

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

File No. C0-00-743

The State of Minnesota,
by its Attorney General,
Mike Hatch

Plaintiff,

vs.

ORDER

Publishers Clearing House,

Defendant.

The above-entitled matter came on for hearing before the **Honorable John T. Finley**, Judge of District Court, on the 22nd day of May, 2000, at the Ramsey County Courthouse, pursuant to Defendant's Motion to Dismiss the Complaint. **David Woodward, Esq.** and **Erik A. Lindseth, Esq.**, appeared representing the plaintiff. **Byron E. Starns, Esq.**, **John W. Getsinger, Esq.** and **Nicholas W. Chase, Esq.** appeared defendant.

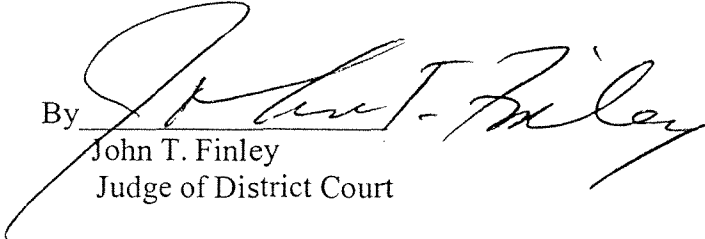
Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED:

1. That the defendant's motion to dismiss the complaint is hereby **DENIED IN ITS ENTIRETY**.
2. That the attached Memorandum is made a part of this Order and constitutes Findings of Fact and Conclusions of Law to the extent required by MN. R.Civ P.52.01.

BY THE COURT:

By


John T. Finley
Judge of District Court

Dated: June 12, 2000

MEMORANDUM

The parties appear before this Court pursuant Defendant Publisher's Clearing House's Motion to Dismiss Plaintiff's Complaint.

Factual Background

The Plaintiff State of Minnesota brought the present action against Defendant Publishers Clearing House alleging that Defendant had violated four Minnesota consumer protection statutes. The Plaintiff essentially alleges that Defendant sells magazines and other merchandise through false, deceptive or misleading mailings involving Defendant's sweepstakes solicitations. Plaintiff alleges these false, deceptive and misleading practices are used as a means of securing orders for merchandise and magazines from the State's consumers.

The crux of the Plaintiff's argument is that Defendant's sweepstakes solicitations have a tendency and capacity to mislead and deceive consumers into believing that either they have won a large sum of money or by purchasing Defendant's products they increase their odds of winning such large cash prize.

Legal Standard

Under *Minn. R. Civ. P. 12.02(e)*, a motion for dismissal for failure to state a claim upon which relief can be granted is appropriate only when it is clear from the face of the complaint that the complaint is legally deficient. *See, e.g., NSP Co v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963).

Analysis

1. Plaintiff's False Advertising Claim

Defendant argues that Plaintiff's claim for false advertising under *Minn. Stat.* § 325F.67 cannot be maintained because the advertisements at issue do not relate to the "character or quality" of any goods or services offered for sale by Defendant.

Defendant's sweepstakes offers cannot be viewed separate from all other practices of Defendant. Rather, the sweepstakes practices of Defendant are directly connected with Defendant's efforts to procure buyers for the magazines and other merchandise (goods) that Defendant sells. Both parties are undoubtedly aware that this is an extremely effective marketing strategy.

Plaintiff's Complaint is sufficient to make the connection between the sweepstakes and the sale of merchandise (goods) by Defendant. The Complaint goes into detail about the specific practices used by Defendant and includes attachments showing the actual documents and mailings. The allegations show that the sweepstakes mailings and the sale of merchandise go hand in hand. While their purposes may be distinct, these two concepts are realistically intertwined. The State has specifically alleged the relationship between the sweepstakes and the merchandise offered by Defendant (*see* Compl. ¶ 13) and has alleged the false, misleading and deceptive techniques used via the sweepstakes as a means of inducing consumers to purchase magazines or merchandise (goods).

The language of *Minn. Stat.* § 325F.67 is broad enough so that it is not limited to the "sales" of goods and services but all things "offered to the public". Forcing a limitation on consumer protection laws such as that which Defendant proposes is contrary to the historically liberal interpretations of Minnesota consumer protection laws. *See, e.g., State v. Alpine Air*

Prods, Inc., 490 N.W.2d 888, 892 (Minn. Ct. App. 1992). The relationship between Defendant's merchandise and magazines offered for sale and the sweepstakes solicitations clearly fall within this interpretation of the statute whether or not the statements made go to the "quality or character" of the goods being offered.

Plaintiff has alleged facts legally sufficient to allow the false advertising claim pursuant to *Minn. Stat.* § 325F.67 to go forward, and therefore Defendant's motion to dismiss on that ground must be DENIED.

2. Plaintiff's Deceptive Trade Practices Claim

Defendant argues that the Deceptive Trade Practices Act, *Minn. Stat* §§ 325D.43 to 325D.48 (2000), applies only to commercial detriment not to consumer detriment as the Plaintiff has alleged and therefore this claim must be dismissed. Defendant also argues that this claim must be dismissed because the Plaintiff is "not likely to be damaged" by the practices of Defendant. Defendant also argues that the claim must be dismissed because the alleged misrepresentations do not relate to any good or service offered by Defendant.

This last argument regarding the offering of goods and services has already been rejected by the Court as part of the false advertising claim above and is also applicable as it relates to the deceptive trade practices claim.

A.

Commercial Detriment vs. Consumer Detriment

The Court must again point out that consumer protection laws are remedial in nature and should be construed liberally in favor of protecting consumers. *See State v. Alpine Air Products, Inc.*, 490 N.W.2d 888 (Minn. Ct. App. 1992).

Minnesota Statute § 325D.44, subd 1 describes a wide range of deceptive trade practices. Subdivision 2 of that statute provides that, in order to prevail in a deceptive trade practices action, a party need NOT prove any competition between the parties. *Minn. Stat.* § 325D.44, subd. 2 (emphasis added). While it may be true that the Deceptive Trade Practices Act more frequently covers business-to-business relationships, there is nothing in the statute itself nor the applicable case law indicating a requirement for “commercial” detriment or a so-called “horizontal business relationship” as Defendant argues. In fact, the remedy provision of the DTPA provides that a person likely to be damaged by a deceptive trade practice may get an injunction and any additional remedies otherwise available. *Minn. Stat.* § 325D.45, subs. (1) and (3)(emphasis added). There is no delineation made that requires “person” to be limited to a business to business relationship for the DTPA to apply. The definition of “person” includes both individuals and businesses.

Commercial (business) detriment is not a requirement for maintaining a claim under the Deceptive Trade Practices Act.

B.

Plaintiff’s Failure to Plead that it is “Likely To Be Damaged”

Defendant argues that because Plaintiff has not shown that it is likely to be damaged by a practice of Defendant, the claim fails.

In viewing the allegations of the Complaint as true, the Plaintiff has clearly shown harm not only to itself but also to the parties it is seeking to protect, i.e., the citizens of Minnesota. The State can and should act on behalf of the consumers of this State to protect consumers from unlawful trade practices.

Plaintiff has properly alleged that it is likely to be damaged, both as to itself and the consumers it represents here, whether or not actual harm or deceit is required under law.

Because Plaintiff has alleged facts sufficient to state a claim under the Deceptive Trade Practices Act, Defendant's motion to dismiss on that grounds must be DENIED.

3. Consumer Fraud Claim

Defendant argues that Plaintiff's consumer fraud claim must be dismissed because the Plaintiff has not alleged that Defendant made any deception or misrepresentation in connection with the sale of any merchandise.

A review of the applicable statutes shows that Defendant's argument is without merit.

The Consumer Fraud Act provides in part:

The act, use or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby is enjoined as provided herein.

Minn. Stat. § 325F.69, subd. 1 (1998)(emphasis added).

As the Court stated earlier, the Plaintiff has shown the connection between the alleged misrepresentations and the "merchandise" that Defendant offers for sale. The Complaint describes the alleged misrepresentations and further alleges how those misrepresentations fit into the whole scheme of things by alleging how the misrepresentations made in the sweepstakes offers interact with the marketing of Defendant's products. These two concepts are intertwined and must be analyzed together. Because of that, the misrepresentations allegedly made in the sweepstakes offers were clearly made "in connection with the sale of merchandise" offered by Defendant. *Minn. Stat.* § 325F. 69, subd. 1. This is all that the Consumer Fraud Act requires.

When this Court views the allegations of the Complaint as true, it is clear that the Plaintiff has set forth facts sufficient to allow the claim for consumer fraud to go forward. Because the Plaintiff has alleged facts sufficient to state a claim for consumer fraud, Defendant's motion to dismiss the consumer fraud is DENIED.

4. Deceptive Acts Against Senior Citizens

Defendant argues that Plaintiff cannot maintain its claim for deceptive acts against senior citizens because the pleadings do not allege that Defendant directed marketing efforts towards senior citizens.

Both parties admit that the deceptive acts against senior citizens claim is derivative of Plaintiff's other claims.

Minnesota Statute § 325F.71, subd. 2(a) provides for an additional civil penalty for a person who engages in conduct that violates consumer protection statutes and whose conduct is perpetrated against one or more senior citizens (emphasis added). Subdivision 2(b) provides four factors a court shall consider in determining whether to impose a heightened civil penalty. *Minn. Stat.* § 325F.71, subd. 2(b)¹. Only one of the four factors in Subdivision 2(b) must be present to impose an enhanced civil penalty. *Minn. Stat.* § 325F.71, subd. 2(a).

¹ Subdivision 2(b) specifically states:

(b) In determining whether to impose a civil penalty pursuant to paragraph (a), and the amount of the penalty, the court shall consider, in addition to other appropriate factors, the extent to which one or more of the following factors are present:

(1) whether the defendant knew or should have known that the defendant's conduct was directed to one or more senior citizens or handicapped persons;

(2) whether the defendant's conduct caused senior citizens or handicapped persons to suffer: loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement or for personal or family care and maintenance; substantial loss of payments received under a pension or retirement plan or a government benefits program; or assets essential to the health or welfare of the senior citizen or handicapped person;

While the legislative history cited by Defendant could presumably be viewed as evidencing an intent to require a “targeting” of seniors to impose the enhanced civil penalty, such a requirement would be at odds with the clear language of the statute.

Taking the allegations of the Complaint as true, the Plaintiff has alleged facts legally sufficient to maintain its claim of deceptive acts against senior citizens. Paragraphs 81 through 89 of the Complaint set out in detail Defendant’s marketing practices and the effect on senior citizens. Section 325F.71 does not require that a party “knew or should have known” that the party’s conduct was directed at one or more senior citizens. Rather, that is only one factor that may lead to imposition of the enhanced civil penalty.

As set out above, the Plaintiff has sufficiently alleged violations of the various consumer fraud statutes that it has pled. The Plaintiff has alleged that the Defendant’s conduct was perpetrated against one or more senior citizens and has shown at least one of the factors set out in § 325F.71, subd. 2(b) necessary to impose the enhanced civil penalty. The statute requires only one or more of the factors to be present. Plaintiff has clearly alleged at least one or more of the factors in § 325F.71, subd. 2(b).

Because Plaintiff has alleged facts legally sufficient to state a claim for deceptive acts against senior citizens, Defendant’s motion to dismiss on that grounds must be DENIED.

(3) whether one or more senior citizens or handicapped persons are more vulnerable to the defendant's conduct than other members of the public because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered physical, emotional, or economic damage resulting from the defendant's conduct; or

(4) whether the defendant's conduct caused senior citizens or handicapped persons to make an uncompensated asset transfer that resulted in the person being found ineligible for medical assistance.

Minn. Stat. § 325F.71, subd. 2(b)(emphasis added).

5. State's Alleged Failure to Join Necessary Parties

The Defendant argues that Plaintiff's claims must be dismissed because the Plaintiff has failed to join parties necessary for the proper adjudication of this matter, namely the individual Minnesota consumers who have been harmed. The Plaintiff argues that it is the proper party under both statutory and case law authorities.

The Plaintiff, as Attorney General of the State of Minnesota, is required to investigate violations of consumer protection laws. *Minn. Stat.* § 8.31, subd. 1. Clearly, under *Minn. Stat.* § 8.31, the State may seek an injunction against unlawful business practices by instituting an action on behalf of its injured citizens. *Minn. Stat.* § 8.31, subd. 3. That part of Plaintiff's Complaint seeking injunctive relief is wholly proper. Plaintiff is seeking, in part, to stop the practices of Defendant, which are allegedly injurious to consumers who are Minnesota citizens because those practices violate consumer protection laws. Plaintiff has established statutory authority to proceed with that part of its action.

Under the common law doctrine of *parens patriae*, a state may maintain an action on behalf of its' citizens where those citizens have been harmed and the state maintains a quasi-sovereign interest. *State v. Standard Oil Co.*, 568 F. Supp. 556, 563 (D. Minn. 1983). The federal court in *Standard Oil Co.* also stated that "Minnesota has a quasi-sovereign interest in protecting the economic health of its' citizens. *State v. Standard Oil Co.*, 568 F.Supp at 563.

The present situation is clearly one to which the doctrine of *parens patriae* applies. The State is acting on behalf of its' citizens and is seeking to redress harm caused by allegedly unlawful business practices. The harm to the citizens becomes harm to the State under the doctrine of *parens patriae*. See *Standard Oil Co.*, F. Supp. at 565. The State of Minnesota, as the

Plaintiff in this action, is protecting not only the economic health of the citizens but also their freedom to be free from allegedly unlawful business practices.

Not allowing the Plaintiff, through the State Attorney General, to proceed with this action would essentially sap the State of power to prosecute and punish such wide spread violations of consumer protection laws that the State may uncover through its investigative duties under § 8.31, subd. 1.

Defendant also argues that Plaintiff's claims should be dismissed because Defendant failed to join necessary parties under *Minn. R. Civ. P.* 19.

Given the statutory and common law authority for the validity of Plaintiff's current action, Plaintiff has already established that it is the proper party. A review of Rule 19 does nothing to change this analysis.

This Court must consider the issues of judicial economy and orderly resolution of disputes when looking at this matter. Here, the Plaintiff is acting on behalf of all citizens allegedly solicited by Defendant's practices. It would be totally unfeasible and entirely irrational for Plaintiff to be required to join each and every consumer solicited and affected by Defendant's marketing solicitations. Indeed, Plaintiff is correct in pointing out that it would constantly be moving this Court to add parties as more affected parties came to light. It is best and proper to have one party who can represent all the injured consumers both adequately and zealously. Plaintiff is that party. The individual consumers are not required to be joined as parties to achieve just adjudication under the factors set out in Rule 19.

The statutory and common law authority allows Plaintiff to proceed with this action on behalf of the injured citizens of this State. Joining individual injured consumers is not necessary,

feasible or logical. Defendant's motion for dismissal on the grounds that Plaintiff has failed to join necessary parties must be DENIED.

6. Plaintiff's Entitlement to Relief Sought

The Defendant argues that Plaintiff's Complaint should be dismissed because certain remedies Plaintiff is seeking, specifically restitution and disgorgement of profits, cannot be had by the Plaintiff.

As stated earlier, Plaintiff is the proper party under both statutory and common law authorities.

Under *Minn. Stat.* § 8.31, Plaintiff can seek an injunction to stop the alleged unlawful practices. Furthermore "a court may award any of the remedies allowable" under subdivision 3a. Subdivision 3a states:

"...any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court.... In any action brought by the Attorney General pursuant to this section, the court may award any of the remedies allowable under this subdivision."

Minn. Stat. § 8.31, subd. 3a.

Restitution is an equitable remedy. *State v. Alpine Air Products, Inc.*, 490 N.W.2d at 896. Plaintiff is entitled to seek "other equitable relief" and restitution is just that type of remedy. The State is entitled to seek this recovery when acting on behalf of its citizens.

Clearly, Plaintiff, by acting on behalf of the injured citizens, can recover in any way a private individual could recover for violations of consumer protection laws under § 8.31. In addition, by acting under the doctrine of *parens patriae*, the Plaintiff can seek any remedy which

the injured party on whose behalf it is acting could recover. As stated earlier, the State has an interest in protecting the economic health of its' citizens, along with protecting numerous other interests. *See Standard Oil Co*, 568 F. Supp. At 563. The State is recovering on behalf of those it represents not just its own (the State's) interests. The federal district court in *Standard Oil* held that when proceeding under the doctrine of *parens patriae*, the State could not recover for alleged harm to its' own interests. 568 F.Supp. at 565. Here, the Plaintiff is asserting the rights of the injured consumers of the State of Minnesota. In turn, Plaintiff can seek whatever redress, equitable or otherwise, those individual consumers could seek. The Plaintiff is not seeking any pecuniary recovery for itself. Rather, Plaintiff is seeking to halt Defendant's practices and force Defendant to recompense those injured by its allegedly unlawful business practices.

This Court also believes that disgorgement of profits falls within the realm of equitable remedies as anticipated in the consumer protection statutes. While this remedy may be infrequently sought or granted, it is a remedy much akin to restitution and should be given the same treatment in the present matter. For this reason, Plaintiff is entitled to seek disgorgement of illegally obtained profits as one of its remedies.

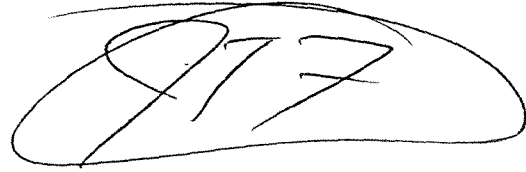
Because Plaintiff is entitled to seek both restitution and disgorgement, Defendant's motion to dismiss the Complaint on those grounds is DENIED.

Conclusion

While not binding by any means, this Court is aware of Plaintiff's past practices in enforcing the State's consumer protection statutes, including similar sweepstakes matters. The Plaintiff is not entering uncharted waters with this present lawsuit. These past practices are certainly relevant here even though the factual bases may be different.

In viewing the allegations in Plaintiff's Complaint as true, it is clear that the Defendant's motion to dismiss must be **DENIED IN ITS ENTIRETY**. Plaintiff's Complaint is legally sufficient and does state a claim upon which relief could be granted under each of the applicable statutes.

6/12/2000

A handwritten signature or set of initials, possibly "JTF", enclosed within a hand-drawn oval.