Updates
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2019 ABA Antitrust Spring Meeting: Consumer Protection Takeaways

This is the final article in a three-part series on the American Bar Association's 67th Antitrust Law spring meeting.

The meeting earlier this month included many sessions addressing consumer protection. Some of the most interesting panels are discussed below.

Consumer Protection Year in Review

Claim substantiation, conspicuous disclosures, "Made in USA" promotions, and social media marketing dominated the 2018 consumer protection landscape according to Lesley Fair (Federal Trade Commission, Bureau of Consumer Protection), Laura Brett (Better Business Bureau, National Advertising Division), and private practice attorneys Christie G. Thompson and Robert M. Langer during a panel moderated by Patricia A. Conners (Office of the Florida Attorney General).

The panel highlighted dozens of matters arising from government entities, industry self-regulators, and private civil actors seeking to enforce federal and state consumer protection laws. The speakers emphasized, among other things, that featured customer reviews should represent the real opinions of the reviewer, privacy promises must be honored while sensitive data is protected, and health-related claims should be supported by reliable product testing.

Fair described, for example, the FTC's settlement with two companies and a physician for advertising without support that their "amniotic stem cell therapy" can treat serious diseases, including Parkinson's disease, autism, macular degeneration, cerebral palsy, multiple sclerosis, and heart attacks. Thompson highlighted private litigation against Ricola USA Inc., over allegations that its marketing of "naturally soothing" throat drops is misleading because the drops contain synthetic or genetically modified ingredients.

As native advertising and social media marketing continue to grow, the panel advised that influencers should clearly disclose their connections to the paying companies, those companies should monitor their influencers' behavior on their behalf, and using fake followers and reviewers is an inappropriate practice for promoters. Langer identified, for example, Florida's action against Devumi Inc. and its owner after an investigation revealed their sale of fake Twitter followers, known as bots, to an estimated 200,000 customers and sale of automated bot traffic from artificial social media accounts.

Echoing last year's comments, the panel confirmed that companies promoting their products as "Made in USA" must meet the FTC's long-standing "all or virtually all" standard, meaning that all significant parts and processing that go into the product must be of U.S. origin. Fair highlighted the FTC's settlement with Patriot Puck, which marketed its hockey pucks as "The only American Made Hockey Puck!" even though the pucks were allegedly wholly imported from China.

In another "Made in USA" matter, Brett cited the NAD's decision recommending changes to J-B Weld Company LLC's marketing because the plastic applicator that stores and mixes its adhesive is foreign-made. The NAD determined that because the applicator was integral to consumers' ability to use the adhesive properly, the unqualified "Made in USA" claim was unsupported.

The panel also emphasized that promotional offers must conspicuously disclose their limitations. Thompson noted a recent decision with potentially wide-ranging effects in which Banana Republic promoted a sale but allegedly did not clearly identify excluded items. In reliance on the promotion, the plaintiffs selected items for purchase at the advertised discount and out of frustration and embarrassment purchased some of them even after learning that the discount did not apply. The California Court of Appeals concluded that these allegations were sufficient to meet the low burden of showing some suffered injury.

GMO, BE, Organic, Natural: Do Labels Matter?

Reading from a snack-bar label, moderator August Horvath rattled off a disclosure and posed the question to the panelists: Do labels matter? Horvath answered with a definitive "Yes." Panelists Gregory Jaffe (Center for Science in the Public Interest, Biotechnology Project), Karin Moore (Grocery Manufacturers Association), Jennifer Tucker (U.S. Department of Agriculture, Natural Organic Program), and private practice attorney Kim Richman agreed, but they differed about the information that should be disclosed on the labels as well as their efficacy.

Moore noted that labels matter but challenged conventional wisdom about the import that consumers attach to labels. She asserted that consumers typically think more about the health and safety of products than about much of the information required by existing disclosure rules. Jaffe observed that national standards should exist to avoid the "Wild West" where consumers lack adequate information to evaluate the trustworthiness of a manufacturer's claims, although he cautioned that too much information can result in label overload. Because he views regulatory safe harbors as more beneficial to manufacturers than consumers, Richman observed, "What cannot be achieved by legislation can be achieved through litigation." Tucker affirmed that labels matter and touted the mission of the USDA to create market opportunities for fairness in serving consumers and producers.

The panelists also addressed labeling for genetically modified organisms or bioengineered ingredients. Because of the increased attention paid to product ingredients, California started the GMO-disclosure movement by putting the issue to the voters in 2012. Other states followed suit, and Vermont in 2014 passed a state law requiring the disclosure of GMOs. Augmenting those efforts, federal regulators adopted nationwide regulations that became effective on December 20, 2018. The panelists questioned whether the new federal regulations will confuse consumers. If a label discloses the presence of a bioengineered ingredient without identifying the specific ingredient, for example, consumers may not be better informed about modified ingredients.

Unlike GMO and BE disclosures, the labeling of organics remains a voluntary process, where manufacturers choose to identify their products as organic to increase their consumer appeal. The panelists debated whether the voluntary system has led to better results and concluded that having uniform standards for organics is a preferable regulatory model in the fastest-growing segment of the food industry.

The panelists ended with a discussion of so-called natural products. Although marketers seem to love the terminology, few dare call their food products "natural" in no small part because of the significant litigation on the issue.

Consumer Protection Litigation: U.S. Trends and Developments

Increased use of social media marketing and California's influential role in the consumer protection legal practice framed the conversation with the firm's Patrick Thompson, Aparna Dave (Wells Fargo), Frederic N. Smalkin (U.S. District Court for the District of Maryland, retired), and private practice attorney Nicole Williams.

Citing statistics showing that nearly a third of humans use social media and that nearly half of all small businesses are on Instagram, Dave emphasized that online influencers must disclose their material connections to promoted products and that featured customer reviews should reflect typical depictions of the broader consumer experience. Dave also noted that consumer protection laws continue to highlight the reasonable consumer and offered that practitioners should focus on the viewpoint of the intended audience and may not be liable for unreasonable interpretations of their advertisements.

The panel addressed California's influential role in the consumer protection landscape. Recognizing that most practitioners have encountered or at least heard of Section 17200 of the California Business and Professions Code, Thompson (an author of this article) highlighted a "sleeper" statute: the California Legal Remedies Act. Although the two statutes address much of the same marketplace conduct, their processes and outcomes are unique. Unlike Section 17200, which permits equitable claims seeking restitution, the CLRA provides for, among other things, trial by jury and recovery of actual damages.

The CLRA is a corrective statute requiring notice of a claim by a potential litigant and an opportunity for the defendant to cure the alleged harm. Thompson explained that the ability to cure is particularly useful for companies seeking to mitigate the risk of court-ordered injunctive relief. Williams commented that the CLRA may not be as frightening to companies as it once was, explaining that many entities accused under the CLRA have seen a net positive outcome after taking advantage of the cure opportunity and expressing public gratitude for the constructive feedback from their customers.

Thompson also introduced an emerging concept to legal practitioners: conjoint analysis. Conjoint analysis is a statistical technique used by marketers to determine how consumers value a product's individual attributes. While companies and marketers have reliably used conjoint analysis for product pricing, its analysis calculating the value of product features may be increasingly advantageous to litigants and counsel.

Smalkin, who teaches legal history at the University of Baltimore, was reminded of a quote often attributed to P.T. Barnum about a sucker being born every minute. Smalkin now sometimes feels as though a sucker is born every nanosecond and "they all keep getting involved in class actions." Smalkin emphasized that damages evidence in consumer matters will almost always be presented via an expert witness. As to what type of expert he finds most persuasive, Smalkin prefers the boat captain who "lived and worked" in the waterway for several decades rather than the tenured professor who spent his or her formative years off the water writing peer-reviewed articles that went unread.

Big Data: Is It a Big Deal?

Panelists Cecilio Madero Villarejo (European Commission, DG Competition), Noah J. Phillips (FTC commissioner), Melissa Scanlan (T-Mobile), private practice attorney Terrell McSweeny, and moderator Kevin L. Yingling (Google Inc.) examined the potential competitive effects arising from the possession and use of "big data." McSweeny defined big data as "large sets of structured or unstructured data and the analysis of them" and outlined that the new development is not the large accumulation of data but the availability of massive computing capacity.

The panelists addressed whether the concern that algorithmic collusion heightens the risk of anti-competitive conduct is valid. Scanlan identified the speculation and suspicion about the use of artificial intelligence and machine learning to implement pricing algorithms, including those that anticipate and react to the algorithms of competitors. The issue, however, is not whether machines can do something humans cannot but whether they can execute the same tasks so quickly and on a such a wide scale that it makes it difficult for enforcers to detect illegal activity. Regardless, to Scanlon, a human agreement about price maintenance implemented by technology

is illegal, but the use of algorithms to scout and match prices without any prior agreement is not an antitrust violation.

Phillips highlighted the importance of understanding why the use of algorithms might be spreading within an industry because those algorithms may be accomplishing pro-competitive efficiencies without the intent to collude. Villarejo noted that firms cannot be required to price without reference to the market, including by using algorithms. He confirmed that the European Commission takes a case-by-case approach and applies a simple principle: What is illegal in the brick-and-mortar world is illegal in the online market.

In the merger context, Villarejo said that access to data as an input is more of a concern than the output from its use, and intervention is required when the lack of access forecloses the possibility of competition. Phillips indicated that concerns about access to data, depending on the harms alleged, might be addressed by traditional remedies, such as firewalls, divesture or licenses.

Finally, Phillips said that the United States has typically viewed privacy under the umbrella of consumer protection, not antitrust. He observed that "privacy" is a nebulous term and explained that competitive concerns and privacy concerns address different values that are difficult to reconcile, which might lead to arbitrary decision-making. Villarejo emphasized that privacy is a fundamental right in the European Union but added that competition enforcement will not be used to fix privacy problems, which are better addressed by the imposition of significant fines under the EU General Data Protection Regulation. McSweeny suggested that the mobility of personal information could increase competition, which policymakers should consider as they wrestle with the tension between the competition and privacy frameworks.

Read the entire ABA Antitrust Law Spring Meeting recap series:

Part 1: Federal and State Antitrust Enforcement Takeaways

Part 2: Merger Analysis Takeaways

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