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Consumer Class Actions - Especially in False Advertising and Privacy - Continued to Rise

Daily Journal on **February 5, 2025**

With the doors recently closed on 2024, a look back on the past year confirms that consumer class actions in California continue to grow, particularly in the false advertising and privacy space.

In California district courts alone, over 500 false advertising cases were filed in the past year, including against pet care, personal care, food and beverage, and healthcare companies. The plaintiffs in these cases typically allege that the product's labeling or other advertising conveys a false or misleading message, or deceptively fails to disclose key information about the product, and therefore the plaintiffs suffered an economic loss.

Privacy class actions have also become more prevalent with California's invasion of privacy and anti-wiretapping laws. The law in this area is fast-developing, which has allowed plaintiffs to test out new theories and ways to apply old laws to new technology. In the past year, over 500 cases have been filed in California District courts alleging violations of CIPA, and another 200 have been filed alleging violations of the federal Video Privacy Protection Act (VPPA).

Of course, these figures do not account for the true number of advertising and privacy disputes. For every case filed, there are many more behind the scenes that are threatened, many of which are resolved out of the public eye.

False Advertising Trends: PFAS and Greenwashing Claims on the Rise

PFAS are a group of forever chemicals—man-made chemicals that do not break down easily. Lawsuits related to alleged PFAS contamination are popping up nationwide involving food and consumer products, including energy drinks, cosmetics, floss, and tampons. Piggybacking off the long-standing trend of challenging "all natural" claims, plaintiffs allege that it is deceptive when even miniscule amounts of PFAS are present in products labeled "all natural."

These cases often fail at the pleading stage because the plaintiffs cannot plead reliable testing that indicates the product they bought in fact contained PFAS. For example, a Northern District of California court dismissed a class action, finding plaintiffs failed to plausibly allege that Edgewell's tampon products contained PFAS. *Lowe v. Edgewell Personal Care Company*, No. 3:23-cv-00834 (N.D. Cal. Feb. 24, 2023). The court reasoned that the "testing allegations are cursory" and plaintiffs' allegations that certain products contain PFAS are merely speculative. The court likewise emphasized that plaintiffs failed to identify the amount of forever chemicals allegedly detected in the product and whether that amount was negligible or significant.

Another frequent target in false advertising lawsuits is greenwashing, a marketing tactic where sustainability-related statements made by a company may not accurately reflect its actual practices. In assessing greenwashing claims, the National Advertising Division and courts (including California's) look to the FTC Green Guides. Compliance with the Green Guides is an important way for companies to mitigate the risk of challenges to their environmental claims.

In a case in the Northern District of California, plaintiffs alleged that defendant Rust-Oleum Corporation misleadingly labels its "Krud Krutter" cleaning products as "earth friendly." They allege that these products pose a risk to the environment and do not comply with the Green Guides. After the court denied defendant's motion to dismiss and motion for summary judgment, the parties reached a settlement in November. *Bush v. Rust-Oleum Corporation*, No. 3:20-cv-03268 (N.D. Cal. May 13, 2020).

Privacy Trends Stemming from CIPA and VPPA

Over the past year, at least 200 cases involving pixels and CIPA claims have been filed in California federal courts. At issue in pixel cases are small snippets of codes that are embedded in emails, webpages, and advertisements, which track a user's activity while on the site. Plaintiffs allege that pixels allow businesses to collect information about users on third-party websites without their consent. The focus of many such cases is whether the website shared the contents of the user's activity or merely recorded information like a user's IP address.

The Southern District Court of California recently dismissed a case alleging that the Meta Pixel software installed on defendant hospital's webpage was collecting patient information and unlawfully sharing it with Meta in violation of CIPA. *Cousin et al. v. Sharp Healthcare*, No. 3:22-cv-02040 (S.D. Cal. Dec. 23, 2022). The court found plaintiffs did not plausibly allege that their "content" was intercepted because plaintiffs did not elaborate on what personal information was shared.

The VPPA has provided another path for plaintiffs to bring class actions concerning alleged privacy violations. The VPPA makes a video tape service provider liable for knowingly disclosing consumers' personally identifiable information (PII) without their consent. Plaintiffs are suing a wide spectrum of companies for allegedly sharing their PII through videos consumers watch online.

In a suit against Fandom, plaintiffs alleged that Fandom shared their PII without their consent. *Jackson v. Fandom, Inc.*, No. 4:22-cv-04423 (N.D. Cal. Jul. 29, 2022). The court denied Fandom's motion to dismiss, finding that Fandom was a video tape service provider under the VPPA even though Fandom does not charge fees to viewers. Fandom moved for summary judgment this past August, arguing that plaintiffs are not "subscribers" as required under the VPPA. The court has stayed the proceeding pending the 9th Circuit's resolution of the intra-circuit split on the definition of a subscriber. *See Heather, et al. v. Healthline Media, Inc.*, No. 24-4168 (9th Cir. Jul. 09, 2024).

Looking Ahead

These types of lawsuits are not going away any time soon. The plaintiffs' bar is savvy and will continue to test out new theories—for example, new ways of alleging that a product was likely contaminated with PFAS, and new theories about how common Internet technologies might invade a consumer's privacy. Companies that interface with, and sell products or services to consumers, should be strategic about their advertising and privacy practices. There are ways to mitigate class action risk, and in some cases to avoid it altogether, including by complying with the Green Guides and privacy best practices.

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