Proskauer

2020 Advertising Law Year in Review

Proskauer on Advertising Law Blog on **January 12, 2021**

While 2020 was an eventful year in the world of advertising law, it feels wrong to begin any type of "year in review" without acknowledging the global events of this year, and the challenges they have brought to every individual in one way or another. In our role, we are often in a position of criticizing or defending from criticism the marketers who create the content at the center of our work. But, right now, we would like to take a moment to celebrate and congratulate them for a year spent capturing the tone of the times with sensitivity, insight, and just the right amount of humor, including the challenges of working from home, our newfound sense of responsibility in not going anywhere, the importance of uplifting and supporting each other, and the fact that we can't wait to end our relationship with 2020. And, amidst all the challenges, we would like to remind everyone that 2020 also brought us Some Good News.

We look forward to a better 2021, and to seeing those of our readers who are old friends in person again and meeting others for the first time. In the meantime, let's talk about this year's key developments in advertising law…

Class Actions

The **appellate courts** didn't skip a beat this year, issuing several important decisions in the world of class actions:

- The Ninth Circuit held that *all* class members, and not just the representative plaintiff, must have Article III standing at the trial stage of a class action to recover monetary damages.
- The Eleventh Circuit banned incentive awards for class representatives.
- The Ninth Circuit reminded us of the power of class action waivers in consumer arbitration agreements to protect companies from potentially costly class action litigation, including deceptive advertising claims.

In California, we saw several unsuccessful attempts to rescue otherwise deficient pleadings by **adding allegations related to consumer surveys** that purported to show consumers were misled by a defendant's advertising. Time and time again, in dismissing claims related to Mott's applesauce, Ghirardelli baking chips, and Westbrae soymilk, the Northern District of California reaffirmed that consumer surveys alone do not make plausible an allegation that reasonable consumers are misled where the complaint has not otherwise plausibly alleged deception.

Every year brings its own set of new and ever more **creative theories of false advertising**. This year was no different, with decisions that resolved a plethora of interesting (albeit unsuccessful) allegations of deception:

- In a case against SeaWorld, the Northern District of California found the (human) plaintiffs failed to demonstrate standing to defend the rights of orca whales via false advertising claims.
- The District of Vermont dismissed false advertising claims from a consumer disappointed that Ben & Jerry's ice cream is allegedly not, in fact, made exclusively from milk sourced from "happy cows" and "Caring Dairy" farms.
- The Southern District of New York reminded us that claims that a seller's products are "premium" or "the best" are mere puffery, and certainly cannot be used as a backdoor to complain about Starbucks's alleged use of pesticides.
- While condemning the exploitation of children in the cocoa bean supply chain, the First Circuit affirmed a series of decisions holding that chocolate companies' failure to disclose information about upstream labor abuses on product packaging did not constitute unfair or deceptive business practices under Massachusetts law.
- The Eastern District of New York threw out another cocoa claim, finding plaintiffs failed to plead that the labeling of Oreo cookies with the statement "Always Made With Real Cocoa" was deceptive, where plaintiffs did not dispute that Oreos do contain cocoa, but rather took issue with the fact that the cocoa was allegedly refined through an alkalizing process.
- The Seventh Circuit affirmed the dismissal on summary judgment of claims that Fruit of the Earth's aloe vera products were deceptively labeled as "Aloe Vera 100% Gel" and "100% Pure Aloe Vera Gel. " The Court found (among other things) that plaintiffs failed to demonstrate that consumers interpreted these claims to mean these products were of "high quality" or "especially effective," and the inclusion of stabilizers and preservatives in the products did not make these claims deceptive.

- The Second Circuit affirmed the dismissal of claims that Dunkin's "Angus Steak" products were deceptively marketed to cause consumers to believe they contained an "intact" piece of meat, when they were actually ground beef patties with additives. The Court noted that the ads at issue included zoomed-in images clearly showing the beef patty, and reasonable consumers purchasing a $2-4 grab-and-go sandwich would not be misled into thinking they were purchasing an unadulterated, intact piece of meat.
- The Southern District of Florida found that Burger King's promise of a non-meat patty in its plant-based "Impossible Burger " did not constitute a promise that the burger would be prepared separately from meat items. The court took it a step further, also granting Burger King's motion to deny class certification at this early pleading stage, crediting Burger King's argument that each consumer has different personal preferences for the preparation of his or her food.
- In a case against Church & Dwight, plaintiffs alleged that the number of "loads" stated on OxiClean stain remover labels is deceptive because, for some purposes other than a typical load of laundry, more than one load's worth of product should be used. The court granted Church & Dwight's motion to dismiss, concluding that plaintiffs failed to plausibly allege a reasonable consumer would be deceived by the labels. The court agreed with defendant's arguments that reasonable consumers are not likely to be misled by the challenged claims given the disclosures made by the OxiClean labels. Proskauer represented Church & Dwight in this matter.

2020 also brought a series of "**white" non-chocolate claims**, with lawsuits filed against numerous confection makers alleging their "white"-labeled sugary goods deceived reasonable consumers into thinking the products contain white chocolate, when they do not. The candy gods (i.e., federal district courts) so far have not looked favorably on these claims, dismissing claims against Nestle Toll House's Premier White Morsels, Ghirardelli's Premium Classic White baking chips, and Hershey's Kit Kat White bars.

However, taking the cake for largest number of class actions filed regarding a single word is almost certainly the category of allegedly deceptive **"vanilla" claims**, alleging that defendants' "vanilla"-labeled products contain flavoring ingredients that do not come from vanilla beans. Claims against Wegmans vanilla ice cream, Westbrae Natural's Organic Unsweetened Vanilla Soymilk and Blue Diamond's vanilla almond milk have been dismissed already, and we expect many more will follow.

Lanham Act

In a year involving a good deal of **Supreme Court** drama, false advertising (and trademark) law did not go ignored at the highest court in the land:

- In *Romag Fasteners v. Fossil*, 140 S.Ct. 1492 (2020), the Court unanimously held that a Lanham Act plaintiff can recover the defendant's profits without proof the defendant acted willfully. That being said, willfulness will still be an important part of Lanham Act cases moving forward, as the Court indicated it is a relevant factor for disgorgement (plus, a showing of willfulness can entitle a plaintiff to a presumption of consumer confusion).

Several **circuit courts** issued notable Lanham Act decisions this year as well:

- In the great beer battle of 2020, the Seventh Circuit reversed a district court's decision preliminarily enjoining Anheuser-Busch from advertising that Bud Light has "no corn syrup" whereas Molson Coors's competing Miller Lite and Coors Lite beers are "made with" or "brewed with" corn syrup.
- The Fifth Circuit vacated a disgorgement and corrective advertising award in a case involving windshield water repellant, concluding that the plaintiff failed to show the defendant's profits were attributable to its false advertising, and that corrective advertising constituted an unsupported windfall.
- The Ninth Circuit affirmed the dismissal of PragerU's false advertising suit against YouTube and Google, concluding that YouTube's content restrictions and statements about its moderation policies did not constitute commercial speech sufficient to support a Lanham Act claim.

As for notable **district court** decisions from the past year, two caught our eye:

- One of those cases we handled: In *MCS Healthcare v. MMM Healthcare*, Proskauer successfully defended a company accused of denigrating its competitor in a widespread media campaign in Puerto Rico. MMM's advertising accused MCS of "tricking" its customers about the availability of special Medicare benefits, and spreading "disinformation" about MCS's Medicare plans. MCS challenged these claims and brought two successive preliminary injunction motions against MMM. We defeated both motions. The court agreed with our arguments that MCS was not entitled to a preliminary injunction concerning MMM's advertising.
- We are also closely following the ongoing dispute between Chanel and The RealReal over the latter's alleged sale of counterfeit Chanel bags. While the court dismissed Chanel's trademark infringement claim, it declined to dismiss Chanel's false advertising claim premised on The RealReal's marketing claims that the products it resells are "100%" authentic.

Regulatory

The FTC's Green Guides have become increasingly relevant to advertisers over the past few years as consumer demand for "green" products increases. This past year saw a few challenges in this space. Whether it becomes a focus for the FTC itself remains to be seen, but we anticipate this may be an area that attracts consumer class actions in the wake of an attention-grabbing NPR investigation. Watch this space.

This was a busy year in the self-regulatory space, with the National Advertising Division closing well over 100 cases. Stay tuned—and make sure you're subscribed to our blog—for our upcoming "NAD Year in Review" deep-dive into notable cases and trends from this past year at NAD and NARB.

***

Want to talk advertising? We welcome your questions, ideas, and thoughts on our posts. Email or call us at lweinstein@proskauer.com /212-969-3240.

View Original

Related Professionals

- **Baldassare Vinti**
  Partner
- **Jeff H. Warshafsky**
  Partner
- **Jennifer Yang**
  Partner