



The Barrister

Article Reprint

Published by the Camden County Bar Association



VOL. 60, NO. 10

June 2012

www.camdencountybar.org

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Parsing Promotional Puffery From Actionable Advertising

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Lately, legal periodicals seem to have at least one weekly story on a recently-filed putative class action that targets facially-innocuous product advertising: “all natural” iced tea; “100% pure” orange juice; “nutritious” breakfast foods; “fat free” milk; dental products providing “relief within minutes”; and “classic” flavor ice cream. New Jersey consumers have eagerly grasped onto the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq.* (“NJCFA”), to test whether advertisers’ efforts to persuade the consuming public are legally cognizable. Even under the consumer-friendly NJCFA, are plaintiffs stretching the statute too far? Here’s a sampling of what New Jersey courts have said recently about this:

Glass v. BMW of North America, 2011 WL 6887721 (D.N.J. Dec. 29, 2011) arose from defendant’s allegedly defective steering system and BMW’s advertisements about its MINI Coopers: “Rated 4 stars in recent crash tests. MINI is ready to serve and protect” and MINI’s power steering is “a powerful ally in the war against loss-of-control.” Plaintiff used the NJCFA to allege these representations were false, misleading, and deceptive. The court granted BMW’s motion to dismiss, finding “the examples of Defendant’s alleged misrepresentations identified in Plaintiff’s Complaint to be mere puffery, and thus not actionable. The NJCFA distinguishes between actionable misrepresentations of fact and puffery. The distinguishing characteristics of puffery are vague, highly subjective claims, as opposed to specific, detailed factual assertions.” Judge Salas ruled that BMW’s ads were “highly subjective expressions of opinion . . . Indeed, such statements are routinely made by companies seeking to gain a competitive advantage in their respective industries, and are therefore not actionable . . . ‘Whether something is the “best” is highly subjective, is always a matter of opinion, and is the type of statement regularly made by companies in promoting their products.’”

Plaintiff in *Beth Schiffer Fine Photographic Arts v. Colex Imaging*, 2012 WL 924380 (D.N.J. Mar. 19, 2012) sued over an allegedly

defective “Poli 2” photograph processing and printing machine, where she allegedly relied on defendants’ supposed misrepresentations that the Poli 2 was a “professional grade” machine and was a smaller and cheaper version of the earlier Poli 1 model. After dismissal for failure to plead with requisite specificity, plaintiff’s amended complaint alleged defendants had represented that: Poli 2 was a professional grade machine developed for the professional and commercial photography market; was a smaller and cheaper version of the Poli 1 but otherwise nearly identical; and was a professional grade machine with functionality designed for that market segment. While acknowledging that puffery is non-actionable under common law and the NJCFA, Judge Walls denied defendants’ motion to dismiss: “The [challenged] statements . . . rise above the level of puffery to the extent that they include specific statements of fact regarding the nature and quality of the product, its suitability for use in a particular market segment, its similarity to earlier products, the existence of a design defect, and the feasibility of repair.”

At issue in *Hammer v. Vital Pharmaceuticals*, 2012 WL 1018842 (D.N.J. Mar. 26, 2012), were defendant’s advertisements and packaging of Liquid Clenbutrix Hardcore as “certified by science” and a “dietary supplement.” Plaintiffs’ claims that were “based on statements that Clenbutrix is the world’s fastest, hardest hitting fat incinerator and an authentic synergistic blend of ingredients” were dismissed with prejudice as the statements “are mere puffery, not actionable misrepresentations.”

Plaintiff claimed in *Steven Robinson v. Hornell Brewing*, 2012 WL 1232188 (D.N.J. Apr. 11, 2012) that he was misled by bottle labels touting Arizona brand beverages as having “All Natural” ingredients, though they contained high fructose corn syrup — which he believed is not a natural ingredient. Relying on *McNair v. Synapse Group*, 2012 WL 695655 (3d Cir., Mar. 6, 2012), Judge Simandle denied Rule 23(b)(2) class certification because plaintiff lacked Article III standing to pursue injunctive relief: “Plaintiff testified . . . he has no intention of ever purchasing any Arizona product in the future . . . Therefore, Plaintiff cannot demonstrate that he is likely to suffer future injury from Defendant’s labeling practices . . . [M]erely seeing

a label that Plaintiff believes is incorrect or that he believes could be misleading to others is not the kind of concrete adverse effect or injury necessary to create a cognizable case or controversy required by Article III.” Of significance is that the “Court pause[d] to note that, as a result of the controlling precedent in this area, class action plaintiffs pursuing injunctive relief to prevent consumer fraud may, in general, have a difficult time satisfying the demands of Article III standing.”

See also Perri v. Prestigious Homes Inc., 2012 WL 95564 (N.J. App. Div. Jan. 2012) (summary judgment because realtor’s statements — assuring plaintiff that “there wasn’t anything to be concerned with in terms of potential flooding” — were “not a statement of fact that is false . . . [A]t best, it indicates an idle comment made conveying her opinion about the seriousness of the problem posed by flooding”) (citing *Gennari v. Weichert Realtors*, 148 N.J. 582 (1997) (differentiating material misrepresentations from “idle comments or mere puffery”).

Although these cases recognize that the consuming public *is* discerning enough to know that the very purpose of advertising is to convince and persuade — while leaving ultimate purchasing decisions up to consumers (and their comparison shopping / reading of ingredients, etc.) — the tangible and intangible costs to defendants from the Promotional Puffery vs. Actionable Advertising epidemic adds one more item (*e.g.*, mandatory arbitration clauses) to the list of considerations for class action avoidance: *i.e.*, have your clients’ marketing department scrutinize carefully the language of their advertisements and product labels.
