eating* - How to Prevent Health Claim Nightmares: Practical Guidance for Structuring Claims that Will Withstand Government Scrutiny and Private Litigation*"*
Speaker: Linda Goldstein
Washington, DC
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inaccurate weight statements on the label. The complaint seeks a $2,500 civil penalty for each violation.

- In March 2011, the district attorneys from Yolo, Fresno and Sacramento counties filed a complaint claiming that Harry & David's packaging violates California's slack fill law by using packaging that is allegedly far larger than the contents. The counties seek $250,000 in civil damages.

The laws present thorny issues for sellers of commodities in California. On their face, they prohibit the sale of any container that has nonfunctional slack fill and does not allow the consumer to fully view its contents from the outside, unless the manufacturer can show that the slack fill is due to:

- "[t]he requirements of machines used for enclosing the contents of the package."
- the "need to utilize a larger than required package or container to provide adequate space for the legible presentation of mandatory and necessary labeling information, such as those based on the regulations adopted by the Food and Drug Administration or state or federal agencies under federal or state law . . ."
- an inability to increase the level of fill or to further reduce the size of the package, where, for example, some minimum package size is necessary to accommodate required labeling or tamper-resistant devices, to discourage pilfering and to facilitate handling.
- "[t]he presence of any headspace within an immediate product container necessary to facilitate the mixing, adding, shaking, or dispensing of liquids or powders by consumers prior to use."
- "[t]he exterior packaging contains a product delivery or dosing device if the device is visible, or a clear and conspicuous depiction of the device appears on the exterior packaging, or it is readily apparent from the conspicuous exterior disclosures or the nature and name of the product that a delivery or dosing device is contained in the package."

To read the complaint in *People v. ConAgra Foods*, click here.

To read the complaint in *People v. Fleming Pharmaceuticals*, click here.

Why it matters: Companies that currently sell consumer products within California should pay close attention to slack fill requirements, especially when they plan to reduce the weight or volume of their product contents while maintaining the same package size. In such cases, simply amending the package statement of net weight, or adding a disclaimer about product settling, may not be sufficient to avoid liability.

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Massachusetts Weighs In on Zip Code Issue

In the wake of a pivotal decision from the California Supreme Court holding that zip codes constitute personal information and retailers may not collect them as part of a credit card transaction, similar suits were filed across the country.

Now a U.S. District Court in Massachusetts has weighed in on the issue, ruling that although zip codes meet the state law's definition of personal information, the plaintiff failed to show a cognizable injury when a retailer requested it.

The suit, filed last year, alleged that arts and crafts retailer Michaels Stores violated Massachusetts' consumer protection law, which forbids the collection of "personal identification information" during a credit card transaction.

Although the court agreed that a zip code met the law's definition of personal identification information – similar to the California Supreme Court's decision in *Pineda v. Williams-Sonoma* – and the plaintiff had stated a claim for a per se violation of the law, it dismissed the suit.

The state legislature "never intended to create a freestanding privacy right derived from [the statute]," U.S. District Court Judge William G. Young wrote.

Instead, the state law was intended to prevent fraud, so the "simple fact of the statutory violation standing alone constitutes no redressable injury."

The plaintiff suffered no cognizable injury, the court said. Her information was not sold, her creditworthiness was not diminished, and although she received unwanted mail, "receiving unwanted commercial advertising through the mail is simply not an injury cognizable under [state law]," the judge said.

Judge Young further declined to accept the plaintiff's argument that reasonable consumers would expect consideration for the "valuable resource" of personal identification information.

However, the court cautioned retailers who request a zip code to heed its holding that they could be in violation of Massachusetts state law.

He also emphasized that the result in the case "could well be different in a data breach case where identity theft were [sic] at issue," a situation which would arguably cause injury to a plaintiff in violation of the stated statutory intent to prevent consumer fraud.

To read the court's order in *Tyler v. Michaels Stores*, click here.

To read the plaintiff's motion to certify questions in the case for Massachusetts' highest court, click here.

Why it matters: While the ruling may have retailers breathing a sigh of relief, the case isn't over. Judge Young gave the plaintiff the option of filing a request to certify the questions in the case to the Massachusetts Supreme Judicial Court, the state's highest court, an opportunity of which she has already taken advantage. In her filing, the plaintiff requests that the court answer two questions: First, does the per se violation of the law constitute an injury for which a consumer may seek redress? And second, does the law establish an actionable privacy right, even in the absence of fraud?

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CVS to Refund Consumers $5M for Deceptive Pricing

Under a settlement with the Federal Trade Commission, CVS Caremark Corp. has agreed to pay $5 million over charges that the pharmacy chain misrepresented the prices of certain Medicare Part D prescription drugs.

Medicare beneficiaries sign up every year for one of several drug plans that offer different costs and benefits. During the enrollment process, beneficiaries can research the different plans, in part to avoid a coverage gap known as the "donut hole," where the beneficiary pays the full cost of the drugs.

From 2007 through at least November 2008, incorrect prices for Medicare Part D prescription drugs at CVS and Walgreens pharmacy chains were posted on RxAmerica, a CVS subsidiary, according to the agency's complaint. Third-party sites, including the Centers for Medicare and Medicaid Services' Plan Finder, listed the same inaccurate prices.

Beneficiaries relied upon the posted prices to select their Medicare Part D drug plans, the FTC said.

But the actual price for the drugs was 10 times higher than the posted prices in some cases, which caused elderly patients to pay "significantly more" for their drugs, the agency alleged, pushing some into the donut hole far sooner than expected.

For example, RxAmerica posted a price of a generic epilepsy drug at $26.83 in CVS stores; the true cost was $257.70. Breast cancer syndrome drug megestrol was listed at $55.68 but actually cost $305.89.

The listed prices were misleading and therefore violated the FTC Act, the agency said.

In addition to the $5 million payment – which will be used to reimburse consumers – CVS is barred from making deceptive claims about its Medicare Part D drug prices. The settlement also subjects the company to record-keeping and monitoring provisions.

The agreement is open to public comment until February 13.

To read the complaint in *In the Matter of CVS Caremark Corp.*, click here.

To read the consent order, click here.

Why it matters: "This settlement puts money back in the pockets of older Americans who struggle to pay for their medications," said FTC Chairman Jon Leibowitz in a statement about the case. "With the cost of health care on the rise, the FTC is especially focused on protecting consumers from any deceptive claims that would cause them to pay more than they should."

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NAD Rules in Battle over Baby Food

In a challenge brought by competitor Beech-Nut, the National Advertising Division reviewed a series of claims made by Gerber Baby Foods about its products, including Lil' Entrees, Graduates Healthy Meals and its Start Healthy/Stay Healthy nutrition system.

While the NAD found that some of the claims made in the television, Internet and Web site advertising were substantiated, it determined that Gerber should modify or discontinue certain claims related to the "natural" contents of its products and its "immune support" capabilities.

Gerber's Start Healthy/Stay Healthy system is based on extensive research and development relating to the needs of infants, toddlers, and preschoolers based on developmental and behavioral milestones, the NAD found, and therefore claims that the system was "unique and innovative" could be substantiated. In addition, Gerber's exclusivity claim that "Only Lil' Entrees is designed just for toddlers, with protein, grains, and a side of veggies" could also stand. The Lil' Entrees products feature a dual compartment design with a separate "side" of vegetables, the NAD said, which helps to teach children the different components of a balanced diet.

However, the NAD reached a different conclusion when evaluating a television commercial for Gerber's Fruit & Veggie Melts. As a voiceover stated that "the Gerber generation is making their fruit and veggies disappear," images of whole fruits and vegetables disappear into a bag of Melts.

This "visual depiction, along with the accompanying voiceover, conveys a message that Gerber's Melts are nutritionally equivalent to whole fruits and vegetables," and a reasonable consumer could reasonably take away the message that the Melts could be considered a nutritional stand-in for whole fruits and vegetables, the NAD said and recommended that the commercial be discontinued.

Turning to Gerber's claims that its products provide "natural immune support," and are "made with 100% natural fruit," the NAD again recommended discontinuance.

A consumer would reasonably "understand the claim as meaning that this product offers a natural way to support one's immune system. Given the additives found in Gerber's products, NAD determined that this 'natural' claim was not supported and recommended that Gerber no longer refer to the immune support offered by its product as 'natural.' "

Further, Gerber's claim that its snack foods provide "immune support" could not be substantiated because the products could be consumed in one sitting, parsed out over the course of weeks, or any rate in between, the NAD said.

"With such a varied and unknowable 'dosage,' Gerber's baby foods could not be claimed to provide any meaningful immune support," according to the decision, which also expressed concern about whether the vitamins contained in the product offer a meaningful immunity benefit.

Therefore, the NAD recommended that Gerber either discontinue the claim or modify it to make clear that its immunity-related benefits relate to the products' capacity to ensure or maintain a healthy immune system by maintaining adequate levels of Vitamins A, C, and E.

To read the NAD's press release about the decision, click here.

Why it matters: Overall, the decision was a mixed bag for Gerber.

Advertisers should take note of the continuing challenges facing the use of “natural” or “100% natural” claims, which the NAD said should be discontinued. Even though the word “natural” modified other terms – in this case, immune support and fruit – the NAD said that reasonable consumers would take away a message that the products were “all natural,” i.e., lacking any synthetic ingredients or additives.

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Federal Courts Can Hear TCPA Suits, U.S. Supreme Court Rules

In a unanimous decision, the U.S. Supreme Court has ruled that federal courts have jurisdiction to hear lawsuits under the Telephone Consumer Protection Act.

The decision was not entirely surprising after a November 28, 2011, oral argument where the Justices expressed frustration with the wording of the statute, with Justice Antonin Scalia calling the Act “weird.”

The plaintiff filed suit in federal court, alleging that the defendant used a robocall system to repeatedly call him about a debt.

The Eleventh Circuit dismissed the suit, holding that the federal courts do not have jurisdiction to hear cases under the Act, which empowers individual plaintiffs to bring a private right of action “in an appropriate court of that state.”

But the Supreme Court reversed, saying that the TCPA’s provision for private actions did not make state courts the exclusive forum for the suits.

“Nothing in the text, structure, purpose, or legislative history of the TCPA calls for displacement” of the jurisdiction given to federal courts where a federal law creates a private right of action and furnishes the substantive rules of decision, Justice Ruth Bader Ginsburg wrote.

“Beyond doubt, the TCPA is a federal law that both creates the claim [the plaintiff] has brought and supplies the substantive rules that will govern the case. We find no convincing reason to read into the TCPA’s permissive grant of jurisdiction to state courts any barrier to the U.S. District Courts’ exercise of the general federal-question jurisdiction they have possessed since 1875.”

State and federal courts therefore have concurrent jurisdiction over TCPA cases, and plaintiffs may file in either venue, the Court said.

To read the decision in *Mims v. Arrow Financial Services*, click here.

Why it matters: The case resolves a split in the federal courts, which had reached different conclusions when determining whether they had jurisdiction to hear TCPA cases. In the decision, the Justices also addressed one of the defendant’s arguments about the impact on federal courts if they were to hear TCPA cases. Despite the defendant’s contention that the courts would be “inundated” with suits involving minor amounts of statutory damages, the Court dismissed such floodgates concerns, calling it “more imaginary than real.”

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Court Puts New Jersey's Gift Card Law Partially on Hold

Provisions of New Jersey's gift card law may be unconstitutional, the Third Circuit recently ruled, affirming a temporary injunction against the retroactive application of certain parts of the law.

In 2010, the state passed a law that, for the first time, provided for the escheat of gift cards to the state. The law covers both "open loop" cards that may be used at several retailers as well as "closed loop" cards, which may be redeemed only for merchandise or services from the specific retailer that issued the card.

In two separate suits, interested parties challenged the law, arguing that it violated the Contract Clause (Article 1 of the Constitution) and was preempted by federal law.

Analyzing the closed loop cards in a suit brought by a group of New Jersey retailers, the Third Circuit agreed.

The law imposes a "substantial impairment" on the contractual relationship between issuers and consumers when applied retroactively, the court said.

Issuers anticipated realizing an expected profit or merchant fee, but the law mandates that after two years of nonuse, they must turn over the entire value of the card – in cash – to state custody.

The state could have posed a lesser burden by requiring issuers to remit only a percentage of the value of the abandoned gift card as some states have done, but chose a course of action that precluded issuers from collecting their bargained-for expected profits or merchant fees.

Therefore, the retroactive application of the escheat law violated the Contract Clause and should be enjoined, the court said.

The panel also determined that federal common law preempts the law's "place of purchase" presumption, which substitutes the address of the place of purchase in instances where the address of the purchaser is unknown.

Under federal common law, unclaimed property must first escheat to the state of the last known address of the creditor, the court said, which conflicts with the New Jersey law. Additionally, as New Jersey lacks a clear connection to the owner or issuer of a gift card, the state does not have a sufficient connection with the parties involved in a transaction to claim a right to escheat the abandoned property, and the Court blocked enforcement of this provision as well.

The second suit challenged the new three-year escheat law. In this suit, the three-judge panel declined to accept the arguments as applied to open-loop cards, as the challenger did not suffer a substantial impairment of its contractual relationships because its product could always be redeemed for cash. It merely had the right to use the money until called for by the user or some other person duly authorized – in this case, the state.

To read the decision in *New Jersey Retail Merchants Association v. Sidamon-Eristoff*, click here.

Why it matters: The decision is a victory for gift card issuers, at least with respect to retroactive application. The case will now head back to the U.S. District Court for further proceedings. Issuers should be aware that the court's ruling addresses the issue of an injunction, and the actual question of the law's constitutionality and enforceability must still be decided.

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