



## Will Microsoft's Massive Holiday Xbox 360 Marketing Blitz Sway Wary Consumers to Purchase the much Beleaguered Game Console?

by Mona Hanna

The competitive world of video gaming stretches beyond the individual player strumming a virtual guitar or slaying an imaginary villain. It is a multi-billion dollar industry whose key players are immersed in a heated rivalry over consumers. Microsoft, who was a late entrant into the gaming race, exploded onto the scene in the early 1990s with the original Xbox and following the enormous success of that gaming console, launched Xbox 360 in 2005. However, the much heralded release of Xbox 360 has been met with a multitude of class action suits from disappointed consumers and an air of distrust has surrounded the technology giant for the past several years.

In response to Xbox 360's alleged poor performance and arguably the rash of the class actions lawsuits that Microsoft faces, it recently deployed the single largest marketing campaign in Xbox history to stymie these doubts. November's "Live your Moment" campaign follows the successful strategy employed by competitor Nintendo, who evolved its dying gaming console from a niche item to the cornerstone of the family living room. Due to Nintendo's efforts to target a broad audience of users, the Wii is currently a mainstream entertainment platform.

While the Wii rose in popularity, consumers trust in the Xbox 360 plummeted. The Xbox 360 which was once the leader of the competitive gaming industry has trailed Sony's Playstation 3 in sales over the course of the past few months. The fall of the Xbox franchise can may be connected to the complaints of hardware defects of many Xbox 360 consoles. These alleged defects caused the consoles to become inoperable and as Microsoft attempted to respond to consumer's demands for replacements, gamers aired their grievances in blogs and forums, and ultimately in courts across America.

In California, consumers filed a class action suit against Microsoft in September alleging that it violated California's Unfair Competition Law (Bus & Prof. Code, § 17200) and California's Consumer Legal Remedies Act (Civil Code § 1750) by knowingly concealing defects in the Xbox 360. At issue in *Reshelle Cable v. Microsoft Corporation and Does 1-500*, Case No. , are allegations of a large number of inoperable or malfunctioning Xbox 360 consoles that the class members believe Microsoft, in its haste to win the vigorous gaming competition, put into the marketplace knowing that some of the 10.4 million consoles shipped worldwide contained serious defects.

These alleged defects included the "red ring of death," a term of art employed in the gaming community to describe malfunctioning equipment based on a circle-shaped flashing red light on the front of the console. The Reshelle plaintiff and the class members she represents paid \$399-\$500 for inoperable consoles that suffered from the red ring of death. They currently seek disgorgement of profits or revenues attributable to Microsoft's unjust enrichment and/or for restitution for those monies Microsoft unjustly received from the sales of the defective Xbox 360 consoles.

Microsoft became aware of consumer complaints over the troubled Xbox 360 long before Reshelle and class actions alleging similar violations were filed in courts throughout America. For months after the console's inauspicious release, the corporation was flooded with comments and demands from irate gamers. Providing credence to the validity of these class action claims are Microsoft's own press releases. Beginning in December 2006, on the heels of mounting consumer criticism, negative publicity regarding the Xbox 360 and the highly successful launch of Nintendo's Wii, Microsoft announced that it would extend the standard 90-day warranty period to one year. This policy extension failed to stem the tide of complaints and Microsoft released another statement which acknowledged an unacceptable number of repairs to the Xbox 360 consoles in July 2007. It later further extended the warranty another three years, limiting the extension solely to the red ring of death.

The Reshelle plaintiff and class members point to these press releases as evidence that Microsoft was aware of the failures in its consoles but nonetheless profited off of unsuspecting consumers eager for the next experience in gaming. On September 19, 2008 they filed a class action demand for a jury trial arguing that Microsoft engaged in fraudulent business practices in violation of § 17200 and actively concealed and failed to disclose material facts about the Xbox 360 consoles in violation of § 1750.

California Business & Professions Code § 17200, and the closely related Consumers Legal Remedies Act ("CLRA") (Cal. Civil Code § 1750, et. seq. are statutes intended to protect the market place, via consumer and competitor actions, from practices that would hinder competition in the economy. Specifically, Section 17200 prohibits "unlawful, unfair, or fraudulent business practices" as well deceptive or misleading marketing activities. The disjunctive nature of the statute (i.e. acts may be "unlawful" or "unfair" or "fraudulent") emphasizes the broad reach of Section 17200. Put another way, an act may be "unfair" even though it is not

"unlawful" or "fraudulent". This said, the remedies available under § 17200 are limited generally to injunctive relief and/or restitution. Similarly, CLRA, protects the consumer from "unfair or deceptive business practices"

Under these statutes the remedies are not only injunctive relief to prohibit the illegal activity, but also restitution of money wrongfully taken from each class members. While the size of the class in Reshelle is undetermined at this time, these types of actions often result in multi-million dollar resolutions, either by way of settlement or, less often, by judgment.

As the Reshelle plaintiff wait for their class action to move forward, Microsoft has launched a multi-pronged marketing campaign to decry the "New Xbox Experience," which hopes to expand the brand from the typical gaming community to the mainstream and although, not stated by Microsoft, move past three years of damaging consumer relations. This marketing effort which includes television spots; print and billboard ads; retail displays; digital marketing, including the use of social networking sites; and public relations outreach as well as direct customer communication advances, has worked thus far. Microsoft recently reported that Xbox 360 software sales leapt from \$371,000 to \$836,000 during the month of November and worldwide, the Xbox 360 is outselling Sony's Playstation 3.

What does this marketing blitz mean for consumers and the pending class action suits against Microsoft? For the former, consumers must determine whether Microsoft has in fact corrected the manufacturing problems that have plagued the Xbox 360 since its inception or has it simply quickly unveiled another phase of the maligned game console, cloaked in shiny marketing wrapping. At the same time, the Reshelle plaintiffs and others like them, await their day in court and the next chapter of this three year products liability saga.

#### About Mona Hanna

Mona Hanna is the managing partner at Michelman & Robinson's Orange County office and the head of the Firm's Litigation Practice Group.

Mrs. Hanna is a versatile litigator who represents her clients in all aspects of employment law and class action matters. She has obtained several precedent setting victories, including her successful defense in a "lemon law" case for the national motorcycle manufacturer, Yamaha Motor Corporation, U.S.A.

Her achievements have often been recognized in the Daily Journal and she was named one of California's "Super Lawyers," in 2005, 2006, 2007, 2008 and 2009. In 2008 she was inducted into the honorary trial attorney society, the Litigation Counsel of America.

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