



Consumer Litigation: Recent Developments, Successes, and Failures

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Wednesday, Sept. 28, 2022, at 12:00 p.m.

- I. FTC Actions
 - a. COVID scams during 2020 and 2021.
 - b. Enforcement work re on-line marketing especially online reviews.
 - c. Continued work re use of testimonials, See, e.g., *Huegerich v. Gentile*, No. 2:22-cv-00163 (C.D. Cal. Jan. 7, 2022) (Plaintiff alleges Defendants used misleading advertisements, including celebrity endorsements from individuals such as Kim Kardashian and Floyd Mayweather, Jr., to promote and sell cryptocurrency, without disclosing material connections between the defendants.)
 - a. FTC finalized new “Made in the USA” labeling rule on July 1, 2021 (Only products that are “all or virtually all” made in the United States may be labeled as such.)

- II. Privacy claims against Big Tech Brought by State AGs
 - a. Mississippi v Google, NM v Google – Google allegedly collected personal information about students who used Google’s G Suite for Education. The data collected included name, email address, telephone number, age, gender and location.
 - b. DC, Ind., Wash., Tex. V Google – States alleged Google deceived consumers about location tracking.
 - c. Ariz. v Google – Arizona alleges Google misled consumers about how and when it collects location information.
 - d. Texas v Meta (Facebook) – Texas alleges that Facebook collected users’ biometric information without consent.

- III. State AG Antitrust Claims against Big Tech
 - a. Wash v Amazon – Washington AG alleged Amazon restrained competition by price fixing by setting minimum prices for products offered through Amazon. Case settled for \$2.25 million
 - b. Multi-state AGs v Google – States allege that Google monopolized the display advertising market, reduced competition, and misrepresented privacy practices.
 - c. NY v Facebook – 48 AGs sued Facebook regarding its acquisition of Instagram and WhatsApp. Case was dismissed and is now on appeal.
 - d. Colorado and US v Google – Cases allege Google restrained trade in general search services and search advertising. Cases set for trial next year.
 - e. Arizona and other states v Google – Allegations that Google used Android mobile operating system to foreclose competitors or to extract rent from aps hosted on the Google Play Store. Case in discovery.

- IV. Other State AG Actions
 - a. Opioids
 - b. Juul - \$438.5 million settlement over marketing to teens.

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- V. Private civil actions
 - a. Continued litigation re food and product labeling
 - i. Organic, ‘non-GMO’ and “toxin free” claims are common.
 - b. Claims re use of “reference” pricing, e.g., advertisement of a sale price in comparison to an inflated “original price.” Use of “list prices” has also come under criticism.
 - i. *California v Overstock.com* (\$6.8 million in civil penalties and injunctive relief affirmed on appeal).
 - ii. *Clark v. Eddie Bauer, LLC* (currently pending in Oregon Supreme Court; certified question from Ninth Circuit addressing whether reference/comparative pricing at outlet stores gives rise to ascertainable loss under Oregon UTPA)
 - c. \$85 million settlement with Zoom due to defective security and data sharing practices.
 - d. Data breach claims continue
 - i. California has a specific cause of action for data breaches. No similar claim under Oregon law.
 - ii. Oregon’s requirement of actual present injury can be a hurdle. *See Paul v Providence*.
 - e. Recent Oregon cases
 - i. Oregon UTPA may or may not have a “materiality” requirement. *See State ex rel. Rosenblum v. Living Essentials, LLC*, 313 Or. App. 176, review allowed, 368 Or 787 (2021) (AG enforcement action alleging multiple Oregon UTPA violations for promotional claims re 5 Hour Energy).
 - ii. Price inflation theory of ascertainable loss isn’t cognizable under Oregon law because the market in consumer goods is not an “efficient” market. *See Bohr v. Tillamook County Creamery Ass’n*, 321 Or. App. 213 (2022) (petition for review filed Sept 14, 2022).
 - iii. Reliance is required (more often than not). *See generally Bohr*.
- VI. Arbitration Clause Enforcement Opening?
 - a. *Berman v Freedom Financial Network*, 2022 WL 1010531 (9th Cir April 5, 2022)
 - i. In a browsewrap agreement, a website offers terms available through a hyperlink, and a user supposedly agrees by continuing to use the site.
 - ii. In *Berman*, the 9th Circuit affirmed an order denying a motion to compel arbitration because the browsewrap agreements weren’t conspicuous and didn’t inform the user that clicking “continue” bound them to the terms and conditions with the arbitration requirement.
 - iii. The Court took pains to point out how inconspicuous the links were to the terms and conditions — they were in the same tiny font and color as the rest of the text.

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- VII. Cryptocurrency
- a. Very little if any regulation.
 - b. Lots of \$ lost, very suspicious activity
 - c. FTC has brought cases involving delayed delivery of bitcoin mining machines, and marketing materials that described a pyramid scheme. First Amended Complaint, FTC v. BF Labs, Inc., et al., <https://www.ftc.gov/system/files/documents/cases/150514butterflylabscompt.pdf>. Complaint, FTC v. Dluca et al., https://www.ftc.gov/system/files/documents/cases/dluca_-_bitcoin_funding_team_complaint.pdf.
 - d. CFPB has taken an educational role but has not passed any regulations nor taken any enforcement actions to date.
 - e. Very few private or state AG actions.