January 2015 Monthly Consumer Protection Update

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Provided by Reed Smith, LLP
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Agenda

- Legislative & Regulatory Developments
- State Attorney General Update & State Legislation
- Developments in Litigation
- Questions
Legislative & Regulatory Developments
Appeals Court Sides with Federal Trade Commission in Pom Wonderful Advertising Case

• Three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit upheld claims of false advertising by Pom Wonderful finding that the government could prohibit the pomegranate juice company from advertising its products as being effective in fighting heart disease, prostate cancer and erectile dysfunction:
  – Court sided with the Federal Trade Commission on most issues in the case, while rejecting Pom Wonderful’s argument that the advertisements and claims were protected by the First Amendment
  – Invalidated a requirement imposed by the FTC that Pom Wonderful obtain support from two clinical trials before making disease-fighting claims, instead holding that one clinical trial was sufficient
  – Rejected Pom Wonderful’s claim that even performing one clinical study is too onerous a requirement, but held that a requirement of two clinical studies could have the effect of denying consumers “useful, truthful information about products with a demonstrated capacity to treat or prevent serious disease.”
The FTC released a report recommending a series of steps businesses should take to protect consumers’ privacy when using Internet-connected devices:

- Build security into devices at the outset
- Train employees on the importance of security
- Manage security at appropriate level of the organization
- Require security standards from outside providers; oversee providers’ security measures
- Implement multiple layers of security to protected against identified risks
- Implement measures to prevent unauthorized access of devices and data stored on devices
- Monitor connected devices and provide security patches to cover known risks
- Data minimization – limit collective and storage time
Green Coffee Bean Weight Loss

- Company settles FTC charges of deceptive advertising through appearances on television programs (*Dr. Oz, The View*):
  - Company claimed that green coffee bean supplements cause significant and rapid weight loss by citing a clinical study
  - Company tailored marketing campaign to capitalize on company spokesperson’s appearance on the *Dr. Oz* show by urging consumers to use certain search terms that the company used in paid advertising search terms to drive traffic to the product’s site
  - Company used the *Dr. Oz* appearance in multiple forms of advertising, creating the impression that the product was “doctor approved”
  - Paid spokespersons portrayed themselves as independent sources of information about the product
Jungle Rangers and “Brain Training Claims”

- Jungle Rangers, a computer game, settled with the FTC over unsubstantiated claims:
  - Jungle Rangers claimed that the computer game improved children’s focus, memory, attention, behavior, and school performance
  - Ads claimed the game had “scientifically proven memory and attention brain training exercises,” that created permanent results
  - Infomercials featured children stating that Jungle Rangers helped them pay attention in school and get better grades
  - Infomercials depicted parents, teachers, and child psychologists
  - FTC alleged that claims were unsubstantiated and that the company falsely advertised that the benefits were scientifically proven
NourishLife Settles Deceptive Claims Charges

- The FTC alleged that NourishLife made deceptive claims that its children’s supplements were proven effective at treating childhood speech disorders
  - Supplements were sold online and through distributors for more than $70 per bottle
  - Advertised via the Internet, including Google sponsored links on websites and at conferences on autism disorders
  - Claimed supplements were developed by a pediatrician
  - Ads featured parent endorsements
  - “Scientifically proven claims”
  - Operated website apraxiaresearch.com and represented it as an independent resource of research and other information of apraxia, a motor speech disorder
FTC Approves Changes to Cooling Off Rule

• Cooling-Off Rule previously provided that it is unfair and deceptive for sellers engaged in door-to-door sales valued at more than $25 to fail to provide consumers with disclosures regarding their right to cancel the sales contract within three days of the transaction
  -- Final amendment increases the exclusionary limit for sales made at locations other than the buyer’s residence to $130
  -- Retains the $25 limit for sales made at the buyer’s residence
TracFone to Pay $40 Million to Settle FTC Charges

- TracFone, the largest prepaid mobile provider in the US, agreed to pay $40 million to the FTC to settle charges that it deceived millions of consumers with hollow promises of “unlimited” data:
  - Despite advertising unlimited data, TracFone drastically slowed or cut off some consumers’ mobile data after they used more than certain fixed limits in a 30-day period
  - The FTC noted that some of TracFone’s brands were targeted at specific populations, such as Spanish-speaking consumers
  - Data limits varied, but service was generally slowed when a customer used 1-3 gigabytes, and suspended data service at 4-5 gigabytes
FTC’s First Case Against Car Title Lenders

- The FTC took action for the first time against a car title lender, by reaching a settlement requiring such lenders to stop their use of deceptive advertising to market title loans:
  - FTC charged that the companies advertised zero percent interest rates for a 30-day car title loan without disclosing important loan conditions or the increased finance charge imposed after the introductory period ended.
  - First American Lending advertised a zero percent offer (in English and Spanish) and failed to disclose that the borrower had to meet specific conditions to receive the rate and that the consumer would be required to pay a finance charge from the start of the loan.
  - Finance Select failed to disclose that unless the loan was paid in full in 30 days, the zero percent offer did not apply and that the borrower would have to pay a finance charge for the initial 30 days of the loan in addition to any finance charged incurred going forward.
  - Fast Cash failed to disclose how much the finance charge would cost a borrower after the 30-day introductory period was over.
  - The FTC voted to issue an administrative complaint.
State Attorney General Update & State Legislation
State AG Update: NY’s Data Security Proposal

• On Jan. 15th, the NY Attorney General Eric Schneiderman proposed legislation that would allow companies a safe harbor if they implement new heightened data security standards.
  – The proposal came just days after President Obama’s State of the Union
  – Currently, NY does not have a law directly requiring entities to implement data security measures to protect consumer information. Rather, in the event of a data breach or unauthorized disclosure, companies are required to notify affected individuals if their private information is compromised

• The proposal would require companies to broaden the scope of information that companies would be responsible for protecting and implement technical and physical security measures to protect the data they hold, including data breach reporting and heightened security standards.
State AG Update:
NY’s Data Security Proposal

• Some examples of these security measures include:
  – Administrative safeguards: assess risks, train employees and maintain safeguards
  – Technical safeguards: (i) identify risks in their respective network, software, and information processing, (ii) detect, prevent and respond to attacks and (iii) regularly test and monitor systems controls and procedures
  – Physical safeguards: special disposal procedures, detection and response to intrusions, and protect the physical areas where information is stored

• A rebuttable presumption is the safeguard from litigation.
• The AG is seeking to incentivize companies to enhance their data security practices to proactively fight attacks
Encore Capital Group, Inc. Settlement

- New York AG settled a case where debt buyer Encore Capital Group Inc. allegedly brought more than 4,500 time-barred debt collection actions against thousands of NY consumers.
  - The investigation revealed that Encore routinely targeted consumers in debt collections claims brought outside NY’s statute of limitations, and because most consumers don't respond when they are sued by a debt collector, Encore obtained default judgments against them.
  - Encore will vacate nearly $18 million in improperly obtained judgments, pay a $675,000 civil penalty, and reform its debt collection practices.
  - AG Schneiderman vowed to continue to take action against companies that abuse the power of the court system.
HIKO Energy, LLC Settlement

• HIKO Energy LLC, a third party energy provider, settled with the state of New Jersey after allegedly misleading customers with false marketing into switching providers to get “lower” rates.
  – HIKO misled consumers with written guarantees that, if they switched from their utility companies, they would see monthly savings in their electric and natural gas bills. HIKO sales representatives also allegedly represented to consumers that their monthly bills would never exceed those of the utility companies.
  – However, as energy prices spiked in early 2014, HIKO’s rates far exceeded those its customers would have paid, had they stayed with their previous electric and natural gas utilities.
  – HIKO agreed to pay $2.1 million, including $1.85 million in restitution to consumers, and to significantly revise its business practices.
Zappos.com, Inc. Settlement

- Zappos.com Inc. has reached a settlement with nine states, including Pennsylvania and Florida, aimed at addressing cybersecurity concerns following a 2012 hacking attack.
  - The investigation revealed that a hacker was able to access sensitive data and personal information of 24 million consumers nationwide after breaching Zappos’ security systems
  - Zappos agreed to pay more than $100,000 to the states and to implement enhanced privacy policies and security standards, such as independent third party audits and regular employee training
State of Washington v. Arlene’s Flowers Inc.

- A Washington state judge ruled that the state’s AG had standing to bring a consumer protection lawsuit against a flower shop and its owner for refusing to provide wedding flowers to a gay customer planning to marry his husband.
  - In the case, AG Ferguson allegedly sent a letter to the florist asking her to comply with the state’s Consumer Protection Act and the Washington Law Against Discrimination, which blocks businesses from discriminating on the basis of sexual orientation
  - The flower shop owner, citing her Christian religious belief that marriage can only be between a man and a woman, allegedly refused to serve the customer
  - Benton County Superior Court Judge Alexander Ekstrom ruled AG Ferguson had standing and the owner could be held personally liable for violating the state’s Consumer Protection Act even though her business qualifies as a separate corporation
Dish Network, LLC Settlement

- Dish Network, LLC will pay $2 million to settle the Colorado AG’s allegations that its representatives misled consumers into believing that the price of their programming under a two-year contract was “locked in.”
  - The complaint alleges that in 2010, Dish Network removed a disclosure alerting consumers that it reserved the right to increase the prices of its monthly programming packages at any time from its sales representatives’ scripts.
  - During a series of undercover calls made by the AG’s office to the company in May 2012, numerous Dish Network representatives made misleading statements which suggested that a consumer’s second year price was “locked in” and not subject to change.
  - The company also didn’t notify consumers about the price changes until after the consumer had already agreed to a price and buried the new pricing information in an email with other information, such as installation time.
Credit Card Company Settlements

- The Missouri AG announced that Discover Financial Services Inc., Capital One NA and HSBC Bank USA NA have agreed to pay $2.3 million to end allegations that they misleadingly marketed payment protection plans to state residents.
  - The AG said that the companies misled customers into believing that, for a monthly fee, they could put their credit card payments on hold if they lost their job or became disabled. However, after making the monthly protection plan payments, customers who tried to suspend payments were often told they did not qualify for the benefit.
  - Some of the banks’ consumers were also automatically enrolled in the plans if they didn’t read and respond to a mailed notice.
  - In addition to the payments, the companies agreed to stop the allegedly misleading marketing of these programs and other add-on products, such as identity theft protection.
Developments in Litigation
Video Privacy Protection Act

Federal judges dismiss VPPA claims against Google/Viacom and Dow Jones

• Video Privacy Protection Act (“VPPA”) is violated when a video tape service provider “knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider [.]”

• Nickelodeon Consumer Privacy Litigation, No. 2:12-cv-07829 (D. NJ.)
  • P’s alleged that Google could learn P’s actual identities by combining collected information with other information
  • Court dismissed P’s claims, holding that personally identifiable information is information which must, **without more**, link an actual person to information collected.

• Locklear v. Dow Jones & Co. Inc., No. 1:14-cv-00744 (N.D. GA)
  • Dow Jones disclosed P’s Roku device serial number and video viewing history to an analytics and advertising company. The company could identify the individual based on other information received.
  • Court dismissed plaintiffs’ claims, stating that the Roku serial number, **without more**, does not constitute PII under the statute.
Class Action Al lleges LinkedIn Exploited User’s Images

Lea v. LinkedIn Corp., No. 5:15-cv-00236 (N.D. Cal.)

-Class Action Complaint alleging violations of California’s Common Law Right of Publicity and California Unfair Competition Law
-LinkedIn emailed existing about contact uploader service
-Emails typically showed the name and photograph of four or more of the recipient’s LinkedIn connections.
-Users never consented to the use of their names and likeness to promote the service and were not made aware that LinkedIn sent these emails
-Privacy Policy did not specify such usage
Zipcar’s Late Fees are Illegal Liquidated Damages
Bayol v. Zipcar Inc., No. 3:14-cv-02483 (N.D. Cal.)

- Under Membership Agreement, members paid fees of $50-$150 for late car return
- Plaintiff brought claims under various CA. consumer protection statutes, including Consumer Legal Remedies Act and Unfair Competition Law
- Court dismissed Zipcar’s motion to dismiss, stating that Zipcar’s late fees are liquidate damages because they can readily be determined from the contract at the time of breach

Adobe’s Early Termination Fee is not unlawful
Scotty Mahlum v. Adobe Systems Inc., No. 5:14-cv-02988 (N.D. Cal.)

- Subscription to a suite of software programs contained an early termination fee ("ETF"): “We’d hate to see you go, but if you cancel within the first 30 days, we’ll give you a full refund. Otherwise, you’ll be billed 50% of your remaining contract obligations.”
- Plaintiff brought claims under California Civil Code 1671(d) (under Ca. Consumer Legal Remedies Act) and Business and Professions Code
- Court granted Adobe’s motion to dismiss, holding that the ETF is an alternative means of performance and not a liquidated damages clause
False Ad Claims Aren’t Pre-Empted by FDA


Cold Company claimed that OTC cold and flu products “safe”, “effective” and “quick acting”

P brought claims under CA State Law (Unfair Competition Law, False Advertising Law, Consumer Legal Remedies Act)

- Claimed products were “nothing more than sweetened, flavored water with … highly diluted concentrations of the products’ so-called ‘active ingredients’”

Unlike state law, FDA does not require that homeopathic drugs undergo randomized placebo-controlled trials

Judge dismissed company’s motion to dismiss, holding that state law claims fit “comfortably within the FDA’s prohibition of misbranded drugs”, and thus not pre-empted
In-store Credit Card Transactions

Container Store Settles Over ZIP Code Collection

- Complaint alleged that Container Store collected ZIP codes to send consumers marketing materials in violation of Mass. State law
- Collection was not due to credit card company requirements or for verification purposes
- Mass. Supreme Judicial Court has held that a consumer’s ZIP code, when combines with the consumer’s name, is “personal identification information”

Class Action Alleges J. Crew Violated FACTA

- J. Crew’s receipts included the first 5 digits and last 4 digits
- Fair and Accurate Credit Transactions Act (“FACTA”) - amendment to the Fair Credit Reporting Act - provides that “[N]o person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction.”
Class Action Alleges Uber’s Safety Claims Are False

Jacob Sabatino v. Uber Technologies Inc. et al., No. 3:15-cv-00363 (N.D. Cal.)

-Alleged violations of California Business and Professional Code
-Claims made by Uber according to the complaint: “safest ride on the road”, “industry-leading” background checks, background checking process and standards are “often more rigorous than what is required to become a taxi driver”
-Background checks outsourced to a third party. Drivers are required to (i) provide short application, (ii) SS#, (iii) 2 pictures of car, (iv) registration and proof of insurance, (v) Uber vehicle inspection form
-Plaintiff alleged that fingerprints aren’t used in background checks, no one meets the applicant, no training, no supervision, etc.
Wal-Mart Customers Seek Class Certification For Incorrect Sales Tax Calculation
Shaun Brandewie et al. v. Wal-Mart Stores Inc. et al., No. 1:14-cv-965 (N.D. Ohio)

-P’s asserted claims for breach of contract under Wal-Mart’s Return Policies, alleging Wal-Mart violated the terms by refunding customers less than the original purchase price.
-Wal-Mart applied lower sales tax rates to returns
-Discrepancies were less than $1, but added up to $9M over four years

Whole Foods Charges Sales Tax On Coupons
Wong v. Whole Foods Market Group Inc., No. 1:15-cv-00848 (N.D. Illinois)

-Class Action Complaint alleged Whole Foods charged sales tax on the full amount of a purchase before deducting the amount of a coupon used
-Plaintiff alleged violations of Illinois’ Consumer Fraud Act and common law fraud.
-Under Illinois law, retailer is required to charge sales tax on the gross amount if the retailer receives no reimbursement from any source for the coupon used
NAD Cases
Alka-Seltzer Plus Cold & Cough

- An advertiser can compare two dissimilar products even if there are more similar products made by the respective companies, so long as the objects of the companies are clearly identified in the advertisement, and there is no implication that the comparison is to a competitor’s more similar product, or that the competitor does not make a more similar product:
  - Express Claim: Advertisement represented that DayQuil Cold and Flu does not treat a runny nose, but that Alka Seltzer Plus Cold & Cough treats a consumer’s worst symptoms, including a runny nose
  - Implied Claim: Challenger alleged that the advertisement represented that the two products can be used interchangeable, when the cannot
NAD Declines Jurisdiction Over Comments Made in LinkedIn Account

- Challenger asserted that the advertiser, Terra Novo, a maker of erosion control products, made a variety of claims that its EarthGuard products outperform or are as effective as the challenger’s product, Flexterra:
  - As a preliminary matter, the NAD determined that it did not have jurisdiction to review the truth and accuracy of comments made in the LinkedIn account of a Terra Nova employee because, in the context in which they appeared, the statements did not qualify as “national advertising” under NAD policies and procedures
  - Additionally, the NAD also recommended that when making comparative or quantified performance claims, the advertiser disclose whether the claims are based on substantiation developed from tests on the specific product being advertised
Questions?