IN THE COURT OF COMMON PLEAS OF PHILADELPHIA

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

JASON TESAURO and ELIZABETH ELEY	:	COMMERCE PROGRAM
	:	
v.	:	AUGUST TERM 2000
	:	
THE QUIGLEY CORPORATION	:	No. 1011
	:	
	:	**Control No. 102883**

ORDER

AND NOW, this 9th day of April 2001, upon consideration of the defendant's preliminary objections to the complaint and the plaintiffs' response, and in accordance with the court's contemporaneously-filed opinion, IT IS HEREBY ORDERED that

(1) The preliminary objections to the plaintiffs' claims under 73 P.S. § 201-2(4)(vii) and (xxi) are SUSTAINED.

(2) Paragraphs 28(b) and (e) are STRICKEN from the complaint.

(3) All other preliminary objections are OVERRULED.

(4) The defendant shall answer the complaint within twenty (20) days after the entry of this order.

BY THE COURT:

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JOHN W. HERRON, J.

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OPINION

In this class action the plaintiffs allege that they bought a newfangled cold remedy that -- believe it or not -- did not work. At issue are the defendant's preliminary objections to the complaint. The court sustains the objections in part.

BACKGROUND

For the purposes of these demurrers, the court accepts as true the factual allegations of the complaint and reasonable inferences from those facts. Smith v. Wagner, 403 Pa.Super. 316, 588 A.2d 1308, 1311 (1991). The complaint alleges that defendant Quigley Corporation is the manufacturer of Cold-Eeze zinc lozenges. In television, radio and Internet advertisements, the defendant touted Cold-Eeze's ability to prevent colds and pneumonia and to reduce the severity of colds and allergies. The ads described these health claims as clinically proven. The ads seem to have worked, for, like the people in that saying about the better mousetrap, cold-sufferers beat a path to the defendant's door. In 1997 sales of Cold-Eeze reached $70.2 million.

On February 10, 1999, the Federal Trade Commission filed a complaint against the defendant charging that the ads violated the Federal Trade Commission Act. The FTC charged that the ads were false and misleading because the defendant did not have a reasonable basis for claiming that Cold-Eeze had these beneficial health effects.

On February 23, 1999, the FTC and the defendant signed a consent order in which the defendant agreed to make no further health claims about Cold-Eeze until it had competent and reliable scientific evidence substantiating the claims. The defendant did not admit any violation of the law.

The plaintiffs, Jason Tesauro and Elizabeth Eley, and the class they want to represent bought Cold-Eeze between August 15, 1996 and November 20, 1999. On August 14, 2000, the plaintiffs filed this class action against the defendant alleging (1) violations of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), (2) breach of the UCC implied warranty of merchantability, and (3) unjust enrichment. The complaint does not allege that the plaintiffs personally saw or relied on the ads.[1] Defendant filed preliminary objections to the complaint arguing that the complaint is legally insufficient and insufficiently specific.[2]

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[1] The plaintiffs likely chose not to plead reliance because reliance might require an individualized inquiry that would not meet the class certification requirements of numerosity, commonality and typicality. Weinberg v. Sun Co., 740 A.2d 1152, 1169 (Pa.Super.Ct. 1999), appeal granted, 764 A.2d 50 (Pa. 2000); Pa.R.C.P. 1702.

[2] The preliminary objections also raised improper venue, but the defendant withdrew that argument.

DISCUSSION

I. THE COURT SUSTAINS IN PART THE DEMURRER TO UTPCPL CLAIMS.

The UTPCPL makes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" unlawful. 73 P.S. § 201-3. The definition section of the UTPCPL sets forth 21 practices that constitute "unfair methods of competition and unfair or deceptive acts or practices." 73 P.S. § 201-2(4). The plaintiff alleges that the defendant engaged in five of these practices: deceptive marketing of goods, § 201-2(4)(v); marketing of altered goods, § 201-2(4)(vii);[3] bait advertising, § 201-2(4)(ix); breach of written warranty, § 201-2(4)(xiv); and fraud § 201-2(4)(xxi). The defendant argues that Count I is legally insufficient.

A. The Court Overrules the Demurrer to the False Advertising Claims.

The plaintiffs' claims under §§ 201-2(4)(v) and (ix) are in the nature of false advertising. Weinberg v. Sun Co., 740 A.2d 1152, 1167 (Pa.Super.Ct. 1999), appeal granted, 764 A.2d 50 (Pa. 2000). Section 201-2(4)(v) makes it unlawful to represent "that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have. . . ." Section 201-2(4)(ix) makes it unlawful to advertise "goods or services with intent not to sell them as advertised . . . ."

To state a false advertising claim under subsection (v) or (ix), the plaintiffs must show

> (1) that defendant['s] advertisement is a false representation of a fact, (2) that it actually deceives or has a tendency to deceive a substantial segment of its audience, and (3) that

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[3] In their complaint, the plaintiffs misdesignated this section as 73 P.S. § 201-2(4)(ii). Complaint ¶ 28(b).

the false representation is likely to make a difference in the purchasing decision. Commonwealth v. Hush-Tone Indus. Inc., 4 Pa.Commw. 1, 1971 WL 13030, at *11, quoted in Weinberg, 740 A.2d at 1167. The plaintiffs must also show that they suffered an ascertainable loss of money or property as a result of the false advertisements. 73 P.S. § 201-3.

The complaint sufficiently alleges these elements. The complaint alleges that the defendant made two false representations of fact: (1) Cold-Eeze had certain beneficial health effects, and (2) there was a reasonable scientific basis for claiming these health benefits. The complaint does not specifically allege that the ads deceived or were likely to deceive a substantial portion of their audience. But the complaint alleges that the defendant sold a lot of Cold-Eeze and it alleges the contents of the ads. These facts would support a finding that the ads deceived or were likely to deceive a substantial portion of their audience. The complaint does not specifically allege that the ads were likely to make a difference in consumers' purchasing decisions. But the complaint alleges that the defendant called its product "Cold-Eeze" and that the ads touted the product's effectiveness against colds, pneumonia and allergies. These facts would support a finding that Cold-Eeze had no other purpose than to fight colds, pneumonia and allergies, that consumers bought Cold-Eeze for this very purpose and that the ads touting this purpose likely made a difference in some consumers' decisions to buy Cold-Eeze. See Smith v. Wagner, 403 Pa.Super. 316, 588 A.2d 1308, 1311 (1991) (stating that court must draw all reasonable inferences in plaintiff's favor when ruling on a demurrer).

Contrary to the defendant's arguments, the plaintiffs need not prove that they personally saw or relied on the ads. Weinberg, 740 A.2d at 1167. In Weinberg, the court held that a plaintiff can satisfy the causation element of a false advertising claim by proving that the false ads made a difference

in *some* consumers' purchasing decisions and by proving that the ads increased demand for the product, thus enabling the defendant to charge more than it could have otherwise charged. Id. at 1155, 1161, 1164, 1170. See also Davis v. Powertel, Inc., 776 So.2d 971, 974-75 (Fla.App. 2000) (citing Weinberg and holding that a plaintiff may satisfy the causation element of the Florida deceptive trade practices law by showing that the deceptive practice reduced the value of the product that the plaintiff bought). The complaint sufficiently alleges facts to support a finding that the ads made a difference in some consumers' decisions to buy Cold-Eeze and that the ads increased the demand for and the price of Cold-Eeze.

Finally, plaintiffs plead actual damages. They allege that they paid money for a cold remedy that did not work.

The court overrules the demurrer to the false advertising claims.

C. The Court Sustains in Part the Demurrer to the Written Warranty Claim.

Section 201-2(4)(xiv) makes it unlawful not "to comply with the terms of any written guarantee or warranty given to the buyer at [sic], prior to or after a contract for the purchase of goods or services is made . . . ." The complaint alleges that the defendant warranted in writing that Cold-Eeze would have certain health effects. The defendant argues that the complaint does not allege the existence of a written warranty. The court disagrees.

This claim presents two issues. Since § 201-2(4)(xiv) applies only to written guarantees and

warranties,[4] the first issue is whether the complaint alleges the existence of a writing. The complaint alleges that the defendant aired the ads on television and radio and posted them on the Internet. The UTPCPL does not define the term "written." Whether "writings" include Internet postings is especially problematic, since the 1976 amendment to the UTPCPL, which added § 201-2(4)(xiv),[5] came at a time when the Internet was not even a glimmer in Al Gore's eye. Act of Nov. 24, 1976, P.L. 1166, No. 260, § 1. The legislative history to that amendment does not mention § 201-2(4)(xiv). See Legislative Journal--House, at 2149-54, 2169-70, 2180-82 (July 16, 1975) and Legislative Journal--Senate, at 1798 (June 28, 1976). The few cases addressing §201-2(4)(xiv) do not define "written." See Johnson v. Hyundai Motor Am., 698 A.2d 631, 639 (Pa.Super.Ct. 1997); Kaplan v. Cablevision of Pa., Inc., 448 Pa.Super. 306, 671 A.2d 716, 721 (1996); Smith v. Chrysler Motors Corp., 1990 WL 65700, at *4 (E.D.Pa.).

The court has looked to legal and lay definitions of "written" and "writing." See e.g., Pa.R.Evid. 1001(a)("'Writings' and 'recordings' consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical

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[4] One federal court has held that, although § 201-2(4)(xiv) applies to written guarantees, it applies to any warranty, whether written or unwritten. In re Clark, 96 B.R. 569, 582 (Bankr.E.D.Pa. 1989). This court specifically rejects that holding. See Hutchison v. Luddy, 763 A.2d 826, 837 n.8 (Pa.Super.Ct. 2000) (stating that Pennsylvania state courts are not bound by decisions of federal courts construing state law).

[5] Though the legislature derived the UTPCPL from a uniform law adopted by many states, the written warranty provision is nonuniform and appears to be unique to Pennsylvania. See Uniform Deceptive Trade Practices Act. Maine has amended its version of UCC § 2-316 to make a seller's failure to honor an *implied* warranty in a consumer transaction a violation of the Maine Unfair Trade Practices Act. See Me.Rev.Stat.Ann. § 2-316(5)(a).

or electronic recording, or other form of data compilation."); Fed.R.Evid. 1001(a) (same); Uniform Commercial Code, 13 Pa.C.S.A. § 1201 (defining "written" or "writing" as "includ[ing] printing, typewriting or any other intentional reduction to tangible form"); Black's Law Dictionary, at 1456 (6th ed. 1990) (defining "tangible" as, among other things, "[h]aving or possessing physical form" or "[c]apable of being touched and seen"); Mirriam-Webster's Collegiate Dictionary, at 1367 (10th ed. 1996)(defining a "writing" as, among other things, "letters or characters that serve as visible signs of ideas, words, or symbols"); Black's Law Dictionary, at 1609 (6th ed. 1990)(defining a "writing" as, among other things, an "expression of ideas by letters visible to the eye" or "[t]he giving [of] an outward and objective form to a contract, will, etc., by means of letters or marks placed upon paper, parchment or other material substance."). See 1 Pa.C.S.A. § 1903(a) ("Words and phrases [in a statute] shall be construed according to rules of grammar and according to their common and approved usage. . . .") and Cranberry Park Assocs. v. Cranberry Twp. Zoning Hearing Bd., 561 Pa. 456, 751 A.2d 165, 167 (2000) (referring to Webster's and Black's Law dictionary definitions of a word used in a statute when the statute did not define that word). The federal Magnuson-Moss Warranty Act -- which regulates a narrow class of statutorily-defined written warranties -- does not define "written." 50 U.S.C. § 2301(definitions). See Skelton v. General Motors Corp., 660 A.2d 311 (7th Cir. 1981)(discussing extensively the meaning of "written warranty" under the Magnuson-Moss Warranty Act).

The court has also looked to the purposes of writing requirements in contract law. See Johnson, 698 A.2d at 639 (stating that claims under § 201-2(4)(xiv) are contract-like). First, a writing may serve an evidentiary function, telling the factfinder whether a party made a promise and, if so, the terms

of the promise. See Restatement (Second) of Contracts § 112, cmt. a ("In general the primary purpose of the Statute of Frauds is assumed to be evidentiary."). Second it may serve a cautionary or ceremonial function, signaling to the promisor that the promisee may legally enforce the promise. See Restatement (Second) of Contracts § 112, cmt a ("In the case of suretyship contracts, however, the Statute also serves the cautionary function of guarding the promisor against ill-considered action.").

Finally, the court has looked to the purpose of the UTPCPL. "The purpose of the UTPCPL is to protect the public from fraud and unfair or deceptive trade practices. It is to be liberally construed in order to effect its purpose . . . ." Keller v. Volkswagen of Am., Inc., 733 A.2d 642, 646 (Pa.Super.Ct. 1999) (citations omitted).

In light of these definitions and purposes, the court holds that a seller gives the buyer a written guarantee or warranty under § 201-2(4)(xiv) if the seller intentionally sets forth the guarantee or warranty in letters, words or the equivalent on a physical medium and gives the guarantee or warranty to the buyer in that form. The defendant intentionally set forth its Internet ad in letters and words on a visible medium -- buyers' computer screens linked to the Internet. The ad was written under this definition.[6] The defendant's television and radio ads, however, were not written.[7]

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[6] Because the Electronic Transactions Act, 73 P.S. § 2260.101 et seq., applies only to writings made, sent, received or stored on or after December 16, 1999, it does not apply to the plaintiffs' written warranty claim. The court expresses no opinion on how that act affects the writing requirement of section 201-2(4)(xiv). See 73 P.S. § 2260.303(c) ("If a law requires a record to be in writing, an electronic record satisfies the law.") and § 2260.103 (definitions of "electronic" and "record") and § 2260.104 (scope of act).

[7] The plaintiffs argue that the FTC's transcriptions of the television and radio ads satisfy the writing requirement. But the means by which the ads were "given to the buyer," § 201-2(4)(xiv), were television and radio. The complaint does not allege that the defendant gave buyers the transcribed television and radio ads.

The second issue is whether the Internet ad was a warranty. Claims under § 201-2(4)(xiv) are analogous to contract claims, Johnson, 698 A.2d at 639, and the court turns to the UCC for guidance on the meaning of "warranty." Under the UCC, a seller creates an express warranty[8] when it makes an "affirmation of fact or promise" about the goods or a "description of the goods." 13 Pa.C.S.A. § 2313(a)(1) and (2).[9] See also 50 U.S.C. § 2301(6) (definition of "written warranty" under Magnuson-Moss Warranty Act). To create an express warranty, the seller need not use the word "warrant" or "guarantee," and he need not have the specific intention to make a warranty. 13 Pa.C.S.A. 2313(b). A seller's affirmation about a product's effectiveness for a particular purpose can create an express warranty that the product is effective for that purpose. See e.g., Klages v. General Ordnance Equip. Corp., 240 Pa.Super. 356, 367 A.2d 304, 312 n.10 (1976). Whether an statement creates an express warranty is an issue for the factfinder. See Babcock Poultry Farm, Inc. v. Shook, 204 Pa.Super. 141, 203 A.2d 399, 401 (1964). The statement in the Internet ad that Cold-Eeze contains a "patented formula clinically proven to reduce the severity and duration of common cold symptoms" contains two affirmations of fact: (1) Cold-Eeze reduces the severity and duration of cold symptoms, and (2) the

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[8] Since § 201-2(4)(xiv) requires that the warranty be in writing and that the seller *give* the warranty to the buyer, that section can apply only to written *express* warranties. An *implied* warranty does not arise from contract language, and a seller does not *give* an implied warranty to the buyer. Nationwide Ins. Co. v. General Motors Acceptance Corp., 533 Pa. 423, 625 A.2d 1172, 1178 (1993). An implied warranty arises by operation of law. Id.

[9] The UCC definition of express warranty and the Magnuson-Moss definition of "written warranty" seem to be narrower than the UTPCPL definition in at least one respect: the UCC and Magnuson-Moss definitions require that the warranty form part of the "basis of the bargain." 13 Pa.C.S.A. § 2312(a) and 50 U.S.C. § 2301(6). The UTPCPL seems to contain no such requirement, and it makes warranties given before or after the time of contracting enforceable. 73 P.S. § 201-2(4)(xiv).

defendant has scientific data to prove it. A factfinder could conclude that the statement created an express warranty.

The court sustains the demurrer to Count I insofar as the plaintiffs base their written warranty claim on the television and radio ads. The court overrules the demurrer insofar as the plaintiffs base their written warranty claim on the Internet ads.

D. The Court Sustains the Demurrer to the Fraud Claims.

Section 201-2(4)(vii) makes it unlawful to represent "that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another." Section 201-2(4)(xxi) makes it unlawful to engage "in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." The plaintiffs' claims under these sections are legally insufficient. To state a claim under these sections, the plaintiffs must allege the elements of common law fraud. Booze v. Allstate Ins. Co., 750 A.2d 877, 880 (Pa.Super.Ct.), app. denied, 766 A.2d 1242 (Pa. 2000); Weinberg, 740 A.2d at 1167-69. In spite of this requirement, the plaintiffs admit in their brief that their claims are not based on fraud. In addition, an element of fraud is "justifiable reliance on the misrepresentation. . . ." Bortz v. Noon, 556 Pa. 489, 729 A.2d 555, 560 (1999). The complaint does not allege that the plaintiffs relied on the defendant's ads.

The court sustains the demurrers to the plaintiffs' claims under section § 201-2(4)(vii) and (xxi) and will order paragraphs 28(b) and (e) stricken from the complaint.

II. THE COURT OVERRULES THE DEMURRER TO THE UCC IMPLIED WARRANTY CLAIM.

Count II alleges that the defendant breached the implied warranty of merchantability. The UCC provides that, "[u]nless excluded or modified . . ., a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." 13 Pa.C.S.A. § 2314(a). That warranty applies only to transactions in goods. 13 Pa.C.S.A. § 2102. The defendant demurs on the single ground that the complaint does not allege a transaction in goods. The court disagrees. Cold-Eeze lozenges are goods. 13 Pa.C.S.A. § 2105(a) ("'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action."); Stephenson v. Greenberg, 421 Pa.Super. 1, 617 A.2d 364, 369 (1992) (stating that medication is a good under the UCC, but holding that the UCC does not apply to a hospital's dispensing of medication, which is a mixed goods and services transaction where services -- the giving of medical care -- predominate).

The court overrules the demurrer to Count II.

III. THE COURT OVERRULES THE DEMURRER TO THE UNJUST ENRICHMENT CLAIM.

Count III alleges unjust enrichment. The defendant argues that Count III is legally insufficient. The court disagrees. To state a claim for unjust enrichment, the plaintiffs must allege that they conferred benefits on the defendant, that the defendant appreciated these benefits, and that the defendant accepted and retained these benefits under circumstances that would make it inequitable for the

defendant to retain the benefit without payment for value. Burgettstown- Smith Twp. Joint Sewage Auth. v. Langeloth Townsite Co., 403 Pa.Super. 84, 588 A.2d 43, 45 (1991). The complaint alleges these elements. The plaintiffs gave the defendant a benefit -- money -- for a cold remedy, and the defendant appreciated, accepted and retained the money. It would be inequitable for the defendant the keep this money if the plaintiffs did not in fact receive a cold remedy.

The court overrules the objection to Count III.

IV. THE COMPLAINT IS SUFFICIENTLY SPECIFIC.

Defendant objects to all three counts on the ground that they are insufficiently specific. Pa.R.C.P. 1028(a)(3). Because Counts I to III are sufficiently clear to allow the defendants to answer and frame a defense, the court overrules this objection. Krajsa v. Keypunch, Inc., 424 Pa.Super. 230, 622 A.2d 355, 357 (1993).

CONCLUSION

The court will enter an order sustaining the objection to the plaintiffs' claims under 73 P.S. § 201-2(4)(vii) and (xxi), striking paragraphs 28(b) and (e) from the complaint and overruling the remaining objections.

BY THE COURT:

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JOHN W. HERRON, J.

DATE: April 9, 2001