Court Hits Cancel On Bulk of Printer Class Action

August 9, 2011 by Sean Wajert

A California federal court earlier this month rejected many of the claims in a putative class action against Epson America Inc. *Christopher O'Shea, et al. v. Epson America Inc., et al.,* 2011 WL 3299936 (C.D. Cal.). What may be of most interest to our readers is the important reminder that a manufacturer is not required under consumer protection laws to denigrate its own product and broadcast that its product may not perform as well as its competition.

Plaintiffs claimed that Epson affirmatively misrepresented and failed to disclose material information regarding the performance and/or value of Epson inkjet printers and ink cartridges. Named plaintiffs claimed to be frustrated with the amount of ink the Epson printer consumed.

In fact, Epson discloses that its printers are tested in accordance with ISO standards, and makes available to consumers detailed information about how ink yields are calculated, including the fact that testing is conducted based on continuous printing; potential consumers, further, are expressly cautioned that since no single yield standard can duplicate a customer's actual printer usage, Epson recommends that customers also consider print yield comparisons from reputable independent sources. In the same vein, Epson discloses on the packaging of its printers that actual cartridge yields may vary considerably for reasons including images printed, print settings, temperature and humidity. But plaintiffs never let a wealth of information deter them from finding one factoid they allegedly didn't get.

So, in essence, plaintiffs sought to impose a duty on the seller to compare this feature of its printers to competitors' products, as the Complaint referred to yields which were allegedly well below the yields of other manufacturers' printers.

The California courts have held that for an omission to be actionable for purposes of the state consumer fraud laws, it must be either (1) contrary to a representation actually made by the defendant, or (2) a fact the defendant was obligated to disclose. E.g., Daugherty v. Am. Honda Motor Co., Inc., 144 Cal.App.4th 824, 835–36, 51 Cal.Rptr.3d 118, 128 (2006). Here, because there was no allegation that the “omitted” information was contrary to an actual representation, to defeat summary judgment and prevail on an omission-based theory of liability, plaintiffs had to establish that Epson was affirmatively obligated to disclose the information.

Yet, plaintiffs failed to identify—and the Court was unable to find—any case in any jurisdiction in which a court imposed an affirmative legal obligation upon a manufacturer to disclose on its packaging that its products performed less efficiently than similar products from competing manufacturers. To the contrary, as Epson pointed out, courts have unequivocally rejected this proposition. As the federal court explained, in the absence of some special circumstance, any duty to disclose information about a competitor's products would be anathema to a competitive free-market economy. Imagine a car manufacturer having to tell you in every ad about every

other car that got better gas mileage or did better in a crash test. Imagine every food maker having to tell you in its ads of every competitive food or beverage that was lower in calories.

Plaintiffs did not allege that Epson's printers were defective, let alone dangerously defective. Their claim, rather, was that they were unhappy upon discovering that Epson's printers "wasted" more ink than other printers. California's consumer protection laws, though broad and sometimes scary, do not extend so far as to require a company to denigrate its own products or promote those of its competitors just because consumers might be interested in the comparison. The duty that plaintiffs sought to impose upon Epson was properly served by independent consumer reports.

The court held that Epson was not legally obligated to disclose that actual print yields generated by its printers and ink cartridges are "grossly inefficient" vis à vis "reason-able consumer expectations and the yields of other manufacturers' printers." Because Epson was not obligated to disclose the purportedly "omitted" information, plaintiffs' omission-based claims consequently failed as a matter of law.

However, the court denied the motion as to express representations allegedly made concerning the claims on one proposed sub-class which alleged that the defendant deceived customers when it told them that its NX series of printers, which uses individual cartridges for different colors of ink, would allow customers to "replace only the color you need." There was an issue of fact regarding whether the consumer is familiar enough with printer technology and operations to know that small amounts of colored ink are used when printing black-and-white documents to keep the print head clear. The plaintiffs have moved for class certification, with the hearing set for later in August.