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Consumers Injured by Meat Processor's False Advertising Receive Class Action Certification Under Lanham Act

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Home Warranty

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ed that arbitration would be final or binding. Only then could the court rely on Association rules that allow for entry of a confirmation judgment. National contended that although Association rules make an arbitration award confirmable, they cannot, by themselves, make the award final.

The appellate court rejected National's position and stated that it would not require the presence of magic words such as final or binding before enforcing arbitration awards. The Fourth Circuit pointed out that courts generally look for a reference to Association rules to determine finality and only when such guideposts are absent, rely upon the presence of words like final and binding.

National also argued that the warranty contract expressly rebutted the Association Rule 26(c) presumption of consent to entry of confirmation judgment. According to National, the warranty contract's stipulation that the arbitration process was a prerequisite to litigation was evidence that the parties anticipated the possibility of future litigation. Therefore, the arbitration decision was not binding.

The Fourth Circuit disagreed, finding that the language of this contract provision was probably left over from the days when courts were hostile to arbitration clauses. Drafters of arbitration agreements, therefore, used this language to insure that parties completed the arbitration process before suing in federal court. The Fourth Circuit found that, in the warranty contract in dispute, this language applied only to a court's ability to enter a confirmation judgment or a litigant's ability to use a final arbitration award as part of some larger litigation.

Lastly, the Fourth Circuit affirmed the lower court's award of damages to Rainwater for the cost of repairing the foundation.

Monica A. Murray

Consumers Injured By Meat Processor's False Advertising Receive Class Action Certification Under Lanham Act

In ***Maguire v. Sandy Mac, Inc.***, 138 F.R.D. 444 (D.N.J. 1991), the United States District Court for the District of New Jersey certified a consumer class action under the Lanham Act for injuries caused by false advertising but denied similar class certification under the New Jersey Racketeering Act, the federal Racketeering Influenced Corrupt Organizations statute, the New Jersey Consumer Fraud Act, and common law fraud.

Background

Sandy Mac, Inc. ("Sandy Mac"), a federally inspected meat plant that is no longer in business, formally processed ham products for resale through distributors and wholesalers nationwide. From 1975 to 1987, Sandy Mac sold ham products that it fraudulently represented as meeting the United States Department of Agriculture standards. Sandy Mac's ham products failed to meet U.S.D.A standards because the amount of water added to the ham exceeded both the amount represented on the label and that which was permitted by law. In 1989, Sandy Mac plead guilty to criminal charges arising out of its fraudulent conduct.

In 1990, Zane Maguire ("Maguire"), a restaurant owner who purchased ham products from Sandy Mac during the relevant time period, sued Sandy Mac on behalf of a group of ham product purchasers. Maguire asserted claims against Sandy Mac under the Lanham Act, 15 U.S.C. 1125(a); the New Jersey Racketeering Act, N.J. Stat. Ann. 2C:41-4 (West 1982); the federal Racketeering Influenced Corrupt Organizations statute, 18 U.S.C. 1964(c); the New Jersey Consumer Fraud Act, N.J. Stat. Ann. 56:8-1 - 56:8-4 (West 1989); and common law fraud.

The proposed class of ham product purchasers was divided into two subclasses. The first subclass consisted of all persons who purchased Sandy Mac's ham products, removed the packaging supplied by Sandy Mac, and thereafter resold the ham in a modified condition. Included within the first subclass were all deli and restaurant owners and large purchasers that sold the ham products over the counter. The second subclass consisted of all ultimate consumers of Sandy Mac's ham products who purchased the products on a cost-per-pound basis for home consumption.

Consumers of restaurant or deli sandwiches who purchased the product for immediate consumption were not included in either subclass.

Consumer Standing Under the Lanham Act

Before the district court reached the issue of class certification, it decided whether the consumers actually had standing to bring a Lanham action. The first issue relevant to standing was if the Lanham Act created a right of action for people who were not competitors.

The Lanham Act, 15 U.S.C. 1125(a)(2), provides that, "any person who, on or in any connection with any goods...or any container for goods, uses in commerce any . . . false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities . . . of his or her goods shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such an act." Sandy Mac argued that consumers could not sue under the Lanham Act because the Act only created a right of action for competitors.

The federal courts disagree about whether the Lanham Act provides protection to consumers. The United States Court of Appeals for the Third Circuit, which controls in this case, has held that the Lanham Act should be broadly construed to provide a remedy for non-competitors. Thus, the district court held that consumers have a right to relief under the Lanham Act.

The second issue the court ex-

amined with respect to standing was whether the consumers had a reasonable interest in being protected against false advertising. The reasonable interest test was adopted by the Third Circuit to prevent frivolous Lanham Act claims from flooding the federal courts. In this case, the district court found that consumers did have a reasonable interest in being protected from commercial misrepresentations.

Certification of the Class Action

Under the federal rules, a proposed class of individuals must meet the following prerequisites for class certification: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims of the representative parties must be typical of the claims of the class; and (4) the representative parties must be able to fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

In this case, the district court found that the numerosity requirement was met because the proposed class apparently consisted of over 100 geographically dispersed members. The district court also found that common questions of law or fact were present in each of the five causes of action.

Sandy Mac did not contest that Maguire's claims were typical of the proposed class's claims. Therefore, the court assumed that Maguire's claims were typical in that his recovery depended on legal claims that were typical of the class.

In examining the fourth requirement, adequacy of representation, the district court applied a two-part test adopted by the Third Circuit. First, Maguire's attorney had to be qualified, experienced, and generally able to conduct the proposed litigation. Second, Maguire could not have interests antagonistic to those of the class. Sandy Mac contested the second issue; it argued that a conflict of interest existed because the consumer subclass had a potential claim against the retailer subclass who sold Sandy Mac's product.

The district court found no conflict of interest because the subclasses had no pending actions against each other. Also, no potential liability existed because, theoretically, the subclasses did not interact in the sale and purchase of Sandy Mac's ham products. The court found no potential liability because Maguire was a restaurant owner and the proposed class excluded restaurant and deli customers. Accordingly, the district court concluded that Maguire was an adequate class representative.

Although the class met these prerequisites, it had to satisfy two additional federal rule requirements. First, Maguire had to show that common questions predominated over individual issues. In determining whether Maguire met this requirement, the court examined each of the five claims individually.

To recover under either the state or federal racketeering statutes, the class would have to establish an injury resulting from Sandy Mac's violation and a causal connection between the injury and the violation. Although proof of the racketeering violation raised a common question, proof of injury did not; each member of the class would have to show the unique circumstances surrounding his or her individual injury. Therefore, the court concluded that common questions of Sandy Mac's racketeering violation would not predominate over the individual questions of injury and causation.

For the state consumer fraud claim, the class would have to prove an ascertainable loss resulting from violation of the New Jersey Consumer Fraud statute. For the common law fraud claim, the class would have to show a material misrepresentation, intent to cause reliance, and detrimental reliance. Although violation of the statute and misrepresentations were common questions, injury and reliance were individual questions. Thus, like the racketeering statutes, the individual questions of fact predominated in the fraud claims.

The Lanham Act claim, unlike the other causes of action, did not require proof of an injury; the class needed only to prove that Sandy Mac violated the Act. The district court found that the violation of the Lanham Act was a common question which predominated over individual issues. Thus, the Lanham Act claim was the only cause of action which met the first additional federal rule requirement.

In addition to showing that common questions predominated over individual questions, the proposed class also had to show that the class action was superior to alternative methods of resolving the dispute. Sandy Mac argued that the class action was not the superior method because the sheer size of the proposed class made it unmanageable. Sandy Mac maintained that problems would arise in attempting to identify and notify allegedly millions of potential class members. In determining whether a class action was the superior method of resolving the dispute, the district court considered the interests of the judicial system, the potential class members, Maguire, the attorneys, the public at large, and Sandy Mac. The court found that judicial economy would best be served by certifying the class. The court also found that because the potential amount of recovery by individual class members was small, legal action would not be financially

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False Advertising

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feasible absent the class action. Thus, the class action would allow the individuals to have their day in court.

Kalina M. Tulley

Iowa Consumer Fraud Act Prohibits Earning Money By Referrals Rather Than By Product Sales

In ***State of Iowa v. Santa Rosa Sales and Marketing, Inc.***, 475 N.W.2d 210 (Iowa 1991), the Iowa Supreme Court held that the Iowa Consumer Fraud Act prohibited a company from earning money by engaging in referral sales, which motivate buyers to become salespersons and recruit others, rather than by generating the sales of products. The court also held that the company deceived its brokers and salespersons by misrepresenting the legality of its silver coin sales program.

Background

Santa Rosa Sales and Marketing, Inc. ("Santa Rosa") is a California corporation engaged nationwide in selling contracts for Silver Eagle coins. The coins are United States currency with a face value of one dollar that Santa Rosa offered at three for $80 or twenty for $500. The coins are also sold nationally in coin shops, banks, and over cable television for prices ranging from $6 to $65 per coin. Charles R. Groeschel ("Groeschel") was Santa Rosa's founder, chairman of the board, former president, and person responsible for marketing procedures. Groeschel and his wife were the sole shareholders of Santa Rosa.

Santa Rosa's sales were made by brokers or salespersons who sold contracts; purchasers of contracts could become brokers or salespersons themselves. Brokers were distinguished from salespersons in that brokers received training and ongoing continuing education from Santa Rosa, but salespersons did not. Brokers were contractual employees who were required to comply with Santa Rosa's written policies. After a broker completed a presentation, prospective clients were given the opportunity to buy coins or sign up to be salespersons.

First-time purchasers bought one or more starter contracts at a cost of either $80 or $500. The purchase agreement for those choosing to become salespeople contained a provision requiring twelve completed sales of coin contracts before they would be paid. Salespersons who did not sell twelve completed coin contracts within thirty days were removed from the referral program, and the initial $80 or $500 payment became a direct purchase of the coins. Purchasers of coin contracts were given the option to never take possession of the coins. In theory, Santa Rosa bought back the coins that purchasers never received, resold them, and then sent the purchasers cash. Eighty-five percent of Iowans who purchased contracts opted not to take possession of the coins.

ANNOUNCEMENT

Top Consumer Scams of 1991

The Alliance Against Fraud in Telemarketing has published a list of the top ten consumer scams in 1991 in the United States. In order, they are:

1. Postcard Guaranteed Prize Offers
2. Advance Fee Loans
3. Fraudulent 900 Number Promotions
4. Precious Metal Investment Schemes
5. Toll Call Fraud (Con artists use binoculars to read calling card numbers of travelers placing long-distance phone calls from airports and train stations.)
6. Headline Grabbers (For example, thousands of people agreed to let military personnel use their long distance calling card numbers to call back to the United States.)
7. Direct Debit from Checking Accounts
8. Phony Yellow Page Invoices
9. Phony Credit Card Promotions
10. Collectors' Items

See ***Alliance Against Fraud in Telemarketing***, Fall, pp. 1-2 (1991).

Trial Court

The State of Iowa sued Santa Rosa alleging that the company violated Iowa's Consumer Fraud Statute, Iowa Code 714.16 (1987), by committing unlawful practices of: (1) referral sales; (2) misrepresentations; (3) violations of the Door-to-Door Sales Act, Iowa Code ch. 82; and (4) violations of the lottery statute, Iowa Code 725.12 (1987).

The District Court, Polk County, Iowa enjoined Santa Rosa's marketing program and held the company liable for a restitution fund of $196,463 to be administered by the State. The court ordered Iowa to make restitution to Santa Rosa consumers from the fund and deposit any remainder with the Iowa Consumer Education and Litigation Fund. Additionally, the court assessed a civil penalty and prejudgment interest and held Groeschel personally liable. Santa Rosa appealed to the Iowa Supreme Court.

Statute Prohibits Referral Sales

Although the statutory language of the Iowa Consumer Fraud Statute does not contain the word referral, the Iowa Supreme Court has interpreted 714.16(2)(b) as prohibiting referral sales. Generally in a referral sales program, the seller represents that the buyer's purchase price will be reduced or that the buyer will receive a commission by referring other prospects to the seller. Santa Rosa argued that its program was not an illegal referral sales plan because a salesperson's compensation was determined by the sale of coins and not by the recruitment of other salespersons.

However, consumer testimony, broker training materials, sales documents, and actual broker presentations, combined with data showing that only a fraction of Iowa purchasers opted to take Silver Eagle coins, established that Iowa purchasers were not motivated by the desire to own Santa Rosa's Silver Eagle coins, but rather, to make easy money by recruiting others. Therefore, the supreme court affirmed the trial court's conclusion that Santa Rosa's money-