

Consumer Protection & False Advertising Disputes



Consumer protection-related litigation appears to be on the rise, in a broad range of areas that include allegations of product liability, consumer fraud, false advertising and deception, privacy and data breaches, and violations of the False Claims Act.

This topic is also receiving increasing attention from enforcement authorities at the federal and state level. For example, the FTC recently identified protecting consumers from unfair and deceptive practices as among its top goals in its strategic plan for 2018–2022. Similarly, Maryland recently amended its related statute to expand the scope of consumer protections and increase the penalty for violations of consumer protection laws.

The Brattle Group has decades of experience in consumer protection matters. Our work spans a wide array of industries, including food, beverages, and other consumer products; consumer and commercial vehicles; insurance; pharmaceuticals; manufacturing; hospitality; and retail. The issues our clients face are complex and often require expertise in a variety of disciplines, such as economics, marketing, finance, and statistics. Our consulting expertise is further enhanced by our global network of top academic and industry experts in these areas, who can be critically important in providing insights into how companies operate in different industries. We are proficient in deploying this multidisciplinary expertise in a thoughtful and cost-effective manner.

DEEP ANALYTICAL EXPERTISE

Brattle provides clients with unique expertise in analyzing the consumer choice data that are often at the heart of these disputes. Brattle Principal and Nobel Laureate Daniel McFadden pioneered many of the econometric and survey techniques used in these analyses, which are now broadly applied and accepted by the courts. Brattle’s analytical expertise includes the areas of statistical and econometric analysis, survey and sampling design, content analysis, and large database analysis.

Statistical and Econometric Analysis

Brattle maintains a specialized staff with expertise in advanced modeling and statistical techniques. Examples of such techniques including discrete choice modeling, difference-in-differences, hedonic regression, nonparametric regressions, and synthetic control methods.

Survey and Sampling Design

Brattle professionals have supported leading experts in critiquing conjoint surveys in high-profile consumer protection matters and have broad experience in designing and implementing such surveys. In addition, we have expertise in the design, implementation, and analysis of a broad array of other survey techniques that are used to elicit information on how consumers perceive advertisements to identify which products consumers view as substitutes, and assess damages arising from brand dilution.

Content Analysis

The underlying assumption of content analysis is that the frequency with which a symbol, idea, reference, or topic occurs in a stream of messages is indicative of its importance within that stream. Given this assumption, content analysis allows for objective identification of the importance of messages that are of interest. Brattle staff have substantial experience using advanced techniques for collecting and analyzing content in the form of documents, communications, and web-based information. Such techniques include data collection, optical character reading, and automated speech recognition. We also have experience applying big data analysis techniques to draw out and analyze patterns and trends in content.

Large Database Analysis

Brattle experts have vast experience constructing large, high-quality datasets – often from unrelated sources and incongruent formats – using highly efficient programmatic techniques. We also have broad experience analyzing both publicly available and enterprise-specific datasets.

REPRESENTATIVE ENGAGEMENTS

We have applied our analytical methods to consumer protection cases involving putative classes of plaintiffs as well as in litigation involving a single plaintiff – often a government agency or competing firm. Although the nature of the claims can be similar, the techniques to evaluate the claims or estimate damages can differ. Brattle has considerable experience with both types of cases and we tailor our analyses to match the demands of each case.

Class Actions

Class actions in consumer protection and product liability cases often involve allegations of false advertising or the misrepresentation of product features or attributes on the part of the defendant. Plaintiffs typically claim that they paid more for the defendant's products or services than they would have paid if the misrepresentations had been known at the time of the original purchase. Brattle provides a wide range of rigorous analytical techniques with which to analyze these issues. Such approaches include examining price trends, evaluating supply and demand conditions, measuring market reactions to news of product defects, and analyzing the value of a product attributable to specific features (e.g., through a conjoint analysis or analysis of sales data).

Ignition switch consumer class action

Working on behalf of General Motors (GM), a Brattle team rebutted the plaintiffs' claims that GM's alleged failure to provide earlier notice of recalls related to ignitions, side airbags, and power steering systems caused consumers to overpay for new GM cars incorporating these components. Our analysis showed that the plaintiffs' experts had failed to calculate the amount of this overpayment, which would have required them to estimate the market price for the vehicles with and without earlier disclosure. Instead of estimating these market prices, which are determined by the intersection of supply and demand, the plaintiffs' experts provided a survey-based analysis that could – at best – capture the demand side of the market. Consistent with our findings, the court concluded that the plaintiffs' analysis of conjoint survey data did not meet the requirements of the plaintiffs' "benefit of the bargain" damages theory. The final settlement was less than 1% of the plaintiffs' original \$17 billion damages claim.

Consumer class action involving ATVs

Brattle assisted Polaris, a US manufacturer of motorcycles, snowmobiles, and all-terrain vehicles (ATVs), in obtaining a victory at the class certification stage of a closely watched product liability case. The plaintiffs alleged that Polaris had failed to disclose information on alleged exhaust heat issues in thousands of its ATVs, causing consumers to overpay for these ATV models. The plaintiffs' experts claimed to have taken into account both supply and demand when establishing the amount of the alleged overpayment. However, Brattle expert testimony explained that both the survey-based analysis of demand and the equilibrium model used to determine the amount of the alleged overcharge were unreliable. The judge denied certification of the class, ruling that the plaintiffs' expert-driven overcharge theory was insufficient to meet class certification requirements.

Class certification in alleged false advertising case

Our client, a producer of branded nutritional supplements, had been accused of collecting a market price premium on its products due to alleged false claims appearing on the product label. Brattle's expert testified that the plaintiff's expert had failed to describe a workable approach for determining the damages associated with this price premium on a class-wide basis. In particular, Brattle's expert explained that the plaintiff's proposed use of a conjoint analysis to assess the price premium was unworkable because conjoint survey data only take into account demand-side factors, whereas a price premium would be the product of both supply and demand factors. Brattle's expert also explained that the plaintiff's proposed use of a hedonic analysis was unworkable because the available data would not allow for separate estimation of the price premium.

Analysis of damages arising from misleading claims

On behalf of a major Canadian automobile manufacturer faced with a class action lawsuit regarding misleading fuel efficiency reporting, Brattle filed an affidavit scrutinizing the plaintiff's expert's demonstration of likely damages to the proposed class of auto buyers. The critique demonstrated that the class's expert made several assumptions at odds with economic theory regarding buyer behavior.

Assessment of damages arising from data breach

Working on behalf of plaintiffs in a matter related to a high-profile data breach, a Brattle team prepared reports explaining how to quantify the damage inflicted on individuals whose personal data was stolen. Our analyses in this matter included a novel approach that explained how data on the dark web sale of personal information could be used to objectively measure consumer losses due to the breach.

Individual Actions

Brattle has also provided support and expertise in individual actions involving alleged fraud and misrepresentation claims. Such claims are often brought by government entities, organizations, or a defendant's competitors. Government entities and organizations often bring suit on behalf of allegedly harmed consumers, which requires damages analyses similar to the analyses conducted in class actions. However, when a suit is brought by a defendant's competitor, the damages analysis often requires a different approach – one that is more similar to antitrust matters. In such cases, Brattle's experts conduct analyses to define the relevant market; quantify the effects of the alleged conduct on market prices and quantities; and estimate the damages, if any, suffered by the plaintiff.

Lanham Act claims against producer of food additives

Brattle economists were retained by a trade association representing a common food additive producer that had alleged that the trade association for a competing additive had misled consumers regarding its negative health effects. We advised the client's academic damages expert and provided a rebuttal report and testimony regarding the opposing damages expert's calculations. We relied on several econometric techniques to demonstrate the unreliable nature of the opposing expert's approach.

Likelihood of confusion in fashion industry and associated damages

A British manufacturer of distinctive footwear alleged that a US shoe company had infringed on the trademark stitching on some of its shoe products. On behalf of the footwear manufacturer, a Brattle economist estimated damages based on surveys assessing consumers' likelihood of confusion. Using the survey data, we were able to measure lost sales and establish the value of the trademarked stitching as a distinguishing feature of the British company's shoes. The case settled on favorable terms for our client.

Alleged disparagement and false advertising in pharmaceuticals

Brattle worked for a large pharmaceutical manufacturer that alleged disparagement and false advertising by a competing manufacturer of an over-the-counter pain reliever in its communications with physicians. Our team analyzed survey data on consumer and physician choices; applied economic theory to assess the effect of misinformation on new product sales; and created a damages model to project the likely trend in sales of the plaintiff's drug but for the alleged violations and to quantify the plaintiff's losses.

False Claims Act (FCA) cases

In FCA matters, Brattle plays several complementary roles: forensic analysts, to identify and trace patterns in activity or financial metrics; big data analysts, to extract and summarize the relevant information from unstructured information sources; and financial and economic experts, to determine the effects of alleged misconduct and provide expert testimony. We have been involved in numerous FCA cases, from the investigation stage through litigation. We work extensively with proprietary, government, and publicly available datasets, and with economic, actuarial, and industry experts to cover the full range of issues in a given case.

Allegations of pyramid scheme business model

Brattle has extensive experience analyzing multilevel marketing (MLM) compensation models, with a focus on nutrition, supplement, and cosmetic firms using the direct selling model. Our team has been involved in many litigations and investigations that have required analyses of customer-level data. Based on these analyses, we have assessed whether a company's compensation model has characteristics of a pyramid scheme (as opposed to a legitimate MLM model) and whether participants were misled about their earning prospects. In addition, we have assisted companies conducting internal investigations of their MLM compensation models, and have provided support to academics who have presented their findings to regulators.

ABOUT BRATTLE

The Brattle Group answers complex economic, regulatory, and financial questions for corporations, law firms, and governments around the world. We aim for the highest level of client service and quality in our industry.

We are distinguished by our credibility and the clarity of our insights, which arise from the stature of our experts; affiliations with leading international academics and industry specialists; and thoughtful, timely, and transparent work. Our clients value our commitment to providing clear, independent results that withstand critical review.

Brattle has over 350 talented professionals across three continents. For additional information about The Brattle Group's experts and services, please visit brattle.com.