Advertising Law

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In This Issue

Chris Cole Invited to Speak at The NLJ's 2012 Complex Litigation Breakfast Series

On June 19, 2012, Manatt partner Chris Cole will participate in *The National Law Journal*'s 2012 Complex Litigation Breakfast seminar on the topic of "Developments & Considerations in False Advertising Claims."

Chris will join a panel of distinguished presenters – including Joel Steckel (Professor of Marketing, Leonard N. Stern School of Business, New York University), Darren Lubetzky (Attorney, Federal Trade Commission, Northeast Region), and Bruce Byrd (Associate General Counsel, AT&T) – to discuss strategies to defend against or challenge competitors' false advertising claims.

The seminar will be held at the New York Harvard Club. For more information or to register for this event, click here.

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Federal Judge Prevents Class Counsel Feast on Domino's Pizza Third-Party Robocalls

A federal judge ruled that Domino's Pizza is not responsible for the actions of a telemarketing firm independently hired by a franchise restaurant.

The court granted its motion for summary judgment and denied class certification in a case alleging violations of the Telephone Consumer Protection Act ("TCPA") and Washington state law.

Named plaintiff Carolyn Anderson filed the class action suit against Domino's Pizza, a Domino's franchisee, Four Our Families, Inc., and a telemarketing company, Call-Em-All LLC, alleging violations of the TCPA and a Washington law that regulates telephone calls made to consumers through an "automatic dialing and announcing device" (ADAD). The plaintiffs alleged they received numerous unsolicited automated calls offering pizza deals from "Domino's Pizza." According to the lawsuit, these calls were made without the prior consent of

Newsletter Editors

Linda A. Goldstein
Partner
Email
212.790.4544

Jeffrey S. Edelstein
Partner
Email
212.790.4533

Marc Roth
Partner
Email
212.790.4542

Practice Area Links

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Members

Upcoming Events

June 12, 2012
Celesq CLE Advertising Law Webinar
Topic: "Privacy Update: Formulating Privacy Policies and Practices for Compliance with the FTC's Final Report and Guidelines"
Speaker: Jeff Edelstein
For more information

June 12, 2012
ABA Section of Litigation's 2nd Annual Food & Supplements Workshop
Topic: "So How Did Walnuts Become Drugs? Compliance Issues for Companies that Sell Supplements & Functional Foods"
Speaker: Ivan Wasserman
Downers Grove, IL
For more information

June 13, 2012
The Beauty Company's Cosmetics Safety Act & Beauty Product Claims Development Webinar
Topic: "Beauty Industry State of Affairs from a Regulatory Standpoint"
Speaker: Ed Glynn
For more information

June 19, 2012
***The National Law Journal's* 2012 Complex Litigation Breakfast Series**
Topic: "Developments & Considerations in False Advertising Claims"
Speaker: Chris Cole
New York, NY
For more information

June 19-20, 2012
ACI's 3rd Annual Conference on Litigating and Resolving Advertising Disputes
Topic/Speaker: "Buckle Up: We're Headed to Trial," Chris Cole
Topic/Speaker: "Defining Advertising Injury: Protecting Coverage Rights When the Company is Sued for False or Misleading Advertising," Steve Raptis
Topic/Speaker: "Developing a Strategy to Combat the Uptick in Litigation Challenging the Marketing and Labeling of Food Products," Linda Goldstein
New York, NY
For more information

July 24–27, 2012
15th Annual Nutrition Business Journal Summit
Topic: "NBJ State of the Industry"
Speaker: Ivan Wasserman

consumers, as required by the TCPA and state law.

According to the lawsuit, the franchisee hired the telemarketer to place the calls under the franchisee's robocall telephone campaign. Domino's Pizza, however, denied it was involved in or connected with Call-Em-All LLC, the telemarketer that generated the calls.

Plaintiff argued that since Domino's Pizza held a national franchise convention where the telemarketer was allowed to advertise its services to franchisees, it should also be held liable for the federal and state violations. Plaintiff also claimed that liability should attach to the pizza giant because the telemarketers used the PULSE system—which Domino's Pizza requires franchisees use to take orders—to make the automated calls. Plaintiff further alleged that the franchise agreement contains a provision that requires franchisees to "participate in all national and local and regional advertising and promotions as [the company] determine[s] to be appropriate. . ." and that Domino's has an "extremely broad right to control advertising and marketing decisions, including robo-calling campaigns."

To refute these claims, Domino's Pizza presented evidence proving that the company does not engage in robocalls on a national basis and/or involve itself with the local marketing activities of a franchisee. This evidence, in conjunction with the fact that there was nothing to suggest or prove that Domino's Pizza communicated with the franchisee or participated in the telemarketing campaign, led the court to grant its motion for summary judgment and deny class certification. The court noted the "fact that Domino's compels franchisees to use the PULSE system, which is capable of producing lists for ADAD-calling, does not compel the conclusion that Domino's was complicit in the allegedly illegal calling here." Likewise, the "mere fact that Domino's requires franchisees to participate in marketing campaigns does not somehow mean that any franchisee's illegal use of an [automatic dialing and announcing device] is imputed to the franchisor."

To read the court's order, click here.

Why it matters: This decision illustrates that national franchisors may not necessarily be held responsible for telemarketing campaigns devised solely by their franchisees and the vendors they hire. The franchisor must have some knowledge, control, or input on the campaign for potential exposure to attach. The court's decision is reasonable; otherwise, franchisors would become limitless insurers for the misconduct of their franchisees and other third parties.

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FTC Obtains Court Order Enjoining Deceptive Business Opportunity Claims

The FTC filed an action in an Arizona federal court alleging that North America Marketing and Associates LLC (and numerous other defendants) engaged in deceptive marketing practices in violation of the FTC Act and the Telemarketing Sales Rule.

The FTC specifically accused defendants of defrauding consumers into buying a business opportunity that would show consumers how to operate their own Web site business. The court issued a temporary restraining order against defendants.

Dana Point, CA
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According to the FTC's complaint, "Since at least 2006 . . . Defendants have marketed their home-based Internet business opportunities to consumers throughout the United States and Canada. These business opportunities offer consumers a chance to operate their own Internet website, which Defendants represent will earn commission-based income for the website's owner." The defendants' business opportunity was marketed online and through telemarketing as a "turn-key" Internet-based business costing from $100 to $400 that will earn consumers "thousands of dollars" on the Internet and through telemarketing.

As part of its sales pitch, defendants allegedly promised that it would link consumers' Web sites to major retailers and provide professional business consulting services or a marketing coach at no additional cost. However, according to the FTC, the marketing coach only served to promote an upsell for needless marketing services. These services include an advertising package to promote the consumer's Web site for an additional $5,000 to $20,000. Defendants allegedly represented that the business would yield monthly profits ranging from $3,000 to $20,000.

With its complaint, the FTC filed, and the court granted, an application for a temporary restraining order against defendants. The federal court found good cause to believe defendants may have violated Section 5 of the FTC Act and the Telemarketing Sales Rule, and if so, consumers would suffer irreparable harm absent such relief. The court also found good cause to appoint a receiver and to freeze defendants' assets. The TRO prohibits defendants from generally misrepresenting any material facts that would induce consumers to purchase the business opportunity. Specifically, it prohibits them from misrepresenting that consumers will quickly recoup the cost of the advertising package, or that business experts, professionals, or coaches will substantially assist consumers with their online businesses.

To read the FTC's complaint or the court's order granting the FTC a TRO, click here.

Why it matters: The FTC's lawsuit reminds the business community that the promotion or creation of get-rich-quick schemes invites costly enforcement action by the FTC as well as potential civil suits. Businesses should only promote a legitimate business opportunity that will realistically help consumers to earn money. Otherwise, an FTC action seeking injunctive relief and drastic remedies, such as an asset freeze, may result.

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Health Watchdog Group Criticizes Michael Jordan Gatorade Ad and Urges FTC to Yank the Ad

The Public Health Advocacy Institute is urging the Federal Trade Commission to order the removal of the Michael Jordan advertisement, "Win From Within," which implies that drinking Gatorade helped the athlete beat the flu in a 1997 NBA Finals game. The Institute claims that the advertisement sends the wrong message to teen athletes by making them think they could engage in sport activities when they are sick, instead of

resting in bed.

The Institute sent a letter to the FTC stating that the campaign targets teen athletes and the "ad openly promotes engaging in vigorous physical activity while suffering from a very high fever, in Jordan's case 103 degrees." The letter further notes that "it is a generally recognized safety principle that teens and even professional athletes suffering from a severe fever and flu-like symptoms should not engage in vigorous physical activity." Moreover, the Institute argues that there is no scientific evidence to substantiate the implicit message that drinking Gatorade will help someone with the flu or a high fever.

The Institute also urged the FTC to "order PepsiCo to engage in corrective advertising that advises teens not to engage in physical activity when they have the flu or are suffering from a fever, describes the dangers of competing in sports when ill, and clearly states that Gatorade is not intended to be used to enhance the athletic performance of teens who are suffering from the flu or a fever." The letter concluded by stating that the "FTC has played an important role in protecting the health and safety of consumers by taking enforcement action when companies engage in unfair and deceptive acts and practices that have the tendency or capacity to influence consumers to engage in behavior which creates an unreasonable risk of harm. The Jordan Ad fits this standard and enforcement action is warranted to protect teens."

To read a copy of the letter, click here.

Why it matters: As with any health claims, a marketer must substantiate both express and implied claims to avoid a lawsuit or regulatory investigation. In addition to reminding businesses to be cognizant of class counsel and regulators, the Public Health Advocacy Institute's letter reminds them to be aware of watchdog groups, like the Institute, which stir the pot with regulators looking for marketers who engage in deceptive advertising. The best defense is to ensure that health claims are based on competent and reliable evidence before placing them in advertisements.

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Class Action Lawsuit Alleges Tetley Tea Falsely Advertises Health Benefits of Tea Products

Plaintiff Daryl De Keczer filed a federal class action lawsuit against Tetley USA on behalf of all California consumers who purchased various tea products from the company over the past four years.

According to the lawsuit, Tetley falsely advertises its tea products as an "excellent" and "natural" source of antioxidants and "utilizes improper antioxidant, nutrient content, and health claims that have been expressly condemned by the FDA in numerous enforcement actions" against other companies that made similar antioxidant claims.

In addition, plaintiffs contend that Tetley inaccurately states on its Web site that the antioxidant in its tea "neutralizes free radicals that can cause cell damage linked to certain cancers"; helps fight heart disease; boosts the immune system and helps "reduce infections"; "lower[s] risk of developing squamous cell carcinoma"; reduces risk of stroke and

protects lungs from cigarette damage; reduces risk of breast cancer; and "provide[s] a boost to exercise-induced weight loss." Tetley is also accused of making unlawful claims on its product packaging, including: "Tetley Tea: the smart choice for your healthy lifestyle; Like fruits and vegetables, tea is an excellent source of natural antioxidants which help boost the body's immune system. So, drink to your health with Tetley." Not long ago, the FDA sent a warning letter to Unilever, the parent company of Lipton Tea, Tetley's biggest competitor, for making similar claims about its tea products.

Based on these allegations, Plaintiff alleges that the advertising was deceptive, misleading and untrue and that Tetley violated several California laws: the unlawful business act and practices law, Business & Professions Code Section 17200; the Consumer Legal Remedies Act; the Song-Beverly Act; and the Magnuson-Moss Act. In addition to damages and restitution (based on unjust enrichment or disgorgement), plaintiffs seek an order requiring Tetley to cease and desist from selling misbranded tea products and enjoining Tetley from falsely advertising its products.

To read the class action complaint, click here.

Why it matters: The Tetley class action highlights the potential risks of making health claims associated with a marketer's products. The ability to substantiate such claims is imperative to fend off class action lawsuits. Not only is it important to ensure truthful advertising campaigns, but it is equally important that product packaging and labels are not misbranded. Otherwise, marketers may find themselves backed into a corner by class counsel seeking to extort a windfall payday.

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