

CLIENT ALERT

Recent Happenings in Advertising & Product Risk Management – March 2017

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This news bulletin is provided by the Advertising & Product Risk Management Group of Crowell & Moring. If you have questions or need assistance, please contact Christopher Cole, Cheryl Falvey, or any member of the APRM Group.

FEATURED ARTICLE

What's the Deal with the Robinson-Patman Act? Recent Litigation Suggests the Law Could Be Making a Comeback

The Robinson-Patman Act, a New Deal-era law aimed at curbing price discrimination, has long been considered a dormant corner of antitrust and pricing law. Recent RPA litigation in the auto dealership industry in late 2016, however, indicates that reports of the law's death are greatly exaggerated.

A Revived RPA?

In October 2016, after three years of litigation, a two-week trial, and a day of deliberation, the jury in *Mathew Enterprise, Inc., Stevens Creek v. Chrysler Group* found that Fiat Chrysler's dealer incentive program did not violate the RPA's ban on price discrimination.¹ The verdict was a win for Chrysler and other car manufacturers, as it vindicated dealer incentive programs that are fairly common in the industry. The fact that the case got to trial, however, signals that the RPA can still open automotive firms and similarly-structured manufacturers to price discrimination lawsuits. In fact, *Stevens Creek* was but one of several cases presenting RPA claims in late 2016. This recent trend demonstrates that the RPA continues to create legal headaches for unwary manufacturers.

At issue in *Stevens Creek* was Chrysler's Volume Growth Program, under which Chrysler paid a bonus to dealers who met or exceeded monthly sales objectives. While the plaintiff initially succeeded in meeting these objectives, it began to falter when a competing Chrysler dealership opened a new location nearby in late 2010. The plaintiff complained that the VGP did not account for the entrance of new dealers, and further that Chrysler used a different formula for calculating the new dealer's VGP targets. The plaintiff also alleged that over the course of a year, the new dealer received more VGP payments while selling fewer cars relative to the plaintiff, which allowed the new dealer to purchase cars from Chrysler at a lower net payment in violation of Section 2(a) of the RPA.

When Chrysler moved for summary judgment, the plaintiff countered that Chrysler failed to use a "uniform pricing policy" for competing dealerships – which included sales incentive payments under the VGP – that were "functionally available on an equal basis."² The court found for the plaintiff, concluding that the availability question was a disputed issue of fact for the jury. In so ruling, the court also found that evidence of a 2.3 percent price difference (roughly \$700 per vehicle) was sufficient to trigger the *Morton Salt* inference – a rebuttable inference of competitive injury that arises if the plaintiff demonstrates "substantial" price discrimination between competing purchasers over time.³

The Recent Trend of Dealer RPA Cases

Stevens Creek is one of several RPA cases from late 2016 that should get manufacturers' attention –only one of which (spoiler alert) was resolved in favor of the defendant.

Bedford Nissan v. Nissan North America: In *Bedford*,⁴⁴ the plaintiff alleged that Nissan NA “unilaterally chose [a rival dealer] as its preferred dealer in the [relevant market]” by offering “cash and incentive payments” that were not available to other Nissan dealers in the same market. In attempting to fend off this claim, Nissan did not counter that these incentive payments were tied to any objective measure such as volume, but instead contended that plaintiff could not show that Nissan made contemporaneous discounts, rebates, or refunds that it did not make for the plaintiff. As a fallback position, Nissan argued that the plaintiff could at best show a reduction in intrabrand competition – a secondary concern of the antitrust laws that is not typically actionable under the RPA.⁵⁵

Sioux City Truck and Trailer v. Ziegler, Inc.: In *Sioux City*,⁶⁶ the plaintiff alleged that the defendant, with whom plaintiff had a decades-long dealership arrangement, offered new and different terms under which the plaintiff would pay higher prices for parts than it had under the parties’ existing agreement. The plaintiff further alleged that defendant stated it would terminate the parties’ relationship if the plaintiff did not agree to the new terms, and that plaintiff’s regional competitors had not faced the same “take-it-or-leave-it” arrangement from defendant. Accordingly, the plaintiff refused the defendant’s new unfavorable terms, and brought suit alleging that the defendant’s differential offering of the new terms was discriminatory under the RPA. The defendant argued that because the plaintiff did not purchase products under the new terms, it was not actually discriminated against under the RPA’s “two purchaser rule” – i.e., the plaintiff must allege actual sales at two different prices to two different buyers.⁷⁷

Napleton’s Arlington Heights Motors v. FCA US LLC: *Napletons*,⁸⁸ another case involving Fiat Chrysler and a disgruntled dealer, featured a class of plaintiffs who asserted that Chrysler and conspiring dealers agreed to a scheme where the conspiring dealers would report falsely inflated sales reports in order to qualify for volume discounts and cash incentives. This scheme, according to plaintiffs, allowed the conspiring dealers to receive favorable pricing from Chrysler which was unavailable to non-conspiring dealers. Chrysler defended itself on the grounds that the plaintiffs could identify neither specific dealers to whom plaintiffs lost business nor specific price differences between conspiring and non-conspiring dealers paid over time.

The defendants had at best a mixed track record in these RPA cases. As explained above, *Stevens Creek* was resolved in favor of the defendant, but only after the case reached a jury – hardly a comforting prospect for other RPA defendants. Ultimately, Chrysler was able to persuade the jury that the plaintiff could have lowered its prices to sell more vehicles, as other dealerships had done to qualify for the incentives at issue. The jury found that the VGP was functionally available to plaintiff, and thus any loss by *Stevens Creek* was due to its irrational decision to maintain high prices relative to its competition.

Bedford and *Napletons*, on the other hand, resulted in losses for the defendants at the motion to dismiss phase. In *Bedford*, the court was unconvinced of the defendant’s arguments that the incentive program at issue at worst spurred intrabrand competition, noting that “Nissan dealers in the same geographic market are also competing for new car buyers generally, impacting interbrand competition in the same market.”⁹⁹ In *Napletons*, the court was convinced that plaintiffs had provided

sufficient detail regarding specific conspiring dealerships and specific losses from the alleged inflated sales report scheme to proceed to discovery.

In *Sioux City*, on the other hand, the court was unconvinced by plaintiff's argument that its RPA claim was valid under *Bruce's Juices*, a decades-old Fifth Circuit case which created an exception to the two-purchaser rule if the plaintiff's "failure to [make a purchase] was directly attributable to defendant's own discriminatory practice."¹⁰ The court found that the *Bruce's Juice's* exemption has been disfavored in subsequent case law, and that "merely receiving a discriminatory price offer will not suffice" to state a claim under the RPA.¹¹

Art of Dealership Management

As these cases demonstrate, the RPA is alive and well in the dealership context, and could well resurface in other industries given some plaintiffs' recent successes in surviving motions to dismiss. These plaintiffs' victories should remind potential RPA defendants that the best defense against these lawsuits is a good offense of transparent pricing initiatives coupled with clear communications with all distributors about pricing and incentive policies.

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LITIGATION ROUNDUP

The litigation arena for the consumer products industry is as active as ever. Each newsletter we bring you a summary of the most important litigation developments from the past two months, from complaint filings and key court decisions to trial results and settlements. For more information about these and other developments, please visit our [Food & Beverage Industry Tracking Report](#).

Filed

Pet Food Company Hit with California Class Action for Advertising Nutrish Dog Food as "Natural"

On February 28, 2017, APN Inc., the company that sells celebrity chef Rachael Ray's dog food brand, was slapped with a putative class action in California federal court for false advertising over the "natural" labeling on Nutrish lines of dog food products when the items allegedly contain harmful additives and synthetic ingredients, including L-ascorbyl-2-polyphosphate, menadione sodium bisulfite complex, and caramel color. [Christina Grimm v. APN Inc. et al., Case No. 8:17-cv-00356, U.S. District Court for the Central District of California](#)

Two Complaints in "Food Court" Allege Kona Brewing Falsely Advertises Beer as Brewed in Hawaii

On February 28, 2017, two California consumers filed a putative class action against the parent company of Kona Brewing Co. in federal court, alleging the brand falsely misleads purchasers into thinking the beer is brewed in Hawaii — even though it comes from continental U.S. breweries. [Cilloni et al. v. Craft Brew Alliance Inc., Case No. 5:17-cv-01027, U.S. District Court for the Northern District of California](#)

On March 6, 2017, suit was filed against Kona Brewing Co. and its owner, Craft Brew Alliance, Inc., over the beer’s perceived place of origin. The lawsuit alleges that defendants mislead drinkers into thinking Kona beers are brewed in Hawaii when it is made in less exotic places on the U.S. mainland, like New Hampshire and Tennessee. In buying the beer, Plaintiff alleges that he relied on illustrations of the beach and surfers, as well as a map of the major Hawaiian Islands with markings and the words “Kona Brewing Co.” indicating Hawaii brewery locations. Plaintiff further alleges that he paid a premium price for beer he thought was brewed in Hawaii and seeks to represent a nationwide class and a California class. [Broomfield v. Kona Brewing Co., Case No. 17-1157, U.S. District Court for the Northern District of California](#)

Settled

California Judge Denies Class Action Settlement in “BOGO” Case for Inadequate Notice

On January 30, 2017, a state judge denied final approval of the proposed settlement agreement because class members did not receive notice that claims not alleged in the original complaint (*i.e.*, that MyPillow deceptively promoted a “Buy One Get One Free” offer by inflating the price of its pillows resulting in consumers actually paying regular price for two pillows) would be included in the settlement agreement. [Amiri et al v. MyPillow, Inc. and Does 1-10, Case No. CIV-1606479, Superior Court for the State of California, County of San Bernardino](#)

Heartland Consumer Products Settles Splenda Knock-off Suit Against Dunkin Donuts

On February 17, 2017, Heartland Consumer Products LLC, owners of the Splenda artificial sweetener product, recently dropped its lawsuit against Dunkin’ Donuts, alleging that Dunkin Donuts was misleading consumers by handing out yellow packets of artificial sweetener when customers asked for “Splenda,” even though what Dunkin’ Donuts was distributing was made in China and labeled with “Dunkin’ Donuts.” The pleadings noted that “Heartland said it had received complaints of actual confusion from Dunkin’ customers who said that they were deceived into thinking the knockoff sweetener, which purportedly had a “funny taste,” was Splenda.” The details of the settlement have not been disclosed. [Heartland Consumer Products LLC v. Dunkin Brands Inc. et al., Case No. 1:16-cv-03045, U.S. District Court for the Southern District of Indiana](#)

Direct Digital Settles Class Action over Effectiveness of Instaflex Supplements

On March 3, 2017, Direct Digital agreed to pay \$4.5 Million to settle a class action over claims that its joint health supplements aren’t clinically proven and don’t work as advertised, pending authorization by an Illinois federal court, according to Plaintiff’s motion for preliminary approval of the settlement. Mullins and his attorneys will petition the court for roughly \$1.5 Million in fees and costs to be paid from the settlement fund, the memo said. Direct Digital will also agree to stop advertising Instaflex as promoting joint health and may no longer represent the product as “special, revolutionary or exclusively formulated.” [Vince Mullins v. Direct Digital LLC, Case No. 1:13-cv-01829, U.S. District Court for the Northern District of Illinois](#)

Dismissed/Stayed

Federal Judge Stays Class Action Against Kraft Pending FDA Input on “Natural”

On March 3, 2017, a Puerto Rico federal judge stayed a false labeling suit over artificially-colored cheese brought against Kraft Foods Group Inc. pending guidance from FDA on the use of the term “natural” on food products. The judge pointed to three recent rulings in support of the company’s argument that the proceedings should be paused pending completion of the FDA’s rulemaking process: the Ninth Circuit’s 2016 decisions in *Kane v. Chobani* and *Astiana v. Hain Celestial Group*, as well as the Southern District of New York’s 2016 ruling in *In re Kind LLC “Healthy & All Natural” Litigation*. [Quinones-Gonzalez v. Kraft Foods Group Inc., Case No. 3:15-cv-01892, U.S. District Court for the District of Puerto Rico](#)

REGULATORY ROUNDUP

CPSC

- Commissioner Ann Marie Buerkle [has been named](#) as CPSC’s acting chair, taking the reins from Commissioner Elliot Kaye. Buerkle will remain acting chair until the President nominates and the Senate confirms a permanent replacement.
- CPSC announced a [\\$5.8 Million civil penalty](#) to settle charges that an American manufacturer failed to immediately report an unreasonable risk of serious injury related to an alleged defect in coffee brewing systems after about 100 reports of burn-related injuries over a period of four years. This is the second-highest penalty ever issued by the agency, though Commissioners Adler, Kaye, and Robinson issued a [joint statement](#) noting concerns about whether the amount is too low to have any meaningful deterrent effect on multi-billion dollar companies.

FDA

- FDA has sent a second [warning letter](#) to an India-based drugmaker for alleged shortfalls in Illinois manufacturing plant inspections. The agency criticized the manufacturer for continuing to distribute batches of medication while an investigation was open to discover why previous batches failed stability testing.

FTC

- On February 6, 2017, the FTC [announced](#) that VIZIO agreed to settle charges that it unlawfully collected television viewing information from consumers without their consent.
- As part of the FTC’s ongoing enforcement in the dietary supplement space, on February 22, 2017, the Commission [announced](#) settlements with three dietary supplement marketers that used radio infomercials deceptively formatted as talk shows and fictitious endorsements to promote dietary supplements. Additionally, the defendants used false “risk free” trial claims without disclosing burdensome requirements for obtaining refunds.
- On March 21, 2017, the FTC and the National Association of State Charities Officials will be hosting an event in Washington DC to discuss charitable solicitation practices and the role of consumer protection. For more information, see the [Give & Take: Consumers, Contributions and Charity Event webpage](#).

- The newly passed [Consumer Review Fairness Act of 2016](#) prohibits a company from including in the terms and conditions of its contract a limitation prohibiting consumers from writing truthful consumer reviews. The FTC can investigate violations of this new law.

NAD

- On March 13, 2017, Lee Peeler, President and CEO of the Advertising Self-Regulatory Council announced that Andrea Levine, Director of NAD, has decided to retire. In her 20 years as NAD Director, Andrea has transformed the self-regulatory process and published more than 2,600 case decisions. Andrea's last date has not been announced, but the Council of Better Business Bureaus has begun its search for a new director.
- On March 1, 2017, the National Advertising Review Board announced that 18 new members have been selected to hear appeals of disputed decisions of the NAD or the Children's Advertising Review Unit. For a list of new members, [click here](#).
- NAD highlighted the importance of disclosing material connections to third party websites and reminded advertisers that they cannot make claims in consumer testimonials that they cannot make on their own in a recent decision involving advertising for Hair La Vie dietary supplements. In a YouTube video advertisement, the advertiser featured testimonials from consumers who used Hair La Vie and experienced dramatic hair growth as well as expert endorsements on the product. However, the advertiser failed to provide any competent and reliable scientific evidence demonstrating that Hair La Vie grows thicker, stronger, or fuller hair. Further, NAD noted that expert endorsements are inappropriate when the endorser has not conducted a thorough evaluation or testing on the product. NAD also was concerned that the advertiser failed to disclose its affiliate marketing relationship with the third party website ConsumerSurvey.org. The website featured two features on the Hair La Vie product and rates it 4.7 out of 5. The website also included a hyperlink to the Hair La Vie website, where consumers could purchase the product. Noting that consumers are likely to weight ConsumerSurvey.org's recommendations differently had they known that the website receives compensation for purchases of Hair La Vie from its website, NAD appreciated the advertiser's willingness to add a disclosure stating ""Disclosure: We are compensated for our reviews. If you click through the links on this page and make a purchase on a partner site, then we receive a commission and/or financial benefit. This is how we keep the content on this site free and pay for the products that are reviewed on the site," but reminded the advertiser that the disclosure must be clear and conspicuous. Finally, NAD also reminded the advertiser that ConsumerSurvey.org cannot make unsupported claims that the advertiser cannot independently substantiate. See *Beauty Science Group, Inc./Hair La Vie*, NAD Case Report #6055 (Feb. 2017). [Press Release](#)
- NAD recently reminded advertisers that they must ensure that comparative pricing claims are frequently updated to ensure that the comparisons are accurate and, when comparing dissimilar products, material differences between the products must be clearly disclosed. Costco challenged the express claims "Who has time to comparison shop? We do. We check hundreds of prices each week so you don't have to", "Don't shop around town . . . shop at Wegmans and save" and "Prices checked on [date]" and implied claims that certain products sold at Costco are more expensive than the same products sold at Wegmans and consumers don't need to comparison shop. NAD determined that some of Wegmans' price comparisons were inaccurate and Wegmans also failed to clarify the basis of comparison to clearly identify material differences between items being compared (e.g., cuts of meat). Additionally, NAD also recommended that Wegmans discontinue advertising claims that instruct consumers not to comparison shop because it contradicts the

qualifier that prices are subject to change. See *Wegmans Foods Markets, Inc./Wegmans Pricing*, NAD Case Report #6054 (Feb. 2017). [Press Release](#)

- NAD recently recommended that Nautilus discontinue use of the claim “all I had to do was walk” in the context of advertising that connects the claim to dramatic weight loss. NAD determined that while walking on the TreadClimber was a more efficient means of burning calories than some other exercise equipment, NAD also determined that the statement “all I had to do is work” when juxtaposed by testimonials and visual imagery showing dramatic weight loss communicated the message that walking on the Treadmill could achieve dramatic results without additional lifestyle modifications. While the advertiser submitted a study collecting weight loss data by TreadClimber users over a six week period, NAD had several concerns with the study’s reliability, including the short time frame to accurately represent the results shown in testimonials. Thus, NAD recommended that the advertiser communicate that exercising with the TreadClimber was simple, requiring only a walking motion, without the need to learn specific techniques. See *Nautilus, Inc./Bowflex TreadClimber*, NAD Case Report #6053 (Feb. 2017). [Press release](#)

Crowell & Moring’s Retail & Consumer Products Law Observer

Each week, Crowell & Moring’s Advertising & Product Risk Management Group brings you the top stories in retail and consumer products law. In the past month, our posts have focused on change: changes in leadership and priorities at the Consumer Product Safety Commission, changes in class action law, and the impact of changes in the presidential administration.

CPSC Acting Chair Buerkle Announces Top Priorities at Product Safety Conference

[Matthew Cohen](#) and [Carolyn Wagner](#) recap Acting Chair Buerkle’s priorities announced at the International Consumer Product Health and Safety Organization annual conference.

The President’s Regulatory Agenda and the FTC

How will Trump’s “two for one” Executive Order and the proposed budget affect consumer protection agencies? [Chris Cole](#) predicts a broader scope of consumer protection authority for the FTC.

Commissioner Ann Marie Buerkle Becomes Acting Chair at CPSC

CPSC gained a new Acting Chairwoman from the minority Republican contingent. Former General Counsel of CPSC, [Cheri Falvey](#), and [Matthew Cohen](#) discuss the implications of this unusual situation.

Class Dismissed? New House Bill Could Transform Federal Class Action Law

Josh Foust lays out the practical impacts of the proposed Fairness in Class Action Litigation of 2017 bill from Chairman of the House Judiciary Committee, Representative Goodlatte.

Target Takes Aim at Chemicals in Consumer Goods; Announces New Strategy to Promote Safer Products

Following the “green chemistry” trend, Target announced a new strategy to remove certain chemicals from consumer products. [Michelle Gillette](#) breaks down Target’s new “Chemical and Goals” policy.

Failure to Obtain Viewer Consent Leads to \$2.2 Million Settlement for Vizio

[Lauren Aronson](#) recounts the complaint brought against Vizio by the FTC and the State of New Jersey for failing to meet standards of disclosure of data collection processes.

CROWELL & MORING SPEAKS

Previous Engagements

On February 2, Advertising & Product Risk Management Group Co-Chair [Chris Cole](#) co-chaired the 2017 Consumer Protection Conference in Atlanta, GA. He moderated a panel entitled “*Claims Substantiation in Novel and Evolving Technologies.*”

On February 10, [Frances Hadfield](#) organized the [2017 Fashion Law Conference](#) in conjunction with The Federal Bar Association and The New School at Parsons School of Design in New York City. Preetha Chakrabarti spoke on a panel entitled “*Corporate Responsibility: Child Labor and Sustainability: Overview of international treaties and U.S. laws affecting child labor and sustainability issues.*”

On February 20-23, The International Consumer Product and Safety Organization hosted the 2017 Annual Meeting & Training Symposium in Orlando, FL. Advertising & Product Risk Management Group Co-Chair [Cheryl Falvey](#) spoke on “*Practical Lessons In Identifying Risk, Using Effective Tools to Manage It, and Using Data to Meet Regulatory Obligations - In Other Words, How to Stay Out of Trouble!*”

On February 27-28, several Crowell & Moring partners spoke at the [GMA Legal Conference](#) in San Diego, CA. [Chris Cole](#)’s topic was “*Roundtable Discussion on Marketing and Advertising Law.*” [Ryan Tisch](#) participated in the breakout session “*Antitrust Concerns in Retailer Interactions.*” [Michelle Gillette](#) spoke on “*Present and Future Attacks on Ingredients.*”

Upcoming Engagements

On March 28-31, the American Bar Association will be holding the Antitrust Law 2017 Spring Meeting in Washington, DC. Advertising & Product Risk Management Group Co-Chair [Chris Cole](#) is chairing the Advertising Mock Trial: “*False, Misleading or Deceptive?*” The scenario? Cat food maker sues a competitor for falsely claiming the absence of impurities, seeking a preliminary injunction for false advertising. Will fair competition prevail? To register, please visit the ABA website.

On April 18-20, [Chris Cole](#) and [Lauren Aronson](#) are presenting at The Institute for Perception’s 2017 Advertising Claims Support: Case Histories and Principles workshop.

On May 4-5, John Fuson will be speaking at the CFSAN Center Director breakout session at the Food and Drug Law Institute’s Annual Conference.

On May 11-12, CLE International is hosting their 2nd Annual Food Law Conference in Austin, TX. [Michelle Gillette](#) will be speaking on a panel entitled “*Class Actions Part I: Merits Update*” on trends and developments in class actions. Visit [CLE.com](#) to register.

On May 23-25, John Fuson will be speaking on a panel about “GMO Labeling: Analysis of the New Law and Strategies for Practical Implementation” at the [American Conference Institute’s Food Law and Regulation Forum](#).

On June 13, [Michelle Gillette](#) will be co-chairing the ABA Food & Supplements Workshop in Hershey, PA. [John Fuson](#) will be presenting an update on FSMA. More information on the workshop and registration can be found on the ABA website.

¹ See Jury Verdict Form, *Mathew Enterprise, Inc., Stevens Creek v. Chrysler Group LLC*, Case No. 13-cv-04236-BLF, 2016 WL 6126783 (N.D. Cal. Oct. 13, 2016).

² *Stevens Creek*, 2016 WL 42369998, at *13 (N.D. Cal. Aug. 2, 2016).

³ *Id.* at *4 (citing *FTC v. Morton Salt Co.*, 334 U.S. 37, 49–51 (1948)).

⁴ *Bedford Nissan, Inc. v. Nissan North America, Inc.*, Case No. 1:16 CV 423, 2016 WL 6395799 (N.D. Ohio Oct. 28, 2016).

⁵ See *Volvo Trucks N. Am., Inc. v. Reeder-SimcoGMC, Inc.*, 546 U.S. 164, 180-81 (2006) (“Interbrand competition, our opinions affirm, is the ‘primary concern of antitrust law.’...In the case before us...the supplier’s selective price discounting fosters competition among suppliers of different brands.... By declining to extend Robinson-Patman’s governance to such cases, we continue to construe the Act ‘consistently with broader policies of the antitrust laws.’”).

⁶ *Sioux City Truck and Trailer, Inc. v. Ziegler, Inc.*, No. 16-CV-4106-LRR, 2016 WL 7106519 (N.D. Iowa Dec. 5, 2016).

⁷ See, e.g., *Fusco v. Xerox Corp.*, 676 F.2d 332, 335 (8th Cir. 1982).

⁸ *Napleton’s Arlington Heights Motors, Inc. v. FCA US LLC*, No. 16 C 403, 2016 WL 5792402 (N.D. Ill. Oct. 4, 2016).

⁹ *Bedford*, 2016 WL 639579 at *5.

¹⁰ *American Can Co. v. Bruce’s Juices*, 187 F.2d 919, 924 (5th Cir. 1951).

¹¹ *Sioux City*, 2016 WL 7106519 at *4.

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