ABA Antitrust Section Consumer Protection Monthly Update

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Eric Berman
Christopher Crook
Alexandra Megaris
Amy Mudge
Shahin Rothermel
AllAboutAdvertisingLaw.com - blog

Defending Liberty
Pursuing Justice

Federal Developments: FTC and FCC

Shahin Rothermel
202.344.4550
SRothermel@Venable.com

Payday Lenders

FTC v. CWB Services, LLC

- CWB Services, LLC and others found liable for operating a payday lending scheme in violation of the FTC Act, TILA, and EFTA.
- The lenders targeted online payday loan applicants, deposited money into applicants' bank accounts claiming consumers had agreed to a loan with Defendants, and then withdrew reoccurring "finance" charges from the bank accounts.
- Consumers attempting to refute the loans could not avoid the reoccurring charges because the lenders provided banks and debt collectors with fabricated loan agreements with consumer information purchased from lead generators and data brokers.

Dietary Supplements

FTC v. Keyview Labs, Inc.

- Marketers advertised and sold a supplement as a "solution" to memory loss and cognitive decline, and used fabricated scientific studies and deceptive expert endorsements to prove the product's efficacy.
- Marketers were found liable for deceiving consumers through false advertisements in violation of Sections 5 and 12 of the FTC Act.

Phantom Debt Collection

FTC v. Centro Natural Corp.

- Phantom debt collection operation in which company cold-called Spanish-speaking consumers and threatened them with harsh consequences, such as arrest, legal actions, and immigration status investigations, if they failed to make large payments on fake debts
- After collecting over two million dollars through a debt collection scheme, the FTC alleged violations of the FTC Act, FDCPA, and TSR.
- Posed as government officials, used abusive debt collection practices, and called consumers on the National Do Not Call Registry.

Car Cases

- In the Matter of TT of Longwood
  - Promoted specific sale prices, but required additional $3,000 to purchase the advertised vehicle;
  - Advertised incentives as generally available to consumers, but required consumers meet certain qualifications before obtaining the vehicle at the advertised price;
  - Advertised that vehicles are available for $0 down, $0 payments, and $0 interest when consumers were required to make a down payment and multiple monthly payments;
  - Promoted “sign and drive” lease offers indicating no down payment at lease signing, yet required a $3,000 down payment;
  - Misrepresented that vehicles were available for $99 when consumers could not purchase or lease vehicles for this amount.
  - Violations of Consumer Leasing Act: Did not disclose that it was a lease and security deposit was required.
- In the Matter of Matt Blatt Inc.
  - Advertised a “Biweekly Payment Plan” as an add-on service to consumers financing the purchase of one of Blatt’s automobiles, but failed to disclose that: (1) the significant fees associated with the program would offset any savings; and (2) the total amount of fees can add up to more than $775 on a standard five-year auto financing contract.

LifeLock

- FTC alleged violation of settlement in 2010 surrounding allegations that LifeLock used false claims to promote its identity theft protection services
- FTC alleged that LifeLock violated 2010 settlement, which barred the company from making any further deceptive claims; required LifeLock to take more stringent measures to safeguard the personal information it collects from customers; and required LifeLock to pay $12 million for consumer refunds.
- Alleged violations of 2010 settlement:
  - Failed to establish and maintain a comprehensive information security program to protect users' sensitive personal data, including credit card, social security, and bank account numbers
  - False statements that it protected consumers' sensitive data with the same high-level safeguards as financial institutions
  - Violations of the order's recordkeeping requirements.

Healthcare Products

Sun Bright Ventures LLC Settlement

- Telemarketers falsely promised consumers new Medicare cards to obtain bank account numbers. Promised consumers they would not take money from accounts. Took money and provided nothing in return, despite promises they would provide identity theft protection.
- Banned from selling healthcare-related products and services, identity theft protection services, and creating or depositing remotely created checks. Prohibited from: billing or charging consumers without consent, violating the TSR, and selling or otherwise benefitting from consumers' personal information.

FCC Releases Telephone Consumer Protection Act Declaratory Ruling

On July 10, 2015, the FCC released a much-anticipated declaratory ruling addressing 21 requests for clarification on a number of TCPA issues.

- 3-2 vote by Commissioners
- It is controversial ruling that immediately resulted in a lawsuit filed by ACA International
- Order provides FCC position on these matters, but it us unknown how much deference state and federal courts will give to the Order

- Declaratory ruling establishes standard for definition of "autodialer"
  - Device has "capacity" to be an autodialer "even if it is not presently used for that purpose," meaning that any device that has present or future capacity to dial numbers on a random or sequential basis is covered by the statute
  - The standard reaffirms that predictive dialers fall under the TCPA
  - Order does not provide clarity on what constitutes sufficient "human intervention" to place call outside the scope of TCPA liability and thus it is still unclear whether "preview dialing," where operator selects a number and clicks to call, falls under the definition.
  - Litigation over these issues will continue

FCC TCPA Declaratory Ruling

- Consumers may revoke "prior express written consent" by "any reasonable means whether oral in writing."
  - Consumers have long had right to opt out of messages, but marketers generally could specify the method
  - Under new rules, the burden effectively falls on the merchant to prove that a consumer has not notified the merchant that consent is revoked
  - Could lead to more "he said/she said" contests in courts
- Reassigned numbers
  - "Called party" for purposes of the statute is the current subscriber
  - FCC permits a single call to a consumer before liability attaches
  - Given that telemarketer does not know that a persons number has changed if there is no answer, this "one-call" exemption provides little protection for callers

FCC TCPA Declaratory Ruling

- Order reaffirmed text messages are calls under the TCPA.
- Internet-to-phone text messages: Internet communications through texts incur liability under the TCPA.
- "On Demand" text messages: One-time text messages sent immediately after a consumer's request for the text does not violate the TCPA.
- Financial and Health-Related Messages: The new rules exempt certain financial and health-related communications.
- Call-Blocking Technology: The Order permits carriers or VoIP carriers to implement call-blocking technology for unwanted robocalls.

State Attorneys General Developments (July 2015)

Eric Berman
(202) 344-4661
esberman@venable.com

Washington AG Wins First-of-Its-Kind Lawsuit Against Crowd Funder

- On July 27, 2015, the Washington AG concluded a lawsuit against Altius Management LLC and its president for violations of the Washington Unfair Business Practices and Consumer Protection Act in connection with a failed crowdfunding project, “Asylum Playing Cards.”

- According to the complaint:
  - Altius created, marketed, and accepted funding for a Kickstarter campaign to create the custom set of playing cards.
  - Altius secured over $25,000 in funding from 810 backers, and thus, as per the terms and conditions of the Kickstarter platform, was legally bound to fulfill backer rewards (in this case, a custom set of playing cards).
  - However, Altius did not deliver the product, and at the time of the complaint had not issued any refunds or communicated with its backers in two years, prompting the suit.

- The court required Altius to pay $668 in restitution and $23,183 for attorneys’ fees and costs. The court held that each unrewarded or unrefunded contributor constituted a separate violation of state law and issued civil penalties totaling $31,000 (31 separate civil penalties of $1,000 each, one for each Washington contributor).

Press Release: http://www.atg.wa.gov/news/news-releases/ag-makes-crowdfunded-company-pay-shady-deal
Complaint: http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/AsylumComplaint%202014-05-01.pdf
Judgment: http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/201507221452.pdf

New York AG Sues Charity Organization for Fraud

- On July 21, 2015, the New York AG filed a lawsuit to close the National Children's Leukemia Foundation (NCLF) for failing to conduct most of the programs advertised on its website, for failing to provide a sufficient amount of the money raised toward the charitable causes the donors intended to support, and for omitting state filing obligations.

- NCLF had informed donors (through its website and other media) that it used donations to create a bone marrow registry, an umbilical cord blood banking program, and its own cancer research center. It also told donors that it had filed a patent application for a new treatment for leukemia.

- The AG's lawsuit alleges that:
  - During a five-year period, NCLF raised $9.7 million; $8.9 million of which was raised by professional fundraisers hired by NCLF, who in turn were paid approximately $7.5 million.
  - NCLF spent less than 1% of the money raised on direct cash assistance to leukemia patients and transferred 5% to a shell organization in Israel run by the sister of Zvi Shor (founder of NCLF), allegedly for research purposes.

Press Release: http://www.ag.ny.gov/press-release/ag-schneiderman-sues-children%E2%80%99s-leukemia-charity-deceiving-donors-and-using-vast

New Jersey AG settles with Telebrands

- On July 13, 2015, the New Jersey AG and State Division of Consumer Affairs settled with Telebrands, Corp. ("Telebrands") regarding the company's "As Seen on TV" products.

- As part of the settlement, Telebrands agreed to revise its Interactive Voice Response ("IVR") merchandise ordering system and other business practices, and pay $550,000 to the state.

- Several issues with Telebrands' marketing ordering process were alleged, including:
  - A lengthy ordering process;
  - No means for consumers to decline offers for additional products;
  - No opportunity to confirm the merchandise order prior to authorizing charges;
  - Inclusion of shipping and billing for additional products that consumers declined to purchase;
  - No information regarding the total cost of consumer's orders; and
  - No opportunity to speak with a live customer service representative

- Under the terms of the settlement, Telebrands is required to retain a Consumer Affairs Liaison for up to a two-year period, with the person subject to the approval of the Division of Consumer Affairs. The Consumer Affairs Liaison, will monitor Telebrands' compliance with the settlement terms. Telebrands also agreed to revise its IVR system, billing processes, and online advertising to comply with New Jersey law.

Press Release: http://nj.gov/oag/newsreleases15/pr20150713b.html\

45 AGs Call on Telecom Companies to Allow Customers to Block Robo-calls

- On July 22, 2015, 45 AGs, through the National Association of Attorneys General (NAAG), sent a letter to the CEOs of five major telecom service providers asking the telecom service providers to offer technology to their consumers that would allow customers to request automatic call-blocking of robo-calls and other mass call efforts.

- The letter highlights the AGs' previous request to the FCC, that the Commission clarify that telecom companies may offer their customers the ability to block robo-calls, as well as other unwanted spam calls and texts. The FCC subsequently provided guidance to this effect.

- The Indiana AG, leader of the state AG coalition, stated that "[n]ow that legal hurdles have been cleared, phone companies should immediately start offering call-blocking services to customers."

Press Release: http://www.in.gov/activecalendar/EventList.aspx?view=EventDetails&eventidn=222065&information_id=216576&type=&syndicate=syndicate

NAAG Letter: http://www.naag.org/assets/redesign/files/sign-on-letter/Final%20Letter%20to%20Telecom%20Providers.pdf

8 AGs File Amicus Brief in *Spokeo*

- On July 9, 2015, AGs from eight states (Alabama, Colorado, Michigan, Nebraska, Tennessee, West Virginia, Wisconsin, and Wyoming) filed an amicus brief in *Spokeo, Inc. v. Robins* (concerning an alleged violation of the Fair Credit Reporting Act.)
  - The plaintiff in the case sued Spokeo on the grounds that the company hurt his chances to obtain unemployment benefits by falsely reporting that he was wealthy and had a graduate degree, when he was actually struggling with unemployment.
- The AGs argued that the individual did not suffer injury-in-fact when Spokeo published inaccurate information about him online.
- The states argue that the Ninth Circuit's decision in *Spokeo* will impede state-level class action reforms:
  - The states stated that they have a strong interest in avoiding a return to the "Wild West" of abusive "no-harm" class actions resulting in windfall judgments.
  - The states cited reforms like heightened certification requirements and interlocutory appeals of certification orders.

Amicus Brief: http://www.scotusblog.com/wp-content/uploads/2015/08/13-1339-tsac-Alabama.pdf

New York Federal Court Examines Scope of AG Authority

- On July 29, a federal court in New York ruled in *Citizens United v. Schneiderman* that the NY AG can require charitable organizations to disclose a list of major donors as part of the organization's annual reporting requirements under state law.

- The Citizens United Foundation and Citizens United sought to enjoin the New York AG from a state law that requires New York charities to disclose the names of donors who gave $5,000 or more through filings that accompany the charities' federal tax returns.

- The plaintiffs made unsuccessful First Amendment and Due Process arguments, among others. The court also held that the plaintiffs failed to show a likelihood of irreparable harm.

- The court indicated that the charity disclosure forms an important part of the AG's investigative authority "because he can compare major donor information against other documents that charities submit, allowing him to uncover possible violations and ultimately take action against unlawful charities."

Case: *Citizens United v. Schneiderman*, No. 14-CV-3703 (S.D.N.Y. July 29, 2015), http://scholar.google.com/scholar_case?case=3704741909354257 3&q=Citizens+United+v.+Schneiderman&hl=en&as_sdt=20006

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NAD/CARU Case Updates

Amy Ralph Mudge
202.344.4743
AMudge@Venable.com

MOTHERLOVE HERBAL COMPANY
More Milk Plus Case # 5865 (7/14/15)

- Challenger: National Advertising Division
- Select claims:
  - ***"I had already noticed a difference, now after a week of using it, I have more than doubled my supply!"***
  - ***"Within 3 days of taking More Milk Plus he stayed latched on longer, and I had a whole day's worth of bottles in the fridge the night before he needed them."***
  - ***"Effective herbal formula designed to quickly increase breast milk"***
- Issue: Whether the testimonial health claims were truthful, accurate, and fully substantiated
- NAD recommended the health benefit claims be discontinued, stating:
  - An advertiser cannot make claims in the form of a testimonial that it cannot support independently with competent and reliable scientific.
  - "Designed to" in claim does not reduce the burden
  - While these claims are not typical establishment claims (i.e. "clinically proven"), they are strong health and performance claims that require competent and reliable scientific evidence demonstrating that the totality of the product's ingredients will generate the claimed benefits
  - NAD, however, did find that the advertiser established a reasonable basis for the claim that More Milk Plus is "Motherlove's best selling herbal lactation formula."

ASPIRE BEVERAGE CO.

ASPIRE Sports Drink, Case #5861 (7/8/15)

- Challenger: Stokely-Van Camp, Inc.
- Select Express and Implied Claims:
  - ***ASPIRE is the "clear choice for…health, and better performance."***
  - ***The antioxidants in ASPIRE make "…it easier to fight colds, flu, and infections."***
  - ***Gatorade and other sports drinks contain too much sugar, artificial dyes, and other ingredients, including high fructose corn syrup and, that are harmful to consumer health.***
  - ***ASPIRE is more healthful than Gatorade.***
  - ***All-natural***
- Issues:
  - Whether ASPIRE's health and performance claims were substantiated.
  - Whether ASPIRE's claim of overall and taste superiority over Gatorade was adequately supported.

ASPIRE BEVERAGE CO.

ASPIRE Sports Drink

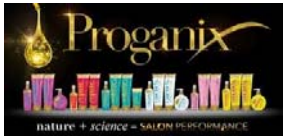
- NAD determined that there was no evidence that:
  - ASPIRE enhances health or that it enhances performance.
  - Sugar impacts athletic performance or that it is unhealthy for athletes.
    - ASPIRE's lower sugar content may support a narrower claim generally related to sugar's harmful effects.
  - Lack of artificial flavors and food coloring contributes to better health and performance.
  - That not all of ASPIRE's ingredients are natural. Therefore, ASPIRE cannot call it a "natural sports drink."
  - That Gatorade contains "empty calories" or provides "extra sugar" when it is used as energy replacement during vigorous exercise.
- NAD also recommended ASPIRE refrain from:
  - Use customer testimonials to make efficacy claims or denigrate competitors without substantiation.
  - Imply "other sports drinks" like Gatorade contain high fructose corn syrup
  - Compare nutrient information in different size servings of competitor information or imply Gatorade shows misleading nutrient information.
- NAD referred Aspire for not agreeing to certain recommendations

Great HeathWorks, Inc. Omega Xl Dietary Supplements, Case #5870 (7/28/15)

- Challenger: Council for Responsible Nutrition
- Select claims:
  - ***"Omega XL is a "Breakthrough Secret" and "Supported by Over 30 Years of Clinical Research"***
  - ***"Makes It Easy for You Get Back What Joint Pain and Inflammation are Limiting You From Doing"***
  - ***Smaller and more potent than other fish oil***
  - ***No known drug interactions, none of the common side effects, pure***
- NAD recommended:
  - Claims of 30 years of research and a breakthrough are in conflict – one or the other
  - Discontinue "makes it easy" because implied unsupported speed of action claim but supported the efficacy claims (with clinical trials)
  - Can promote comparative strength but must be specific. Claim as drafted suggested stronger than all other fish oil on market.
  - Discontinue "no known drug interactions" unless supported by studies. Simply having an expert not being aware of any drug interactions not sufficient evidence
  - Limit no side effect claims to the specific side effects studied "e.g., does not cause fish burbs)
  - Purity and "no levels" of toxins claims too strong when there were trace levels. An advertiser cannot make claims in the form of a testimonial that it cannot support independently with competent and reliable scientific.

VOGUE INTERNATIONAL, LLC

Proganix Line of Hair Care Products, Case #5864 (7/13/15)



- Challenger: Procter & Gamble Co.
- Select express and implied claims:
  - ***"Performance Naturals (noun): 1. High performance extracts up to 200x more potent than their raw natural state."***
  - ***The natural ingredients in Proganix render the formula 200x more powerful in delivering the claimed benefit.***
  - ***"Salon Quality"***
  - ***"Science + Nature = Performance"***
- Issue: Whether the claim is puffery or objective requiring substantiation
- Puffs: Salon quality and Science + Nature + Performance
- Not puffs: "200X more *potent*" implied that the highly concentrated extracts were highly effective. Can claim 200x more *concentrated* than raw natural state.
  - In deciding whether a commercial message is puffery or makes an objective claim requiring substantiation, NAD evaluates whether the language in the claim is vague and fanciful and is not objectively measurable or whether it refers to specific attributes that are measurable.

Dole Packaged Foods,
LLC Dole Fruit Bowls, Case #5868 (7/27/15)

- Challenger: Del Monte Foods, Inc.
- Select claims:
  - ***"Dole Fruit Bowls, the only national brand packed in 100% real fruit juice.* *Dole's entire line of regular Fruit Bowls are packed in 100% fruit juice. National competitors primarily pack regular fruit cups in light syrup"***
- Issues: Did the claim imply other products are unsuitable for consumption or unhealthy? Did claim imply all of Dole fruit cups are in juice?
- NAD recommended:
  - The claim was not falsely disparaging as promoted a truthful benefit and did not imply competing products were unlealthy. Ads at issue showed women saying "Dole fruit bowls are 100% fruit juice". Her friend asks "So you don't drain it?" and the woman answers "I drink it!" This was truthful, narrowly tailored and promoted positive benefits. (Note: Earlier ads referring to syrup as "goo" have been discontinued prior to the challenge and not reviewed.)
  - Fact that ad set in gym did not imply health benefits
  - Dole be clearer in its ads which of its fruit bowls were made with all juice. NAD found the ads imply the Dole benefit was for the entire line. Consumers would not know what was a regular fruit bowl and the Dole name was shown multiple times. The specific package shots at end and the disclaimer did not cure.

Kimberly-Clark Corp. Huggies Natural Care Wipes, Case #5866 (7/17/15)

- Challenger: The Procter & Gamble Company
- Claim:
  - ***"Cleans better* *Huggies Natural Care wipes v. Pampers Sensitive Wipes, among those with a Preference"***
- Issue:
  - When is an advertising claim sensory and supportable with consumer perception evidence and when is a claim performance based requiring objective product testing as support? K-C argued that the attributes at the center of its claims were best assessed by consumers who regularly used the wipes. P&G argued that the claims were not "sensory" claims and that the claimed attribute superiority was objectively measurable and provable.
- NAD recommended:
  - K-C discontinue the claim. NAD determined that the "clean better" claim was not a sensory claim, that cleaning efficacy is "objectively verifiable," and, as a result, should be substantiated with objective testing that goes beyond simply asking consumers for their opinions as to which product cleans better.
  - NAD noted that the cleaning ability of a baby wipe can be objectively measured because its performance can be tied directly to a specific tangible benefit – the removal of mess from a child. NAD also noted that a consumer's subjective assessment of cleaning efficacy can be influenced by other product attributes that do not directly relate to how well the product actually cleans – how a product looks, smells or feels in the hand, for example. While such factors may influence the overall consumer experience, consumers' opinions about those attributes do not correlate to how well the product actually removes mess from a child.

EURO-PRO OPERATING LLC

Shark Rotator Lift-Away Case #5860 (7/6/15)

- Challenger: Dyson, Inc.
- Select express and implied claims:
  - ***Shark receives "more 5-star online reviews than any other vacuum brand*" (*"based on an aggregate of verified online reviews at major retailers of leading uprights per NPD over $149, 6/2014.")***
- Issue: Whether Euro-Pro can use aggregated online review data to support the claim
- NAD found data was not both reliable and representative.
  - Euro-Pro used reviews of verified purchases in order to use only reliable reviews but in so doing set aside a number of reviews that may have been reliable, concluding the disclaimer contradicted the broader claim
  - NAD had concerns with differences across retail websites in how reviews were defined and how long sites archived older reviews
  - NAD felt the $149.99 price cut off was arbitrary
  - Found some reviews may relate to the shopping experience at a retail website and not the vacuum performance
  - Found disclosure not clear and conspicuous
  - Concluded claim using single platforms likely acceptable but not aggregating across sites
- Euro-Pro to appeal

WALMART STORES, INC.

"Raise in Pay" Commercial, Case #5862 (7/8/15)

- Challenger: National Advertising Division
- Implied claims from video advertisement:
  - ***Walmart raised wages of its employees from minimum wage to $15 per hour.***
  - ***Walmart raised the wages of its employees to a living wage, allowing them to earn enough to support themselves and/or their family.***
  - ***Walmart's increased wages allows its employees to "build a future."***
- Issue: Whether NAD has jurisdiction over advertising of editorial content
- Walmart contended that NAD lacks jurisdiction since the advertisement is not a "typical commercial" in that it was only informing the public of the measures it has taken to boost associate pay.
  - Walmart stated that the commercial does not have the purpose of "inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service" required for NAD jurisdiction.

WALMART STORES, INC.

"Raise in Pay" Commercial

- NAD determined:
  - NAD's jurisdiction extends to evaluating "the truth or accuracy of national advertising." The point of the campaign was to show "*Walmart as a company that cares deeply about its workers welfare and, consequently, its stores as places where consumers who care about the welfare of working people should shop*."
    - Prior NAD cases have found NAD has jurisdiction when a commercial message intended to "persuade the audience of the value of a company."
  - NAD reviews highly technical matters on a consistent basis, including highly technical statistical analysis and claims across the U.S. population as a whole and is thus able to conduct a meaningful analysis of Walmart's claims.
  - It has jurisdiction over the matter and referred the matter FTC

UNIVERSAL PICTURES
Jurassic World, Case #5863

- Challenger: Children's Advertising Review Unit
- Concerns:
  - CARU expressed concern that a commercial aired during a children's program called *Adventure Time* at 6:00 p.m. CARU questioned the appropriateness of advertising a film rated PG-13 to children
- Issue:
  - Whether advertiser's content inappropriately advertised directly to children
- CARU referred advertising to the Motion Picture Association of America (MPAA) pursuant to contractual agreement
- MPAA found that the advertisement was appropriately placed within the guidelines of MPAA's
  - A few PG-13 rated motion pictures are considered by the Advertising Administration to be compatible with children's programs or networks, based on the content of the movie, the advertisement, and the program with which the advertisements are placed
  - The movie was a sci-fi action/adventure motion picture and the show was "Adventure Time," which was rated T-PG and geared to older kids and tweens.
  - Ads themselves also did not contain strong depictions of violence.

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Lanham Act and Class Action Litigation

Christopher Crook
202.344.4752
CCrook@Venable.com

Lanham Act Litigation

- *Church & Dwight Co. v. SPD Swiss Precision Diagnostics*, GMBH, 2015 WL 4002468, No. 14–CV–585 (S.D.N.Y. July 1, 2015)
  - SPD and C&D are competitors in home pregnancy test market; SPD sells and markets "ClearBlue Advanced Pregnancy Test with Weeks Estimator"
  - Test estimates weeks since ovulation, not last menstrual period (LMP), the standard used by doctors
  - False advertising claims under Lanham Act and NY state law
  - Opinion and order after two-week bench trial
  - Court noted that post *POM Wonderful v. Coca-Cola*, the FDCA did not preclude the Lanham Act claim

Lanham Act Litigation

Figure 1

First Packaging

Figure 3

Second Packaging

Lanham Act Litigation

- *Church & Dwight Co. v. SPD Swiss Precision Diagnostics*, GMBH, 2015 WL 4002468, No. 14–CV–585 (S.D.N.Y. July 1, 2015)
  - Upon use, the first test would state: "Pregnant ___ weeks."
    - FDA reached out to SDP with concerns about its launch advertising. SDP subsequently changed both the language in its television ad and on its packaging.
    - Doesn't mention "ovulation" anywhere
  - Upon use, the second test would state: "Pregnant ___", with "weeks along" displayed under the digital reading. But changes are minor.
  - Television commercial stated that the test would estimate "how many weeks" (omitting the word "pregnant").
  - Court concluded the ads were *literally false.* Revised package is still impliedly false.

Lanham Act Litigation

- *Church & Dwight Co. v. SPD Swiss Precision Diagnostics*, GMBH, 2015 WL 4002468, No. 14–CV–585 (S.D.N.Y. July 1, 2015)
  - Most notably, the deception was *intentional*, as shown by emails, trial testimony
  - Rather than clarify its product advertising, SPD's staff sought to exploit the confusion: “My thinking is that we make the confusion a story”
  - Evidence of actual confusion, woman wondering if her “baby was not developing correctly”

Lanham Act Litigation

- *Spruce Environmental Technologies, Inc. v. Festa Radon Technologies*, Co., 2015 WL 4038802, No. 15–11521 (D. Mass. July 2, 2015)

- Spruce and Festa are competitors who sell products for testing and reducing indoor levels of the gas radon.

- Festa issued a catalog comparing the two.

- Spruce filed suit per the Lanham Act because it alleged the catalog included false direct competitive ad claims. Spruce filed to enjoin Festa from continuing its advertising campaign.

Lanham Act Litigation

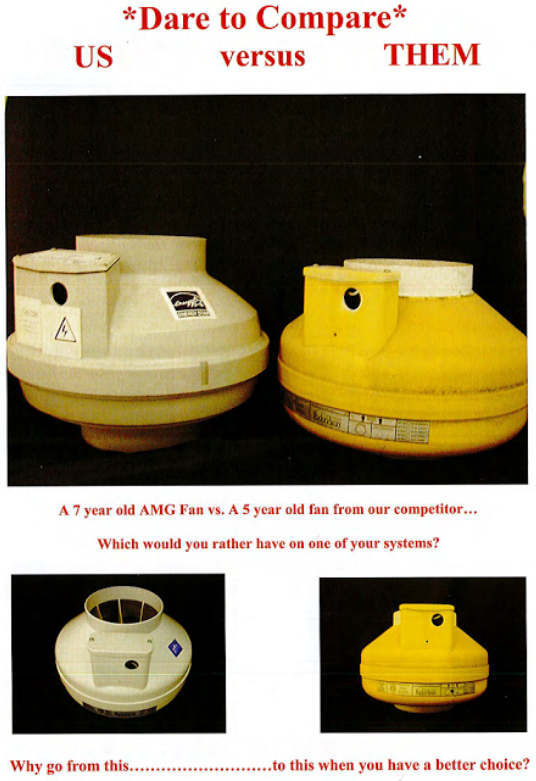
- *Spruce Environmental Technologies, Inc. v. Festa Radon Technologies*, Co., 2015 WL 4038802, No. 15–11521 (D. Mass. July 2, 2015)
- Motion for preliminary injunction, granted and denied in part
- Spruce's Lanham Act claims:
  1. Festa depicted its products as HVI and Energy Star certified when they are not.
  2. Festa claimed that its fans have solid motor lead wires even though they use stranded wires, like Spruce fans.
  3. Festa claimed that the Spruce fan motors' label "Generic–No Manufacture Info" was misleading, since they did have a manufacture's label.
  4. Festa's photograph misleadingly implied that the Spruce fan casing will degrade and change into a yellow color after five years.
  5. Festa implied that Spruce's motor wires and capacitors are not factory sealed, which is literally false.
  6. Spruce also alleged the false advertising was illegal because Festa admitted the catalog was issued after they learned that Spruce referred to Festa radon mitigation fans as "garbage" and "junk."

Lanham Act Litigation

- *Spruce Environmental Technologies, Inc. v. Festa Radon Technologies*, Co., 2015 WL 4038802, No. 15–11521 (D. Mass. July 2, 2015)

- The court found a likelihood of success on part of the plaintiff's allegations with respect to two issues:
  - HVI or Energy Star certification
  - Festa admitted that it photographed Spruce's fan with a flash, while it did not do so with its own fan –misleading and inaccurate comparison

- The court was less impressed with the other claims, finding the statements were not literally false, or finding lack of authority



Lanham Act Litigation

- *Friedman v. Zimmer*, No. 15-502 (C.D. Cal. Jul. 10, 2015)

- Richard Friedman sued Hans Zimmer and others, alleging that the score to *12 Years a Slave* infringed his copyright to a composition, *To Our Fallen*.
- Friedman additionally alleged that his misrepresentation of the score's authorship in advertising and promotion was a violation of the Lanham Act.
- Section 1125(a)(1)(B): misrepresenting the "nature, characteristics, qualities, or geographic origins of . . . goods, services, or commercial activities"

Lanham Act Litigation

- *Friedman v. Zimmer*, No. 15-502 (C.D. Cal. Jul. 10, 2015)

  - Held: Dastar forecloses this claim.
  - **Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003)**: "Origin" refers only to the manufacturer or producer of physical goods, and not the person or entity that originated the ideas or communications that those "goods" embody or contain.
  - Claim would be clearly barred if brought under §43(a)(1)(A). Here, they were brought under §43(a)(1)(B).
    - §43(a)(1)(A): provides a theory of liability under false representations of the origin of the work.
    - §43(a)(1)(B): provides a theory of liability under false representations of the nature of the work.

Lanham Act Litigation

- *Friedman v. Zimmer*, No. 15-502 (C.D. Cal. Jul. 10, 2015)

- Court held that the plaintiff's claim was "essentially the same claim as the Dastar plaintiff's."
- "Given the Court's concerns about creating overlap between the Lanham Act and other intellectual property regimes, it would have made little sense for the Supreme Court to reject the Dastar plaintiff's claim under 15 U.S.C. § 1125(a)(1)(A) but permit the same sort of claim to be asserted under a different prong of the same statute."

Lanham Act Litigation

- *Photographic Illustrators Corp. v. Orgill, Inc.,* 2015 U.S. Dist. LEXIS 99031 (D. Mass. July 29, 2015)
  - Plaintiff Photographic Illustrators took pictures of a third party's lighting fixtures.
  - Defendants Orgill, Inc. and Farm & City Supply, LLC were distributors of the lighting fixtures.
  - Lanham Act Claims
    - Defendant Farm & City used Plaintiff's pictures of lighting fixtures to sell products online. When doing so, Farm & City placed a watermark "farmandcitysupply" on the images.
    - The court recognized the split of authority under *Dastar "*as to whether the Lanham Act encompasses the false designation of the origin of a photograph, not itself a "good" for sale to the public, used to advertise the object actually for sale."
    - The Court found that Plaintiff could not proceed under the Lanham Act for the watermark.
      - *PIC alleges that Farm & City displayed its photographs with false attribution — the watermark — and, in doing so, misrepresented the "origin and nature" of those photographs. But after Dastar, the phrase "origin of goods" applies only to the producer of the tangible product sold in the marketplace. Here, that product is OSI's light bulbs. While the defendant's failure to attribute the images to PIC is actionable under the Copyright Act, as discussed above, "it would be out of accord with the history and purpose of the Lanham Act" to afford PIC relief under trademark law as well.*
    - The Court also held that 43(a)(1)(B) was equally unhelpful.
      - *Moreover, "[t]he import of Dastar . . . cannot be avoided by shoe-horning a claim into section 43(a)(1)(B) rather than 43(a)(1)(A).*

Lanham Act Litigation

- *Aliya Medcare Fin., LLC v. Nickell*, No. CV 14-07806 MMM EX, 2015 WL 4163088, at *1 (C.D. Cal. July 9, 2015).
  - Applies Lexmark to false designation claims
  - Plaintiff CTB alleged that the defendant Aliya was sending and receiving e-mail communications using the 'ctbcollect.com' domain to confuse or trick recipients into believing that those individuals are interacting with the plaintiff when they were in fact interacting with the defendant.
  - Allegedly done to "exploit the commercial advantages of CTB's trademark, service mark, and trade name, gain a competitive advantage over CTB[,] ... usurp its revenues and business opportunities, and sully CTB's business reputation."
  - Standing was found to sue under the Lanham Act
    - CTB and Aliya are competing in a specific service, even if they are not direct competitors in their primary line of business

Lanham Act Litigation

- *Parks, LLC v. Tyson Foods, Inc.*, 2015 U.S. Dist. LEXIS 98008 (E.D. Pa. July 28, 2015)
  - Plaintiff Parks, LLC is the seller of sausages and other processed meats.
  - Defendant Tyson Foods is the owner of the "Ball Park" brand of hot dogs.
  - Defendant offered a new line of products under the name "Park's Finest"
  - Plaintiff sued for false advertising under the Lanham Act.
  - Holding
    - The "Park's Finest" name did not amount to a literally false statement of origin because there were at least two reasonable consumer take-aways from the name.
      - That the name referred to Plaintiff – Plaintiff's theory of the case.
      - That the name referred to the famous "Ball Park" brand—Defendant's theory.
    - The "Park's Finest" name did not tend to deceive consumers
      - Defendant's survey showed that 54% of consumers surveyed identified the "Park's finest" name with Defendant.
      - "For Defendants' statements to misrepresent the Park's Finest product, the message would necessarily have to be understood by consumers as referring to a particular, identifiable person or entity that is not [Defendant]. . . . The mere fact that a consumer may fail to understand the association between the Park's Finest name and the Ball Park brand does not mean that Defendants' statements are false or misleading. For a consumer who receives from Defendants' packaging or advertisements only the message that the product is called "Park's Finest"—neither believing the product to relate to Plaintiff nor understanding Defendants' play on the "Ball Park" name—the name would contain little to no meaning at all, other than the meaning the name derives from its association with the product."

Lanham Act Litigation

- *General Steel Domestic Sales, LLC v. Chumley*, 2015 U.S. App. LEXIS 13356 (10th Cir. Colo. July 31, 2015)
  - A former disgruntled employee of General Steel founded his own business and immediately began utilizing attack ads against General Steel
    - These advertisements not only mischaracterized the nature of General Steel products, but also the nature of the newly founded competitor's products.
    - Defendant utilized an aggressive online marketing campaign including its own website and Google ad words.
  - General Steel sued and was granted summary judgment on its false advertising claims
    - Importantly, injury was found at the district court level due to a presumption. The 10th Circuit, without deciding the issue of a presumption, did not disturb this finding.
    - The Court upheld the traditional burden shifting as it relates to Lanham Act damages
  - General Steel's denial of its Colorado Consumer Protection Act claim was affirmed
    - General Steel failed to come forward with evidence of injury and instead relied upon the fact that Defendant failed to come forward with evidence proving no injury.
    - The Court cited to *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986) for the proposition that "a defendant may support its motion for summary judgment on an issue on which the plaintiff bears the burden of proof by arguing that the record lacks any evidence in the plaintiff's favor."
    - The Court held that "General Steel's failure to come forward with any evidence to rebut [Armstrong's] argument [on summary judgment] was thus a real problem, just as the district court held.

Class Actions

- *Mullins v. Direct Digital*, LLC, 2015 U.S. App. LEXIS 13071 (7th Cir. Ill. July 28, 2015)
  - Plaintiff Vince Mullins sued defendant Direct Digital, LLC for fraudulently marketing its Instaflex Joint Support product.
  - The alleged false claims include: "relieve discomfort," "improve flexibility," "increase mobility," "support cartilage repair," "scientifically formulated," and "clinically tested for maximum effectiveness"
  - Direct Digital filed a petition for leave to appeal under Rule 23(f) arguing that the district court abused its discretion in (1) certifying the class without first finding that the class was "ascertainable" and (2) that the district court erred by concluding that the efficacy of a health product can qualify as a "common" question under Rule 23(a)(2).
    - The court said that it primarily took the appeal to clarify the law on the ascertainable issue and address the Third Circuit holding in *Carrera v. Bayer Corp.,* No. 12-2621, 2014 WL 3887938 (3d Cir. May 2, 2014).
      - *We granted the Rule 23(f) petition primarily to address the developing law of ascertainability, including among district courts within this circuit*.
    - *Carrera* held that class member affidavits on their own are generally not enough to define a class and that Plaintiffs must have some evidence other than class member affirmations.
    - In this case, the Seventh Circuit said that, at the class certification stage Plaintiffs are not required to show administratively feasible means of identifying particular class members, so long as the class definition is objective.

Class Actions

- *Zakaria v. Gerber Products Co.*, No. 15-cv-00200 (C.D. Cal. July 14, 2015)
- Gerber claimed its Good Start Gentle infant formula reduced infants' risk of developing eczema, which plaintiff alleged was false.
- California statutory and common law claims
- Plaintiff pointed to a study concluding there is no evidence that consumption of ingredient reduced risk of allergies, including eczema
- Gerber moved to dismiss under *In re GNC Corp.*, No. 14-1724, -- F.3d --, 2015 WL 3798174 (4th Cir. June 19, 2015) (applying CA law)

Class Actions

- *Zakaria v. Gerber Products Co.,* No. 15-cv-00200 (C.D. Cal. July 14, 2015)

- *In re GNC*: so long as there is "reasonable difference of scientific opinion" as to merits of health claim, the alleged actual falsehood of the claim cannot be basis for claim under consumer protection laws incl. UCL, CLRA

- Court rejects *In re GNC*

- Court points out that there are no CA laws consistent with *In re GNC*, which relies primarily on the Lanham Act.

- But notes plaintiff may fail to carry burden of actual falsehood where science is inconclusive

Class Actions

- *Aloudi v. Intramedic Research Group, LLC*, 2015 WL 4148381, No. 15-cv-00882 (N.D. Cal. Jul. 9, 2015)

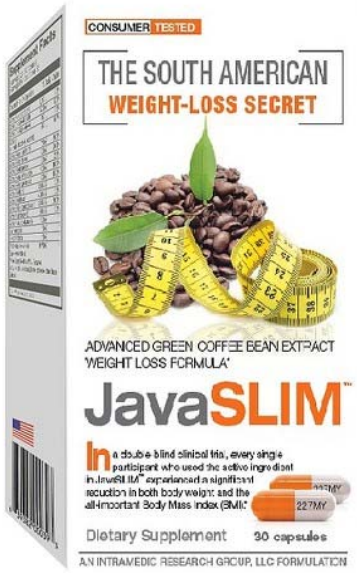
- Lanham Act "establishment claims" analysis does not apply to CA consumer protection laws
- JavaSlim box label claimed product was "clinically proven" to cause "significant reduction in actual body mass index (BMI)."
- Ads claimed that a clinical trial proved that ingredients caused significant reduction in body weight and BMI.

Class Actions

- *Aloudi v. Intramedic Research Group, LLC*, 2015 WL 4148381, No. 15-cv-00882 (N.D. Cal. Jul. 9, 2015)

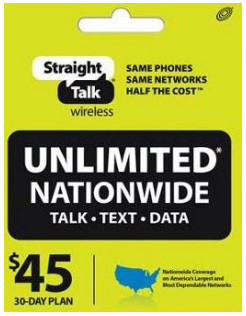
- Plaintiff attacked Defendant's clinical study by citing "scientific consensus," which court dismissed as conclusory

- "As a matter of law, plaintiffs cannot bring consumer protection claims solely on the basis of a lack of substantiation."



Class Actions

In Re: TracFone Unlimited Service Plan Litigation, No.13-cv-03440 (N.D. Cal. July 2, 2015)



- California federal judge approved TracFone Wireless Inc.'s $40 million settlement with a proposed class, ~$15-65 per affected phone line
- FL and CA statutory and common law causes of action
- Global settlement, settling 4 consolidated class actions and FTC enforcement action
  - 8 million class members
- "Straight Talk" brand advertised "unlimited" data plans
  - In fact, after reaching certain data caps, TracFone would "throttle" or suspend data service, or terminate phone service completely
- Court noted that customers' willing renewal of monthly plans despite throttling should mitigate damages

Defending Liberty Pursuing Justice

Widener University Delaware Law School

Class Actions

Harnish et. al. v. Widener University School of Law, No.12-00608 (D.N.J. July 1, 2015)

- Federal judge denied class certification in a suit brought on behalf of graduates of Widener University School of Law. The plaintiffs alleged that:
  - Widener routinely reported that 90 to 95 percent of graduates found work within nine months of graduation, without disclosing that these included part-time and non-legal jobs
  - Widener misrepresented graduates' mean salaries, failing to disclose that the figures provided represent a small and deliberately selected subset of graduates.
- Class certification was dismissed as predominance and typicality were not satisfied:
  - Predominance was not satisfied as some graduates obtained the type of full-time legal jobs they sought, even though other class members suffered ascertainable losses as a result of the school's alleged misrepresentation. Therefore “individual questions predominate over common questions about the loss each proposed class member sustained.”
  - Typicality was not satisfied since it was not clear whether all members of the proposed class were exposed to the misrepresentations claimed by the plaintiffs.

Class Actions

Niloofar Saeidian v. The Coca Cola Co., No. 2:09-cv-06309 (C.D. Cal. July 6, 2015)

- Had been stayed while *Pom Wonderful v. Coca-Cola* was pending
- Federal judge denied Coca-Cola's motion to dismiss a class action lawsuit for false advertising of Minute Maid Enhanced Pomegranate Blueberry Juice. Plaintiffs alleged that:
  - Calling the product "pomegranate blueberry" juice and prominently displaying the two fruits next to each other on the front label, created a misleading impression that it contained more of the two juices than it actually does.
  - The juice contained only 0.3% pomegranate juice and 0.2 % blueberry juice, and 99.4% of the juice was composed of cheaper apple and grape juice.
- The court rejected Coca-Cola's argument that the class action should be dismissed as the claims were pre-empted by U.S. Food Drug and Cosmetic regulation.
  - "The Supreme Court's … opinion in *Pom Wonderful*, though addressing the issue of preclusion rather than preemption, explicitly rejected the '[assumption] that the FDCA and its regulations are at least in some circumstances a ceiling on the regulation of food and beverage labeling.'"
  - "While there are specific regulations regarding the labeling of juice-containing beverages, these regulations operate in addition to, rather than in place of, the [Food Drug and Cosmetics Act]'s prohibition of misleading labeling."

Class Actions

Teamsters Local 237 Welfare Fund et al. v. AstraZeneca Pharmaceuticals LP et al., No. SN04C-11-191 (Del. Super. Ct. July 8, 2015).

- A Delaware court dismissed a class action against AstraZeneca. The plaintiffs, four union health and benefits funds, had alleged:
  - AstraZeneca engaged in consumer fraud by introducing an "essentially identical drug," Nexium, when the over-the-counter version of Prilosec became available. AstraZeneca falsely represented Nexium as superior to Prilosec to maintain market share after Prilosec's patent expired.
- Judge found insufficient allegations to support reliance, or even “some awareness” of the misrepresentations by consumers
- Dismissed with prejudice
  - Action had been filed in 2004, then been stayed pending parallel litigation; after stay was lifted in August 2010, case sat for over 3 years with no activity

Class Actions

- *Cabrera v. Kenneth Cole Productions, Inc,* No. 1:15-cv-05107 (S.D.N.Y June 30, 2015).

  - Kenneth Cole hit with a $5 million false and deceptive advertising class action lawsuit under the California Consumers Legal Remedies Act and the FTC Act. Plaintiffs allege:

LOOK GOOD FOR GOOD. -KENNETH COLE

-KENNETH COLE-

  - Kenneth Cole represents a fake "former price" on "outlet merchandise" that was never designed to be sold at a retail store.

  - "Kenneth Cole manufactures certain goods for exclusive sale at its Kenneth Cole Outlets, which means that such items were never sold—or even intended to be sold—at the 'MSRP' listed on its labels."

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Consumer Financial Protection Bureau Developments (July 2015)

Alexandra Megaris
212.370.6210
amegaris@venable.com

CFPB Developments: Bureau's Fourth Anniversary

CONSUMER FINANCIAL PROTECTION BUREAU:
ENFORCING CONSUMER PROTECTION LAWS

The Consumer Financial Protection Bureau (CFPB) was created in the wake of the financial meltdown to stand up for consumers and make sure they are treated fairly in the financial marketplace. Supervising financial companies and enforcing consumer protection laws is core to the Bureau carrying out its mission. Since opening its doors in 2011, the CFPB has held law breakers accountable and helped consumers harmed by illegal practices.

CFPB ENFORCEMENT AND SUPERVISION BY THE NUMBERS

- **$10.1 Billion**: Approximate amount of relief to consumers from CFPB enforcement activity, including:
  - $2.6 billion in restitution to consumers; and
  - $7.5 billion in principal reductions, cancelled debt, and other consumer relief.
- **17 Million**: Consumers who will receive relief because of CFPB enforcement activity.
- **$286 Million**: Money ordered to be paid in civil penalties as a result of CFPB enforcement activity.
- **$248 Million**: Monetary relief provided to consumers as a result of CFPB supervisory actions.
- **1.8 Million:** Consumers who have received relief because of CFPB supervisory actions.

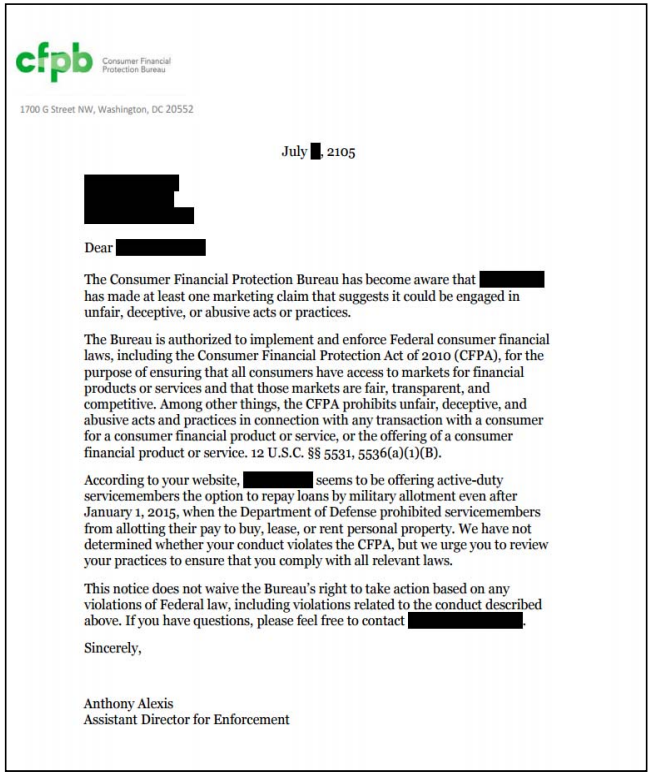
CFPB Developments: Defense Military Lending Act, Final Rule

- Final Rule expanding types of credit products that are covered by a 36% rate cap and other military-specific protections under the Military Lending Act
- The rule generally covers "consumer credit" offered or extended to active-duty servicemembers or their dependents, as long as the credit is subject to a finance charge or payable by written agreement in more than 4 installments.
  - Excludes: residential mortgages and credit extended to finance the purchase of, and secured by, personal property, such as vehicle purchase loans.
- See also CFPB Guidelines issued on Sept. 2013.

CFPB Developments: Scrutiny of Military Allotment Practices

- CFPB sent letters to sellers of retail goods to military servicemembers avoiding them to review websites and other advertising for potentially misleading marketing and review other practices related to payment by military allotments.

- Active-duty servicemembers are not permitted to use allotments to pay for personal property such as vehicles, appliances, and consumer electronics.



cfpb Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

July [redacted], 2105

[redacted]

Dear [redacted]

The Consumer Financial Protection Bureau has become aware that [redacted] has made at least one marketing claim that suggests it could be engaged in unfair, deceptive, or abusive acts or practices.

The Bureau is authorized to implement and enforce Federal consumer financial laws, including the Consumer Financial Protection Act of 2010 (CFPA), for the purpose of ensuring that all consumers have access to markets for financial products or services and that those markets are fair, transparent, and competitive. Among other things, the CFPA prohibits unfair, deceptive, and abusive acts and practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. 12 U.S.C. §§ 5531, 5536(a)(1)(B).

According to your website, [redacted] seems to be offering active-duty servicemembers the option to repay loans by military allotment even after January 1, 2015, when the Department of Defense prohibited servicemembers from allotting their pay to buy, lease, or rent personal property. We have not determined whether your conduct violates the CFPA, but we urge you to review your practices to ensure that you comply with all relevant laws.

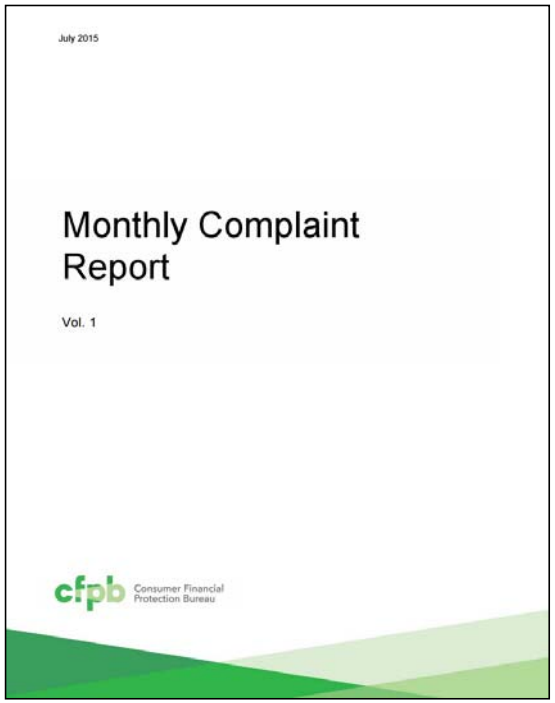
This notice does not waive the Bureau's right to take action based on any violations of Federal law, including violations related to the conduct described above. If you have questions, please feel free to contact [redacted].

Sincerely,

Anthony Alexis
Assistant Director for Enforcement

CFPB Developments: Launch of Monthly Complaint Report

- The CFPB began accepting complaints as soon as it opened its doors 4 years ago in July 2011.
- CFPB accepts complaints on many consumer financial products, including credit cards, mortgages, bank accounts, private student loans, vehicle and other consumer loans, credit reporting, money transfers, debt collection, and payday loans.
- As of July 1, 2015, the CFPB has handled 650,700 complaints.
- Monthly Report - product spotlight: complaint volume, product trends, state information, most complained about companies.



CFPB Developments: Enforcement Against Bank & Other Providers of Add-On Services

- Core allegations:
  - Unfairly charging consumers for credit card add-on benefits that consumers did not receive.
  - Consumer Financial Protection Act (UDAAP), and Telemarketing Sales Rule (TSR).
- July 1, 2015 - Under two consent orders, a service provider would pay approximately $6.8m in monetary relief for eligible consumers who have not yet received refunds and $1.9m in CMP, while another service provider would pay approximately $55,000 in monetary relief to eligible consumers who have not yet received refunds and $1.2m in CMP.
- July 21, 2015 – Consent order against Citibank for allegedly unfairly billing consumers for credit card add-on products, deceptively marketing those products, and deceptive collection practices. Bank has agreed to pay about $700 million in refunds on about 8.8 million accounts; and $35m in CMP.
- Background: See CFPB Bulletin 2012-06.

CFPB Developments: JPMorgan Chase Settlement

- CFPB, 47 State AGs, and DC announced settlement with bank in connection with debt sale and debt collection practices.
- Allegations
  - Sold “bad” credit card debt
  - Robo-signed affidavits filed in court when suing consumers for debt
- $136M to CFPB and States, $30M to OCC, and at least $50M redress to affected consumers
- Onerous restrictions on future debt sales

CFPB Developments: Honda ECOA Settlement

- Alleged Honda violated ECOA by charging African-American, Hispanic, and Asian and Pacific Islander borrowers higher dealer markups for auto loans, without regard to credit worthiness.
- As result, minority borrowers paid, on average, $150 to over $250 more.
- Ordered to pay $24M to a settlement fund.
- Ordered to change practices, including reducing dealer discretion to mark-up interest rate or move to non-discretionary dealer compensation.

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VENABLE® LLP

Amy Mudge
AMudge@Venable.com
202.344.4743

Christopher Crook
CCrook@Venable.com
202.344.4752

Shahin Rothermel
SRothermel@Venable.com
202.344.4550

Eric Berman
EBerman@Venable.com
202.344.4661

Alexandra Megaris
AMegaris@Venable.com
212.3706210

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And It Takes a Village:

Special Thanks to:

Mark Goodrich

Peter Frechette

Jessica Talbert

Neha Dhindsa

Manmeet Dhindsa

THE END—THANKS FOR LISTENING!