

Navigating Deceptive Advertising Consumer Class Actions

DAVID J. LENDER, ERIC S. HOCHSTADT AND OLIVIA J. GREER, WEIL, GOTSHAL & MANGES LLP, WITH PRACTICAL LAW LITIGATION

Recent decisions highlight that seeking dismissal of putative consumer class actions for deceptive advertising based on the failure to allege facts sufficient to satisfy the "reasonable consumer" standard can be a powerful weapon for companies.

Putative class action lawsuits based on deceptive advertising claims, especially those brought under California law, present an increasing threat to companies across the US. Many consumer protection and false advertising laws permit restitution and the recovery of attorneys' fees and costs, providing consumers and their counsel with additional incentive to bring class action claims. Recent decisions from courts in various jurisdictions demonstrate that seeking dismissal of deceptive advertising claims at the pleading stage can be a powerful weapon for companies. These cases also highlight the importance of carefully selecting advertising language and the location and accessibility of disclaimers to discourage or defeat consumer fraud class actions.

THE "REASONABLE CONSUMER" STANDARD

Courts apply the reasonable consumer standard in deciding deceptive advertising claims under the laws of several jurisdictions, including California, New York and Florida. Generally, this requires a plaintiff to show that members of the public are likely to be deceived or misled by the business practice or advertising at issue (*Fink v. Time Warner Cable*, 714 F.3d 739, 741-42 (2d Cir. 2013); *Elias v. Hewlett-Packard Co.*, 950 F. Supp. 2d 1123, 1131-32 (N.D. Cal. 2013); *In re Horizon Organic Milk Plus DHA Omega-3 Mktg. & Sales Practice Litig.*, 955 F. Supp. 2d 1311, 1331-32 (S.D. Fla. 2013)). Some courts determine that whether a plaintiff has met the reasonable consumer standard is a question of fact better left for resolution on summary judgment. However, a motion to dismiss under *Federal Rule of Civil Procedure (FRCP) 12(b)(6)* asserting that a plaintiff's allegations have failed to satisfy this standard may successfully eliminate these putative class actions before discovery ever begins.

SUCCESSFUL FRCP 12(B)(6) MOTIONS

The following cases show that a motion to dismiss under *FRCP 12(b)(6)* can defeat a putative consumer fraud class action even though the reasonable consumer standard is sometimes viewed as a fact-specific inquiry. These cases also provide valuable insight on the kinds of advertising content and structure that might help companies avoid liability under the standard.

In *Manchouck v. Mondelēz International, Inc., d/b/a Nabisco*, Nabisco brought a motion under *FRCP 12(b)(6)* to dismiss a putative class action based on a consumer's assertion that the "made with real fruit" label on Nabisco's strawberry and raspberry "Newton" cookies was misleading, because the cookies contained mechanically processed fruit purée and not "real fruit." Nabisco argued that the complaint failed to plausibly allege why the statement "made with real fruit" would deceive a reasonable consumer. The plaintiff did not dispute that:

- The cookies contained real fruit in puréed form.
- Even the narrowest definition of "real fruit" does not exclude fruit in puréed form.
- The packaging prominently displayed a depiction of the cookies' puréed fruit filling.
- The list of ingredients on the products' packages served as notice to customers that the products contained "Raspberry Purée" and "Strawberry Purée."

The district court agreed with Nabisco's argument that the complaint's allegations were insufficient to meet the reasonable consumer standard under California law, and concluded that the complaint failed to allege why strawberries and raspberries in their puréed form are no longer "real fruit." The district court also found it "ridiculous" that consumers would expect snack food "made with real fruit" to contain only "actual strawberries or raspberries," rather than the same fruits in a form that could be squeezed inside a Newton (*No. 13-cv-02148*, 2013 WL 5400285, at *1, *2-3 (N.D. Cal. Sept. 26, 2013)).

Similarly, in *Porras v. StubHub, Inc.*, StubHub prevailed on a motion to dismiss under *FRCP 12(b)(6)* in a putative class action alleging



that StubHub's use of the terms "guarantee," "100% confidence," "authentic," and "valid" in relation to the resale of tickets by third-party sellers through StubHub's website was misleading and confusing. The plaintiff, who had purchased tickets that were ultimately invalid, asserted that these terms implied that all tickets purchased through StubHub's website would be valid for entry. StubHub moved to dismiss the lawsuit based on its "FanProtect™ Guarantee" policy, which:

- Appeared on StubHub's website.
- Guaranteed that StubHub would, if the tickets were invalid and not honored by the venue:
 - attempt to locate comparable replacement tickets for the buyer; or
 - fully refund the buyer if replacement tickets could not be found.

Based on this disclosure, which expressly acknowledged that tickets may be invalid, the district court held that the plaintiff's allegations did not establish under California law that reasonable members of the public were likely to be deceived by the terms used on StubHub's website (*No. 12-cv-1225, 2012 WL 3835073, at *1,*5-6 (N.D. Cal. Sept. 4, 2012)*).

In *Weinstein v. eBay, Inc.*, another putative class action based on alleged deceptive practices arising from the purchase of tickets from third-party sellers through StubHub's website, the defendants moved to dismiss under *FRCP 12(b)(6)* on the grounds that the plaintiff had failed to satisfy the reasonable consumer standard under New York law. The plaintiff claimed that eBay, StubHub (acquired by eBay) and the New York Yankees misled consumers into paying more than the face value for a resold ticket. However, the plaintiff alleged that she:

- Went to the Yankees' website to purchase tickets but was unsuccessful in buying tickets directly from the website.
- Followed a hyperlink on the Yankees' website to StubHub's website, which was located at an entirely new website with a different web address.

In granting the motion to dismiss, the district court concluded that no reasonable consumer would plausibly think, based on these allegations, that tickets purchased through StubHub's website come directly from the Yankees, particularly given that tickets to various non-Yankees events are sold through StubHub's website. The district court also noted that "[a]ny reasonable consumer who knowingly goes to the secondary market for tickets would understand the possibility that she may have to pay more than face value to purchase tickets that are not available directly from the vendor" (*819 F. Supp. 2d. 219, 227-29, 230 (S.D.N.Y. 2011)*).

UNSUCCESSFUL FRCP 12(B)(6) MOTIONS

Decisions in which courts have declined to dismiss similar putative class action claims also provide valuable insight on the reasonable consumer standard. For example, in *Muir v. Playtex Products, LLC*, the district court declined to dismiss a putative deceptive practices class action arising from Playtex's assertion that its diaper disposal system was "Proven #1 in Odor Control," as stated on the front of the product's packaging. The complaint alleged that Playtex knew, based on tests against similar products, that its assertion regarding odor control was not true. Among other things, Playtex argued in its *FRCP*

12(b)(6) motion that its "Proven #1 in Odor Control" claim was not deceptive because the packaging disclosed the limited circumstances under which the statement was true. In denying Playtex's motion, the court concluded that the placement of the disclaimer on the back of the package, in a much smaller, barely legible type, could have the capacity to deceive a reasonable consumer in violation of Illinois law (*No. 13-cv-3570, 2013 WL 5941067, at *2, *4-6 (N.D. Ill. Nov. 6, 2013)*).

Similarly, in *Chapman v. Skype Inc.*, a California court reversed the dismissal of putative class action claims against Skype based on advertising that its monthly calling plan for internet telephone service was "unlimited," qualified by a footnote on Skype's website that a "fair usage policy" applied. The footnote provided a link to another page on Skype's website containing the policy, which stated that the unlimited calling plan was in fact limited to a certain number of hours and calls per day, and minutes per month. Before purchasing the unlimited plan, users were required to agree to terms of service stating that the policy applied. The terms of service also contained a link to the policy.

The trial court dismissed the plaintiff's claims, finding that Skype's fair usage policy was conspicuous and that the plaintiff agreed to the terms of service referencing the policy. However, the appellate court reversed, finding that:

- The footnote referencing the policy was at the bottom of the page in much smaller font, and the policy containing the limits on the "unlimited" plan was on a separate page, undermining the trial court's conclusion that the policy was conspicuous.
- The words "fair usage policy":
 - could reasonably suggest a policy to protect against misuse of the service provided;
 - would not necessarily suggest to a reasonable consumer that the "unlimited" plan actually imposes limits on the number and length of a user's phone calls; and
 - would not necessarily alert a reasonable consumer to the need to follow the link to the policy to learn the details of the plan's limits.
- Disclosure of the plan's limitations did not excuse Skype's practice of labeling the plan as "unlimited" in its initial dealings with customers.

As a result, the appellate court concluded that the plaintiff had adequately alleged her claims, and that questions of fact existed as to whether a reasonable consumer would read the policy and discover the limits on the "unlimited" calling plan (*220 Cal. App. 4th 217, 222 (Cal. Ct. App. 2013)*).

BEST PRACTICES

These cases highlight the importance of developing advertisements with the "reasonable consumer" in mind. Counsel should consider the following best practices when advising companies on their advertising campaigns.

CHOOSE ADVERTISING LANGUAGE WISELY

When structuring advertising content, at a minimum, counsel should advise companies to:

- Ensure that there is a reasonable basis to support all objective claims in the advertisement. This requirement applies not only to explicit statements, but also to any implied meaning that a reasonable consumer may infer from the advertisement.
- Step into the shoes of customers who may not know anything about the product and consider how these customers are likely to interpret the advertisement.
- Use language that would make sense to a reasonable consumer in the context of the product or service being sold.

MAKE ANY CLARIFYING DISCLOSURES CONSPICUOUS

If additional information is necessary to prevent an advertisement from potentially being misleading, companies should include a clear and conspicuous disclosure in the advertisement. Where a disclosure is necessary, counsel should advise companies to:

- Place the disclosure and other clarifying or limiting language in close proximity to the advertising language.
- Avoid placing the disclosure in a footnote or in miniscule font.
- Ensure that a clearly visible link to the disclosure is closely located to the relevant advertising language on a website, and that the disclosure can be easily accessed by clicking on the link.

For information on preparing motions to dismiss under *FRCP 12(b)(6)*, see *Motion to Dismiss: Overview* (<http://us.practicallaw.com/8-523-9648>) and *Motion to Dismiss: Drafting and Filing a Motion to Dismiss, Opposition and Reply* (<http://us.practicallaw.com/1-524-1621>).

For more information on avoiding deceptive advertising claims, see our *Advertising and Marketing Toolkit* (<http://us.practicallaw.com/2-503-9096>), and specifically, our *Practice Notes, Advertising: Overview* (<http://us.practicallaw.com/2-501-2799>), *Advertising and Promotions in Social Media* (<http://us.practicallaw.com/1-538-6609>) and *Online Advertising and Marketing* (<http://us.practicallaw.com/4-500-4232>).

David J. Lender and Eric S. Hochstadt defended StubHub in the *Porras* and *Weinstein* cases discussed in this article.

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