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Linda A. Kerns

identification of the authorized sellers who breached their distribution contracts. The retailers responded by submitting affidavits stating that they did not obliterate the batch codes from any JPMS products. JPMS argued that even if the retailers were not responsible for the obliteration, they knew that this action precluded JPMS from tracing the product to those parties responsible for the illicit distribution. However, the court held that the defendant retailers had no duty to disclose the missing batch codes to JPMS. As a result, the court held that JPMS presented insufficient evidence to prove concealment by the retailers. Accordingly, the court dismissed the fraud claim.

Conclusion

The court denied in part and granted in part the retailers motions for summary judgment and dismissal. The court found that the obliteration of the batch codes resulted in Paul Mitchell products materially different from JPMS authorized products. This caused a likelihood of consumer confusion regarding the origin of the Paul Mitchell products sold by the retailers. The court, therefore, denied summary judgment and dismissal on the first Lanham Act claim and the unfair competition claim. The court dismissed the second claim, but only because this claim proved too similar to the Lanham Act claim to form an independent claim. The defendant retailers were not the only ones involved in taking Paul Mitchell products out of the JPMS distribution network. Thus, JPMS could not establish that the defendant retailers instigated the unauthorized distribution or that they obliterated the batch codes. The court was unwilling to hold the retailers liable for mere awareness of such activities. Consequently, the court dismissed the tortious interference and fraud claims.

The statute of limitations of the Fair Credit Reporting Act is strictly construed

by Linda A. Kerns

Consumers seeking to file a claim under the Fair Credit Reporting Act ("FCRA") must strictly adhere to the statute of limitations unless their claim meets a narrowly construed discovery exception. In ***Clark v. State Farm Fire & Casualty Insurance Co.*, 54 F.3d 669 (10th Cir. 1995)**, the United States Court of Appeals for the Tenth Circuit affirmed the district court's holding that a "general discovery exception" to the statute of limitations would be contrary to Congress' express intention. To ensure a consumer's privacy, the FCRA provides limited circumstances where credit reports may be furnished and specified instances where consumers must be notified if their credit report is issued. The statute of limitations under the FCRA will only be extended if a credit report is issued, is required to be disclosed to the consumer, and contains a willful and material misrepresentation.

Credit report obtained without consumer's consent

The plaintiffs, Robert and Billie Clark ("the Clarks"), filed an action against State Farm Fire & Casualty Insurance Company ("State Farm") seeking actual and punitive damages. The Clarks alleged that State Farm violated the FCRA when it obtained the Clarks' credit report without their consent on July 25, 1989. State Farm procured the report in connection with a separate investigation which involved the alleged destruction by arson of a piece of property that the Clarks had sold to a third party.

Narrow exception in statute may extend tolling period

The Clarks filed their complaint on April 6, 1992, two years and eight months after the credit report was issued. State Farm filed a motion to dismiss, claiming that the statute of limitations had run. The FCRA requires that an action be brought within two years from the date on which the liability arises. However, a claim may be brought at any time within two years after the consumer discovers the report if the consumer provides evidence that the credit reporting agency willfully misrepresented material information that the FCRA requires to be disclosed to the consumer. The Clarks attempted to avoid the express two year limitation by claiming that they did not know that the credit report had been issued until 60 days after the two-year period had lapsed. A claims file requested in a discovery motion in a separate lawsuit filed by Robert Clark against State Farm included the credit report at issue. The file which State Farm provided the Clarks in that case contained a credit report, but the print was allegedly of such poor quality that no one discovered the existence of the credit report. However, after the two year statute of limitations had run, a second report of better quality was provided.

The case law conflicts regarding the statute of limitations provided in the FCRA. In *Houghton v. Insurance Crime Prevention*, 795 F.2d 322 (3d Cir. 1986), and *Rylewicz v. Beaton*, 888 F.2d 1175 (7th Cir. 1989), the courts held that a discovery exception may not be read into the FCRA unless the credit reporting agency materially and willfully misrepresents information required to be disclosed to the consumer. The district court in *Clark v. State Farm* relied on the above mentioned cases, holding that tolling the statute of limitations under the FCRA is permissible in only one limited "circumstance" of material and willful misrepresentation.

In contrast, the Fifth Circuit has taken a contrary position in *Hyde v. Hibernia National Bank*, 861 F.2d 446 (5th Cir. 1988), finding that the statute of limitations under the FCRA commences when a report issued to a third party causes injury to the consumer. If, however, the consumer is not aware of the issuance of the report, the limitation period tolls until the consumer becomes aware.

The Clarks relied on the reasoning in *Hyde*. However, the appellate court found that *Hyde* did not address the part of the FCRA which the Clarks construed as favorable to their case. This section states that the "tolling" provision does not apply to extend the limitation period unless the information contained in the consumer's credit report is required to be disclosed to the consumer.

Investigative consumer report defined

The language of the FCRA requires that the issuance of an "investigative consumer report" be disclosed to the consumer. The Clarks claimed that the credit report that State Farm requested and received was an "investigative consumer report," thereby triggering the exception to the statute of limitations. However, the district court found, as a matter of fact, that the consumer report at issue here was not an "investigative consumer report." The district court noted that an "investigative consumer report" differs from a regular consumer report because it contains general information about the consumer's character, reputation, personal characteristics, mode of living, and other information that is not obtained directly from a creditor of the consumer or from a consumer reporting agency. The district court found that the Clarks' consumer credit report merely listed credit transactions; therefore, nothing in the report indicated that the report was an "investigative consumer report." The district court concluded that the Clarks did not establish that State Farm "materially and willfully misrepresented any information required . . . to be disclosed" because they failed to prove that the report was investigative. The Clarks failed to qualify for an exception to the two year limitation period provided by the statute.

The appellate court relied on the reasoning found in *Houghton v. Insurance Crime Prevention Institute*, 795 F.2d 322, 325 (3rd Cir. 1986), and concluded that an equitable tolling or discovery period may not be read into the FCRA. The Supreme Court has stated that where Congress has enunciated an exception to a general prohibition, "additional exceptions are not to be implied in the absence of evidence of a contrary legislative intent." Congress explicitly set forth one discovery exception for the FCRA; therefore, the appellate court concluded that implying anything more would be excessive and against Congress' express intent. Since no evidence supported the Clarks' claim that the discovery exception should apply to their case and because the two year statute of limitations had run, the appellate court affirmed the district court in barring the Clarks' claim. Congress included a specific exception to the statute of limitations in the FCRA, and the Tenth Circuit refused to expand the exception in Clark.

A federal district court holds distributor's failure to maintain manufacturer's quality control standards possible violation of federal trademark law

by Paul Lukitsch

In *Anthony Distributors, Inc. v. Miller Brewing Co.*, **904 F. Supp. 1363 (M.D. Fla. 1995)**, a United States district court held that a distributor's unauthorized sale of date-expired products could infringe a brewer's trademark under federal trademark laws. In addition, in reviewing the distributor's motion to dismiss the brewer's claims, the court held that the "economic loss rule," a rule under Florida law which prevents a tort action from being maintained on purely economic damages, does not bar a brewer's fraud claim where damages include damages to the brewer's trademark.

Since May 1, 1983, Anthony Distributors ("Anthony") has been engaged in distributor agreements with Miller Brewing Company ("Miller"). These agreements grant Anthony the exclusive right to distribute Miller products, which bear the registered trademark of Miller, in the Tampa Bay and St. Petersburg markets of Florida. According to the terms set forth in the distributor agreements, Anthony is required to uphold Miller's strict quality control standards by preventing Miller products with expired date codes from reaching consumers. To ensure this control, Anthony must retrieve overage products from all retail accounts and destroy the product at their own expense.

Miller alleged that Anthony failed to comply with the required quality control standards set forth in the distributor agreements despite repeated warnings. Miller insisted that Anthony's failure to comply with these standards was due in part to a scheme by Anthony to generate profits. Miller took the position that Anthony, through its representatives, intended to fraudulently deliver overage products to retail accounts by "slamming, swapping, and dumping" the overage products to increase sales. Miller believed that Anthony's failure to comply with the quality control standards affected Miller's ability to exercise control over products bearing the Miller trademark. Miller alleged that Anthony's sale of overage products damaged the goodwill of the Miller trademark and allowed Anthony to earn profits to which it was not entitled. Miller further alleged that Anthony breached the distributor agreement, thereby causing financial losses to Miller.

On May 8, 1995, Miller filed a seven count action in the district court against Anthony, alleging breach of contract, trademark infringement under federal law, fraud, and unjust enrichment. In response to these claims, Anthony filed a motion to dismiss, claiming that the economic loss doctrine barred Miller's tort claim of fraud because Miller had only sustained pecuniary damages but no property damages. Anthony further contended that federal trademark law did not apply because Anthony was an "authorized distributor."

In reviewing a motion to dismiss, the court looks only to the sufficiency of the plaintiff's complaint and accepts all allegations as true. Here, the district court allowed the claim based on federal trademark law, holding that Anthony's status as an authorized distributor offered no protection from trademark infringement. In addition, although Anthony sold genuine Miller products bearing the registered Miller trademark rather than an imitation or counterfeit product, the court held that Anthony's failure to follow Miller's quality controls rendered the product not genuine. Thus, the court found Anthony's sale of Miller's products without following the quality controls to be an infringement of Miller's registered trademark. The court also held that by suffering damage to their registered trademark, an intangible asset, Miller suffered damage to property. Therefore, the court found the "economic loss rule" inapplicable and allowed Miller's fraud claims to stand. However, the court denied Miller's unjust enrichment claim pursuant to the "economic loss rule," noting that