



# **CONSUMER PROTECTION LAW UPDATE**

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# Agenda

1. Federal Trade Commission
2. Private Litigation
3. State Attorneys General
4. National Advertising Division

# 1. FTC Update

# Operation Empty Promises

- Multi-agency effort: FTC, DOJ, Postal Inspection Service, many states
- 90 actions filed against scammers who falsely promise lucrative jobs and work-at-home opportunities

# Operation Empty Promises

- *FTC v. Ivy Capital, Inc.*, Case No. 2:11-cv-00283 (D. Nev.)
- *FTC v. National Sales Group*, Case No. 11-cv-01230 (N.D. Ill.)
- *FTC v. Darling Angel Pin Creations, Inc.*, Civil 8:10-cv-00335 (M.D. Fla.)

# Operation False Cures

- Daniel Chapter One and its principal charged with violating FTC Order
- Unsubstantiated claims that herbal products prevent and/or cure cancer
- DOJ seeking PI and civil penalties in D.C. District Court (No. 1:10-cv-01362)

# Acai Berry “News Reports”

- Websites intended to look like legitimate news sites (ABC, Fox, CBS, CNN)
- Fake news items that purport to provide objective investigative reports with dramatic and positive results
- FTC filed 10 actions, seeking injunctions

# Oreck Corp.

- Halo vacuum and ProShield Plus air purifier: The Flu Fighters!
- Unsubstantiated claims of reducing the risk of flu and other illnesses and eliminating virtually all common germs and allergens
- Consent Order with \$750,000 payment



# Children's Vitamins

- Final Order against makers of Disney and Marvel Heroes vitamins
- “DHA is naturally found in the brain and the eyes. 100 mg promotes healthy brain and eye development. One serving provides 100 mcg of DHA.”
- Unsubstantiated claims, and misleading
- \$2.1 million refund program

# Rascal Scooter

- Entering sweepstakes did not create an established business relationship
- Calling phone numbers on sweepstakes form violated the Do Not Call Registry
- 3 millions calls in violation
- \$2.1 million civil penalty

# PrivacyLock

- Online data broker sold “PrivacyLock” for consumers to hide personal data on web
- Deceptive because data still available via indirect searches
- Full refund for all purchasers (5,000)
- Commissioner Brill’s concurring statement

# Mortgage Relief Settlement

- False promises to modify consumer loans and make payments more affordable
- Consent Order bans defendants from selling mortgage relief services and from misleading consumers about financial-related goods and services
- Surrender of assets worth \$2.2 million

# Timeshare resellers

- Unsolicited calls to timeshare owners seeking to broker a sale
- Consumer paid substantial fee, only to learn there was no buyer and no refund
- FTC obtained TRO barring defendants' conduct, freezing their assets and placing the companies into receivership
- PI hearing on May 20

# Food Stamp Services

- “Almost everybody” and “virtually anyone” can apply legally for food stamps
- Guide encouraged misrepresentations on application form
- .
- Previous consent order v. same defendants
- FTC files for contempt (M.D. Fla.)

## 2. Private Litigation

# Private Litigation

- *AT&T Mobility v. Concepcion*, 2011 U.S. LEXIS 3367 (2011)
- *Khaliki v. Helzberg Diamond Shops, Inc.*, 2011 U.S. Dist. LEXIS 37534 (W.D. Mo. 2011)





## *AT&T Mobility v. Concepcion*, 2011 U.S. LEXIS 3367 (2011)

- Is this the end of consumer class actions as we know it?
  - Supreme Court holds that class action waivers in consumer arbitration agreements are enforceable, and that California’s rule to the contrary, as discussed in [Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P. 3d 1100 \(2005\)](#), is pre-empted by the Federal Arbitration Act (“FAA”).
  - “The decision basically lets companies escape class actions, so long as they do so by means of arbitration agreements,” Brian T. Fitzpatrick, a law professor at Vanderbilt University, said. “This is a game-changer for businesses. It’s one of the most important and favorable cases for businesses in a very long time.”  
<http://www.nytimes.com/2011/04/28/business/28bizcourt.html>



# *AT&T Mobility v. Concepcion*, 2011 U.S. LEXIS 3367 (2011)

- What happened?
  - The Concepcions purchased AT&T service, which was advertised as including a free phone, but they were charged \$30.22 in sales tax based on the phone's retail value.
  - In March 2006, the Concepcions filed a complaint against AT&T in the United States District Court for the Southern District of California.
  - The complaint became consolidated with a putative class action alleging that AT&T had engaged in false advertising and fraud when it charged sales tax on the phones it advertised as free.



## *AT&T Mobility v. Concepcion*, 2011 U.S. LEXIS 3367 (2011)

- AT&T moved to compel arbitration, citing the arbitration agreement entered into with the Concepcions.
- The Concepcions opposed AT&T’s motion, “contending that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed class wide procedures.” *AT&T Mobility*, 2011 U.S. LEXIS 3367 at \*8.



## *AT&T Mobility v. Concepcion*, 2011 U.S. LEXIS 3367 (2011)

- Both the District Court and 9th Circuit side with the Concepcions, relying on California Supreme Court precedent -- [\*Discover Bank v. Superior Court\*, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P. 3d 1100 \(2005\)](#) -- that class action waivers in arbitration agreements are unconscionable and unenforceable under California law.



# *AT&T Mobility v. Concepcion*, 2011 U.S. LEXIS 3367 (2011)

- Scalia, Roberts, Kennedy, Alito and Thomas (with Thomas concurring) overrule the 9th Circuit.
  - “The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements.” *AT&T Mobility*, 2011 U.S. LEXIS 3367 at \*10 (internal citations omitted).
  - “We have described this provision as reflecting both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract.” *Id.* at \*11 (internal citations omitted).
  - “Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at \*18.
  - “Arbitration is poorly suited to the higher stakes of class litigation.” *Id.* at \*29.



# *AT&T Mobility v. Concepcion*, 2011 U.S. LEXIS 3367 (2011)

- Where do we go from here?
  - “The decision basically lets companies escape class actions, so long as they do so by means of arbitration agreements,” Brian T. Fitzpatrick, a law professor at [Vanderbilt University](http://www.vanderbilt.edu), said. “This is a game-changer for businesses. It’s one of the most important and favorable cases for businesses in a very long time.”  
<http://www.nytimes.com/2011/04/28/business/28bizcourt.html>
  - “In light of *AT&T Mobility v. Concepcion*, it behooves employers with pre-dispute arbitration agreements in employment contracts to consider inserting class-action waivers if their agreements do not already contain them. Employers without arbitration programs are likely to consider adopting them as a means to manage the risk of wage & hour and employment discrimination class actions.”  
<http://www.workplaceclassaction.com/class-certification/att-mobility-v-concepcion---what-the-supreme-courts-april-27-ruling-means-for-employers/>



# *AT&T Mobility v. Concepcion*, 2011 U.S. LEXIS 3367 (2011)

- A Legislative Response?

- The Arbitration Fairness Act, revisited

- Senators Al Franken (D-Minn), Richard Blumenthal (D-Ct), and Representative Hank Johnson (D-Ga) announce their plan to reintroduce the Arbitration Fairness Act in response to the Supreme Court's holding in *AT&T Mobility*.

- <http://pubcit.typepad.com/clpblog/2011/04/return-of-the-arbitration-fairness-act.html>

- “AT&T Mobility v. Concepcion ‘is another example of the Supreme Court favoring corporations over consumers,’ said a statement from Sen. Al Franken, D-Minn., who will sponsor the bill on the Senate side. Rep. Hank, Johnson, D-Ga., will again sponsor the House bill. ‘The Arbitration Fairness Act would help rectify the Court’s most recent wrong by restoring consumer rights. Consumers play an important role in holding corporations accountable, and this legislation will ensure that consumers in Minnesota and nationwide can continue to play this crucial role.’”

- <http://neworleanscitybusiness.com/blog/2011/05/05/u-s-supreme-court-deals-death-blow-to-consumer-class-actions/>



## *Khaliki v. Helzberg Diamond Shops, Inc.*, 2011 U.S. Dist. LEXIS 37534 (W.D. Mo. 2011)

- Proposed class action under the Missouri Merchandising Practice Act, Mo. Rev. Stat. § 407.020 (“MMPA”)
- Claim for unjust enrichment
- Rule 9(b) and *Iqbal/Twombly*
- Plaintiff failed to plead to the Rule 9(b) fraud standard for her MMPA claim
- Plaintiff, however, sufficiently pleaded her unjust enrichment claim under the *Iqbal/Twombly* standard



# **3. State Attorneys General**

# State AG Update—Multistate

- Blast by Colt 45
  - New “alcopop” drink
  - Sold in a 23.5 oz, brightly colored can and is 12% ABV
  - Comes in four fruit flavors
- 18 Attorneys General wrote “Binge-In-A-Can” Letter to brewer criticizing the drink
- To date, Blast remains on market without any changes



# State AG Update—Multistate

- JK Harris, a tax relief company that advertises nationally
  - Entered a 2008 consent decree with 18 states
- Tenn. and W. Va. AGs have initiated contempt proceedings for violation of consent decree
  - The AGs allege that company continues to misrepresent consumers' eligibility for compromises with IRS.
  - Tenn. AG further alleges that company continues to improperly bill consumers for services and to misrepresent its employee qualifications.
- Texas AG recently entered into consent decree with company to resolve lawsuit based on same conduct
  - \$800,00 in consumer restitution, injunctive relief, and \$400,000 in AG costs.

# State AG Update—Texas

- Jury held that Jubilee Financial Management, LLC, The Credit Card Solution, Freedom from Debt Alliance and Robert Lindsey engaged in illegal “debt invalidation” scheme
- AG alleged that defendants falsely claimed that they would erase customer’s debts and restore credit
- Customers paid, on average, \$3,000 for defendants’ “debt invalidation” service
- Defendants must pay \$7,590,000 in civil penalties, \$5,874,000 in restitution, and the AG’s attorney’s fees

# State AG Update—New York

- New York AG announced settlement with Columbia Utilities LLC, an energy service company that sells electricity and natural gas through telemarketing and door to door sales
- AG alleged that Columbia engaged in variety of deceptive marketing practices
- Columbia agreed to \$2 million in consumer refunds, \$200,000 in civil penalties, and to a number of disclosure and conduct remedies

# 4. NAD Update

## NAD Update

- DSE Healthcare Systems, Case # 5317
  - Cystex Urinary Pain Relief Tablets
  - Cystex Liquid Cranberry Complex with Proantinox
- VISS Beauty Inc., Case # 5312
  - VISS Intense Pulsed Light Hair Removal Device
- Your Baby Can, LLC, Case # 5313
  - Your Baby Can Read Early Language Development System

## DSE Healthcare Solutions

- NAD's ongoing monitoring and Initiative with the Council for Responsible Nutrition ("CRN")
  - CRN Press Release
  - [http://www.crnusa.org/PR06\\_CRN\\_NAD091806.html](http://www.crnusa.org/PR06_CRN_NAD091806.html)





## DSE Healthcare Solutions

- The Challenged Advertisements
  - *“Cystex® Helps Manage UTIs . . . and Now Promotes Urinary Health!”*
  - *“Cystex® is the trusted urinary health brand that has helped millions of women manage the pain and discomfort of urinary tract infections.”*
  - *“Cystex both manages the pain associated with a UTI and reduced [sic] the progression of the bacteria.”*

# DSE Healthcare Solutions

- NAD's Review and Disposition
  - The two Cystex products help to (1) “manage the symptoms” of UTIs (2) “prevent” UTIs, and (3) prevent UTIs from getting worse.
  - NAD expressed concern about the combined advertisement of two separate, differently classified, Cystex products – the tablets and the dietary supplement.
  - DSE acknowledged NAD's concerns about mixed messages and agreed to take the necessary steps to make it clear that these Cystex products are two separate products.
  - DSE also agreed to modify any of its suggestions that the dietary supplement product can manage or treat the symptoms associated with UTIs.

# VISS Beauty Inc



- The Challenged Advertisements
  - “VISS IPL is a sophisticated light-based permanent hair reduction system that delivers professional, laser-equivalent results in the comfort and privacy of your own home.”
  - “Permanent Hair Reduction. The pulse of light emitted by VISS IPL is absorbed by pigment in the hair shaft beneath the skin surface; this disables the hair follicle activity preventing the hair from growing back.”
  - “VISS IPL uses the innovative Intense Pulsed Light (IPL) technology to remove unwanted hair through a process called selective photothermolysis. When directed at the site of unwanted hair, the light is absorbed by dark pigment of the hair, disabling the follicle with minimal discomfort ... With continued use, you should see less hair regrowth. The hair that does return should become progressively lighter and finer.”

# VISS Beauty Inc

- “Optional Lamp Cartridges for Photorejuvenation and Acne therapy. Hair removal is just the beginning! Our optional lamp cartridges can turn your VISS IPL into a sophisticated skin rejuvenation system and acne-clearing miracle.”
- “Scientifically-proven permanent hair reduction.”
- “In summary, the efficacy of IPL and laser hair removal is now generally accepted in the dermatology community, however IPL methods have been shown to provide faster results and cause less pain while showing equivalent or better efficacy to laser systems.”
- “Do your research, IPL is far better than laser – more effective, and safer on your skin.”
- “VISS IPL has been developed in conjunction with leading dermatologists, and fulfils all the safety regulations for home-use devices.”

# VISS Beauty Inc

- NAD's Review and Disposition
  - “Given the advertiser’s election not to participate in the self regulatory process, NAD will refer this matter to the Federal Trade Commission as well as the Food and Drug Administration for review, pursuant to Section 2.1 F (iii) of the *NAD/CARU Procedures*.”
  - “The advertiser acknowledged receipt of the NAD inquiry but refused to file a substantive response.”

# Your Baby Can, LLC



[Learn More!](#)

- The Challenged Advertisements
- Express Claims
  - *“When children develop reading skills during their natural window of opportunity, from about birth to age four, they read better and are more likely to enjoy it.”*
  - *“In fact studies prove that the earlier a child learns to read, the better they perform in school and later in life.”*
  - *“Early readers have more self-esteem and are more likely to stay in school.”*
  - *“Because of Your Baby Can Read, at 19 months, Evan is reading over 500 words.”*

# Your Baby Can, LLC

- Testimonials

- *“My daughter began reading by the time she was 8 months old . . .”*
- *“. . . Your Baby Can Read definitely made a difference in how Mona talks. She’s holding a conversation and she is only 2. . .”*
- *“I think Your Baby Can Read videos have already impacted [Tuesday’s] future. She’s already reading at the age of 2 – first grade level books. It’s already apparent how much easier things are going to be for her and I think it’ll give her a tremendous amount of confidence. . .”*

- Implied Claims

- *Implied claim that there is a benefit to teaching reading in infancy, prior to a child entering school.*

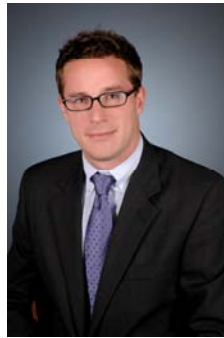
# Your Baby Can, LLC

- NAD's Review and Disposition
  - Jurisdictional issues, pending litigation
  - Advertiser should modify its testimonials to comply with the Federal Trade Commission Guides on Endorsements and Testimonials
  - Advertiser should modify testimonials to clearly disclose the timeframe to achieve the expected results
  - Advertiser should discontinue consumer testimonials that babies using this product will perform better in school and/or later in life
  - The scope of NAD's recommendations
  - Advertiser's response





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