Overview

The past 18 months have witnessed a steady increase in the filing of consumer class actions involving allegations of false or deceptive advertising related to consumer products. While such cases traditionally focused on product features or performance, more and more class actions challenge advertising describing the environmental, sustainability, and ethics practices of the consumer product manufacturers themselves. In addition, more plaintiffs are bringing false and deceptive advertising claims based on affirmative statements of product safety or a failure to disclose the presence of supposed harmful substances. This article discusses examples of recent cases that illustrate these trends.

“Greenwashing” Suits

The rise in “conscious consumerism,” or the commitment to purchasing decisions that have a positive social, economic, and environmental impact, has resulted in a number of consumer product manufacturers touting their products as “sustainable,” “ethical,” “environmentally friendly,” “green,” and “cruelty-free.” But what happens when details emerge about purportedly unethical or unsustainable practices within these manufacturers’ supply chains? As the examples below illustrate, putative class action plaintiffs have been quick to challenge the manufacturer’s marketing claims about environmentally friendly actions, the sustainability of their products, and “cruelty-free” or ethical manufacturing processes.

- In Lee v. Canada Goose US, Inc., the plaintiff alleged that the manufacturer’s representation that a coat had fur obtained through “ethical, sustainable, and humane sourcing” was misleading given the coat manufacturer’s use of leg traps and snares. Rejecting the manufacturer’s argument that the plaintiff’s “subjective views” regarding fur-trapping standards “do not render the Company’s statements misleading or deceptive,” the district court denied the motion to dismiss, reasoning that the allegations “support[ed] the reasonable inference” that the manufacturer’s “purported commitment to ‘ethical’ fur sourcing [was] misleading because [it] obtains fur from trappers who use allegedly inhumane leghold traps and snares.” Although the court found that the complaint sufficiently alleged false advertising, the parties later stipulated to a voluntary dismissal (with prejudice) when it was discovered that the plaintiff never relied on the challenged product representation at time of purchase.

- In Dwyer v. Allbirds, Inc., the plaintiff alleged that advertised figures relating to the average carbon footprint of a popular footwear and apparel company’s products were misleading because they failed to account for the larger environmental impact of wool production, thus “excluding almost half of wool’s environmental impact.” The complaint
also alleged that the manufacturer's wool supplier had not taken adequate measures to ensure that the “sheep live the good life,” as claimed on the manufacturer’s website. The manufacturer moved to dismiss, asserting that its carbon-footprint calculation was described accurately and that statements about sheep living “the good life” are too imprecise to form the basis for an actionable legal claim. In dismissing the complaint without leave to amend, the court held that it was not plausible for a reasonable consumer to think the carbon-footprint calculation was done in a way other than as described and that the challenged animal welfare statements were “classic puffery,” intended to be humorous, not a factual claim.3

- A proposed class in Marshall v. Red Lobster Mgmt. LLC has accused a popular seafood restaurant chain of lying about the sustainability of its Maine lobster and farmed shrimp, saying the restaurant chain’s suppliers use inhumane methods and environmentally damaging practices. The complaint includes causes of action under California’s consumer protection statutes. Defendant’s motion to dismiss is pending.4

- Hanscom v. Reynolds Consumer Products LLC involves consumer class claims challenging the marketing of recycling bags as “Perfect for All Your Recycling Needs” and “Designed to Handle All Types of Recyclables” as false and misleading because the bags themselves are not recyclable. Rather, the complaint alleges the bags contaminate the recyclable waste stream, decrease the recyclability of otherwise recyclable materials, and are not recyclable because they are made from low-density polyethylene (“LDPE”) plastic. Citing the growing problem of unrecycled plastic waste, the complaint alleges that many consumers seek to purchase products that are either compostable or recyclable, and that defendants capitalized on consumers’ demand for “green” products by falsely implying their “Recycling” bags are recyclable.5

False Advertising Challenges to Product Safety

Claims alleging false advertising as to the safety of products for failure to disclose alleged health risks reflect another trend seen in recent years. Some of these safety claims relate to the growing concern with Per- and polyfluoroalkyl substances (“PFAS”), nicknamed “forever chemicals” because they do not break down in the environment, and benzene, a carcinogenic chemical alleged to be present in dozens of sunscreen, after-sun products, and antiperspirants. Plaintiffs have also sued manufacturers of pet foods and cosmetic products for advertising claims about their quality and safety notwithstanding the presence of harmful ingredients. Below are examples of false advertising lawsuits stemming from marketing claims regarding product safety and the failure to disclose the presence of alleged harmful substances.

- Several of the largest cosmetics manufacturers face class action lawsuits alleging that they misled plaintiffs by failing to disclose the presence of PFAS in products. These suits include Vega v. L’Oreal USA, Inc., GMO-Free USA v. Cover Girl Cosmetics, and Onaka v. Shiseido Americas Corp. Each of these lawsuits alleges that advertising claims about product safety and sustainability were false given PFAS’ environmental toxicity and association with high cholesterol, thyroid disease, ulcerative colitis, and certain types of cancer. These complaints allege that, because the manufacturers failed to disclose the presence of PFAS, consumers were misled and deceived by the product labeling.6

- Following a study and FDA citizen petition filed by a self-proclaimed independent laboratory pharmacy, a number of plaintiffs filed lawsuits against manufacturers of sunscreen and aerosol body sprays based on alleged benzene contamination. These complaints allege that no reasonable consumer would expect to find any benzene, a known carcinogen, and reproductive toxin, at levels above the limits set by FDA in consumer products. The large number of complaints filed in federal court led to consolidated Multi-District Litigation proceedings in the Southern District of Florida. Some defendants have entered into class-wide settlements of these claims.7

- Other benzene litigation remains ongoing, including a putative class action pending in the Southern District of Ohio alleging that Proctor & Gamble “wrongfully advertised and sold ... Aerosol Antiperspirant Products without any labeling to indicate to consumers that these products may contain benzene.”8 Another class action lawsuit pending in the Northern District of Illinois alleges that Unilever failed to disclose the presence of unsafe level of benzene in its antiperspirant products, thereby misleading consumers who relied on Unilever’s representations regarding product safety.8 A motion to dismiss the complaint is currently pending.

- In Weaver v. Champion Petfoods USA Inc., a pet food manufacturer’s packaging touted its “biologically appropriate” dog food made with “fresh regional ingredients” prepared in their “award-winning kitchens”—“never outsourced.”

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Plaintiff alleged these claims were false and misleading because, according to plaintiff, there was a risk the dog food contained BPA and pentobarbital. The trial court and Seventh Circuit were not persuaded, as it was “undisputed that humans and animals are commonly exposed to BPA, no BPA was added to the dog food, and the level of BPA purportedly in the dog food posed no health risks to dogs.” The mere risk that any small amount of BPA was present in the food did not render the product representations misleading to a reasonable consumer.10

- In Goldfarb v. Burt’s Bees, Inc. the plaintiff brought suit challenging Burt’s Bees’ label claim that its dog shampoos and conditioners are “99.7% Natural,” when in reality they allegedly contained synthetic chemicals that are harmful to pets. The complaint points to FTC guidance on the use of the term “natural” in advertising materials, asserting that consumers have the right to take manufacturers at their word when they claim a product is “100% natural.” Despite rumblings for years11 that further regulatory or legislative guidance on the use of the term “natural” in advertising is needed, to date, FDA has not provided a definitive definition.12 The case was voluntarily dismissed within months of filing as the parties reached an out-of-court resolution.

- Based on a November 2021 report concluding that certain spices contained unsafe levels of arsenic, lead, and cadmium, plaintiffs filed a class action complaint against a spice manufacturer alleging it knowingly concealed the presence of heavy metals in its products. As support for their claims, Plaintiffs pointed to affirmative representations that the manufacturer made about the quality, safety, and integrity of the spice products, focusing on the company’s slogan: “The Taste You Trust.”13 A motion to dismiss the complaint is currently pending.

Conclusion

With increasing consumer interest in “environmentally friendly” and “ethically produced” products, as well as a greater awareness regarding product safety and ingredients used, manufacturers have employed marketing strategies seeking to address consumer demand and tastes. Given recent case trends, however, caution should be taken in making advertising claims regarding the company’s sustainability practices or on matters of product safety involving potential health risks. Consumer product manufacturers should review their labeling and advertising on these topics to avoid or minimize the risk of potential false advertising or failure to disclose claims. Although many of these types of statements have been regarded as non-actionable puffery or there may be no duty to disclose, it will be important to monitor these cases for further guidance from the courts as to whether these are short-lived liability theories or a long-term threat that is here to stay.

ENDNOTES

1 https://bschool.pepperdine.edu/blog/posts/conscious-consumerism.htm


11 E.g., HR 5017, introduced in November 2019, would have amended the FDA Act to define “natural” with a certain set of standards.


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