Advertising Law Newsletter

August 4, 2011

In This Issue

Manatt's Linda Goldstein to Present at WOMMA Webinar on Latest Marketing Issues Relating to Social Media

On August 24, 2011, Linda Goldstein, Chair of Manatt's Advertising, Marketing & Media Division, will lead a webinar discussion hosted by the Word of Mouth Marketing Association focusing on the key legal and practical risks of conducting sweepstakes and promotions in social media. Linda's presentation, "There is No Retweeting From the Law," will highlight the legal issues that can arise when marketing products and services on Facebook and foursquare as well as present strategies for mitigating the risks associated with the use of social media tools.

The webinar will be held from 12:00 pm - 1:00 pm Eastern. For more information or to register for this event, click here.

back to top

Industry Fights Government's Nutrition Guidelines

A coalition of advertising groups and members of the food industry are stepping up their fight against proposed nutrition guidelines issued earlier this year by the federal government.

In April, the Interagency Working Group – comprised of the Federal Trade Commission, the Food and Drug Administration, the Centers for Disease Control, and the Department of Agriculture – released a preliminary report suggesting a set of guidelines for nutrition criteria on foods marketed to children and teenagers. While the proposed guidelines would be self-enforcing, groups like the American Association of Advertising Agencies, the Association of National Advertisers, and honorary member the Grocery Manufacturers Association, as well as companies including General Mills, Kellogg, Time Warner, and Viacom, have joined together to object.

Calling themselves the "Sensible Food Policy Coalition," the members have already spent $6.6 million lobbying against the proposed guidelines in the first quarter of 2011 and almost $60 million since the beginning of the Obama Administration, according to *The Washington Post*. In addition, various members of the Coalition filed comments on the proposed guidelines. In its comments, the ANA argued that the guidelines would amount to de facto regulations and would require "massive re-engineering of the entire food industry based on nutrition standards that go far beyond any ever approved by a government agency."

The group argued that the guidelines would also violate the First Amendment rights of advertisers and food companies and would impact adults as well as children. For example, if 20 percent of a television show's audience includes teens aged 12-17, it would be subject to the advertising restrictions in the guidelines. Programs like sports events would be covered by the guidelines and would therefore have to be treated as child-directed advertising, the ANA said.

The ANA called on the IWG to formally withdraw its proposals, calling its report "clearly 'backdoor regulation' by four extremely powerful government agencies that seek to accomplish a goal indirectly that could not be reached through normal rulemaking procedures. By using the coercive force of government agencies to suppress truthful advertising about a broad range of healthy, legal products for every segment of the public, the proposal clearly violates the First Amendment rights of both marketers and consumers. Worst of all, there is absolutely no discussion or proof that these massive changes in product formulation or marketing practices, which if carried out would cost the food, restaurant and media communities multi-billions of dollars, would actually have any direct or material impact on reducing childhood obesity rates in the United States."

Director of the FTC's Bureau of Consumer Protection David Vladeck responded to the industry's efforts in a blog post. "Frankly, these folks might want to switch to decaf," he commented, adding that the FTC has no plans to sue companies that do not adopt the proposed guidelines and disputing that the proposal is not regulation by the back door. He also took issue with the suggestion that the proposed guidelines violate the First Amendment. "A report to Congress containing recommended nutrition principles can't violate the Constitution. A report is not a law, a regulation, or an order, and it can't be enforced. While we hope companies voluntarily choose to adopt the principles (when finalized), there's no legal consequence if they don't. So there's no effect on their free speech rights," Vladeck wrote.

To read the Interagency Working Group's report, click here.

To read the comments the ANA filed on the IWG's report, click here.

Why it matters: In addition to the Coalition's efforts to directly battle the government's proposed guidelines, industry groups and food companies have also taken steps to self-regulate without government oversight. Earlier this month the Council of Better Business Bureau's Children's Food and Beverage Initiative announced new uniform criteria designed to further strengthen the efforts to self-regulate child-directed food advertising for its 17 members, including companies like McDonald's Corp., Sara Lee, and Unilever. While the industry continues to fight any form of government regulation, the IWG plans to submit a final recommendation on its nutritional criteria to Congress by the end of the year.

back to top

Tweet This: Mendenhall Sues Over Terminated Endorsement Deal

Pittsburgh Steelers running back Rashard Mendenhall has filed suit against Champion sports apparel after the company terminated an endorsement deal over his comments on Twitter.

Following the announcement that Osama bin Laden had been killed, Mendenhall questioned public celebration over his death, tweeting, "What kind of person celebrates death? It's amazing how people can HATE a man they have never even heard speak. We've only heard one side . . ." and opined on the Sept. 11 attacks, "We'll never know what really happened. I just have a hard time believing a plane could take a skyscraper down demolition style."

Mendenhall's tweets received a large response, leading to a statement from the Steelers team president as well as a subsequent clarification by Mendenhall. Days later Champion terminated his deal. The company relied upon a reputation clause in the parties' contract, which allowed the company to terminate the deal if Mendenhall "becomes involved in any situation or occurrence tending to bring [him] into public disrepute, contempt, scandal or ridicule, or tending to shock, insult or offend the majority of the consumer public."

Mendenhall responded by filing a $1 million federal lawsuit, arguing that his termination was a breach of contract that violated his First Amendment rights. The suit argues that Mendenhall had used Twitter for several months with "the apparent assent" of the company to express his opinions and "foster debate" on various issues. For example, Mendenhall tweeted his agreement with fellow NFL running back Adrian Peterson comparing the League to "modern-day slavery" and also made comments about the opposite gender, tweeting that "Women are some of the most SELFISH creatures I know!" and "Women, if you don't #respect your man someone else will." In each instance, the company "at no time suggested that it disagreed with [Mendenhall's] comments or that his tweets were in any way inconsistent with the values of the Champion brand," according to the complaint.

To read the complaint in *Mendenhall v. Hanesbrands*, click here.

Why it matters: "This case involves the core question of whether an athlete employed as a celebrity endorser loses the right to express opinions simply because the company whose products he endorses might disagree with some (but not all) of those opinions," Mendenhall's complaint alleged. Despite the suit's claim that Champion's actions were unreasonable and contrary to the course of dealing between the parties, celebrities are often dismissed after generating controversy, even via Twitter. Both Michael Vick and Tiger Woods were dropped by sponsors when their off-field actions made headlines.

back to top

Got Milk? Muscle Milk Doesn't

Recently the Food and Drug Administration issued a warning letter to CytoSport Beverage Company regarding the labeling of its Muscle Milk product, although the Federal Trade Commission has already declined to take action against the company over allegations that the product name was misleading.

In 2009 Nestlé brought a challenge in the National Advertising Division against CytoSport, arguing that Muscle Milk's product name was false and misleading because the product – sold in

grocery and convenience stores alongside milk and other consumer beverages – contains no milk. CytoSport declined to participate in the process, calling its claims “truthful and non-misleading,” and the NAD referred the matter to the FTC and the FDA.

Last May the FTC responded. Despite concern that consumers would be misled that Muscle Milk contains milk when it is in fact a water-based nutritional drink, the agency declined to take an enforcement action because the company “pledged to disclose, prominently and directly below the product name on the front panel of the label, that the product ‘Contains No Milk,’” the FTC said. In addition, the company represented that it was no longer marketing its line of Mighty Milk children’s line of products.

But the FDA took a different approach in its warning letter issued in late June. It determined that despite the “Contains No Milk” disclaimer, the product label is false and misleading because it contains no milk and yet contains ingredients derived from milk, which could mislead consumers who have milk allergies. And even with the disclaimer, the agency said, the product name remained misleading. “These products purport to be milk by prominently featuring the word ‘MILK’ on the labels. Milk is a food for which a definition and standard of identity has been prescribed by regulation,” the FDA said, a standard of identity Muscle Milk failed to meet.

Specific products – like the Chocolate Muscle Milk Protein Nutrition Shake and Chocolate Peanut Caramel Muscle Milk – were further misbranded because they included claims that they were “healthy” and yet exceeded the maximum fat and saturated fat content as prescribed by regulation, the agency said. The Web site for the Vanilla Crème Muscle Milk Light Nutritional Shake also ran afoul of requirements for relative claims, the FDA said, because it failed to provide the identity of the reference food for its “Light” and “lower in calories” claims.

To read the FTC’s letter to CytoSport, click here.

To read the FDA’s warning letter, click here.

Why it matters: Muscle Milk’s experiences provide an interesting case study in regulation by multiple agencies. While the FTC declined to take action against the company once it added the “Contains No Milk” disclaimer, the FDA found that the disclaimer itself could mislead consumers with milk allergies, as the product contains ingredients derived from milk, and that because milk is a regulated food, the product name is misleading.

back to top

Marketers of Payday Loan Scheme Must Pay FTC $4.8M

A U.S. District Court judge has ordered Swish Marketing, Inc., to pay $4.8 million to settle a case in which the Federal Trade Commission alleged the company and its directors used Web advertising to trick payday loan applicants into purchasing prepaid debit cards.

The sites purported to match short-term, or "payday," loan applicants with potential lenders, according to the complaint, but the application form also included an order for a debit card. To submit the application, users were given four product offers all unrelated to the loan, each with "yes" and "no" buttons. The "no" button was preclicked for three of the offers, with "yes" preclicked for the debit card, the agency said. When users clicked the "Finish matching me with a payday loan provider!" button, they were charged up to $54.95 for the debit card, the FTC claimed.

Other sites touted the debit card as a "bonus" and disclosed the enrollment fee only in fine print below the submit button, according to the complaint. The FTC alleged the sites "conveyed the general message that the consumer, in completing the application form, was merely applying for a payday loan, as opposed to purchasing any good or service."
The case dates back to August 2009, when the FTC filed its complaint against Swish Marketing and the seller of the debit card, VirtualWorks, alleging deceptive business practices. The agency later filed an amended complaint with additional charges that Swish sold consumers' bank account information to VirtualWorks without their express consent.

VirtualWorks and the executive defendants reached prior settlements with the FTC. In addition to the $4,856,872 payment – the total amount of consumer injury caused by the activities in the FTC's complaint, reduced by the amounts already paid by other defendants – the court order banned the defendants from engaging in marketing any product with a negative option program. The order also requires the defendants to obtain informed consent from consumers prior to using their information collected for a particular purpose for any other purpose by a third party. Misrepresentations about material facts about a product or service as well as calling a product or service "free" or a "bonus" are also barred under the order.

To read the complaint in *FTC v. Swish Marketing*, click here.

To read the court's order in *FTC v. Swish Marketing*, click here.

Why it matters: In a press release about the court order, the FTC said it is "closely monitoring payday lending and other financial services to protect financially distressed consumers." Marketers utilizing negative options programs have also been on regulators' radar recently, and legislation introduced last year by Sen. Jay Rockefeller, the Restore Online Shoppers' Confidence

Act, would have imposed stringent rules on all online negative option sales, with detailed disclosure, consent, and cancellation requirements.

back to top