Advertising Law

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Manatt Partner Linda Goldstein to Serve as Faculty at Digital Gaming & Lottery Policy Summit

On December 5-6, 2011, regulators, policymakers, gambling operators, lotteries and technology providers will convene at the inaugural Digital Gaming and Lottery Policy Summit to address policy changes in the U.S. that could result in the regulation of new forms of electronic, interactive gambling.

Linda Goldstein, Chair of Manatt's Advertising, Marketing and Media Division, will participate as a panelist in a session titled "Lottery 2.0 – Welcome to the Social Networks." She and her fellow presenters will highlight successful social media campaigns and discuss the benefits and potential risks for lottery operators in using social media as a promotional vehicle or as a revenue stream.

The two-day conference will be held at the Washington, D.C., Hilton Alexandria Mark Center.

For more information or to register for this event, click here.

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Manatt Partner Ivan Wasserman Invited to Speak at FDLI's New Dietary Ingredient Regulation Event

On December 12, 2011, The Food and Drug Law Institute will host a one-day workshop on New Dietary Ingredient (NDI) Regulation and Compliance. FDA's issuance of this long-awaited draft guidance brings significant implications to the dietary supplement industry. FDLI's workshop will provide valuable insight into the legal aspects of NDI notifications, as well as practical approaches to filing successful NDI notifications and bringing new dietary ingredients to market.

Manatt advertising partner Ivan Wasserman's presentation will focus on "Determining Whether a New Dietary Ingredient Notification is Necessary" during which he will explore what qualifies as an NDI and when it is necessary to file a notification.

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Upcoming Events

December 5-6, 2011
Digital Gaming and Lottery Policy Summit
Topic: "Lottery 2.0 - Welcome to the Social Networks"
Speaker: Linda Goldstein
Washington, D.C.
For more information

December 12, 2011
FDLI Dietary Ingredient Regulation and Compliance Workshop
Topic: "Determining Whether a New Dietary Ingredient Notification is Necessary"
Speaker: Ivan Wasserman
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For more information

Awards

Recognized for Excellence in the areas of Advertising, Marketing and Media

Named a Top Practice Nationally for Marketing and Advertising

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The workshop will be held at The Madison Hotel in Washington, D.C. As a friend of Manatt, Phelps & Phillips, LLP, we are pleased to offer a 15% discount on registration. Please visit FDLI's regitration page to take advantage of this discount by entering the following code: NDIPROMO.

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Facebook Status Update: It's Complicated

A victory in the court system was followed by a letter from federal legislators, resulting in mixed outcomes for Facebook.

First, a U.S. District Court judge dismissed with prejudice a suit alleging that the social media site's promotion of its "Friend Finder" service misappropriated users' names. The service suggests friends for users based on their e-mail contacts. The plaintiffs claimed that the use of their names and likenesses (in a profile picture) without their compensation or consent violated their right of publicity.

But U.S. District Court Judge Richard Seeborg ruled that the plaintiffs were not injured by the company's ads. "[T]he names and likenesses were merely displayed on the pages of other users who were already plaintiffs' Facebook 'friends' and who would regularly see, or at least have access to, those names and likenesses in the ordinary course of using their Facebook accounts," the court said. Although the plaintiffs argued that statutory damages of $750 were available, the court said the plaintiffs failed to state a cognizable injury requiring an award of damages.

On the heels of the court victory however, Facebook received a letter from Reps. Joe Barton (R-Tex.), Edward Markey (D-Mass.), Marsha Blackburn (R-Tenn.), and Carolyn Maloney (D-N.Y.) seeking information about the company's storage of users' data. The letter came after *The Wall Street Journal* reported that a user requested all the data Facebook had collected about him. In response, the company provided 1,200 pages of log file data, including chat conversations, various IP addresses the man used to log in to the site, uses of the "Like" and "Poke" functions, and actions the user had taken to delete information from his profile, like "defriending" other users.

"As members of the Congressional Bipartisan Privacy Caucus, we are concerned about Facebook's consumer data collection and storage practices," the lawmakers wrote. "We are concerned that although the user was under the impression that his information was deleted at the user's request, Facebook continued to retain the information." The Representatives requested answers to questions about the personally identifiable information Facebook collects from its users, the storage of information and the company's policy for deleting information as requested by users. The legislators requested responses to their inquiry by Nov. 21.

To read the court's order in *Cohen v. Facebook*, click here.

To read Reps. Markey and Barton's letter to Facebook, click here.

Why it matters: Facebook's usage of user data continues to raise questions among both users as well as legislators. While the "Friend Finder" lawsuit was dismissed with prejudice, the site must now deal with the lawmakers' concerns about data collection and storage. In a

statement, the company said it “care[s] deeply about respecting the expectation of the people who trust Facebook with their information and believe that our sound data policies and secure practices are part of the reason people enjoy using our service. We look forward to discussing this in more detail with members of the Bipartisan Privacy Caucus and answering any questions they may have.”

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Suits Target “Fat Free,” “All Natural” Ad Claims

Continuing the steady stream of suits challenging health and marketing claims, two class actions were recently filed over “fat free” and “all natural” advertising.

A proposed class action was filed in New Jersey federal court alleging that Smart Balance lied about the amount of fat in its “Fat Free” milk. According to the complaint, instead of being fat free, the milk actually contains 1 gram of fat per serving, which is double the legal limit of 0.5 grams of fat per serving for companies to label products as “Fat Free.”

The suit alleges that the company’s claims preyed on Americans “desperate for healthy options in the supermarket aisles,” and aggressively marketed, promoted and labeled its line of Fat Free Enhanced Milks as “Fat Free” despite its content. “Fat Free” is a nutrient content claim regulated by the Food, Drug and Cosmetic Act, the plaintiffs contend, and Smart Balance violated 21 C.F.R. §101.62(b), which established the limit of 0.5 grams of fat per serving. The plaintiffs seek to enjoin the defendant from continued marketing or sales of the mislabeled product, as well as trebled damages and punitives.

In a second suit, California residents filed a class action against Trader Joe’s Company for false advertising. The plaintiffs claim that the company’s products – including Joe-Joe’s Chocolate Vanilla Crème Cookies and Trade Joe’s Fresh Pressed Apple Juice – labeled as “all natural” or “100% natural” actually contain synthetic ingredients like ascorbic acid, sodium citrate, and xanthan gum.

The suit contends the grocery chain “cultivat[ed] a wholesome and healthful image in an effort to promote the sale of these products, even though its food products were actually *not* ‘all natural.’” While the complaint notes that the Food and Drug Administration does not directly regulate the term “natural,” it argues that the agency has a policy which defines “the outer boundaries of the use of that term by clarifying that a product is *not* natural if it contains color, artificial flavors, or synthetic substances.”

Seeking to certify a nationwide class, the suit asks for injunctive relief to stop Trader Joe’s from labeling its products “all natural” if they contain synthetic ingredients, as well as statutory and punitive damages.

To read the complaint in *Stewart v. Smart Balance*, click here.

To read the complaint in *Larsen v. Trader Joe’s Company*, click here.

Why it matters: The suits are just the latest examples of consumer class actions challenging advertisers’ use of “all natural” or “fat free”

claims. Similar suits have been filed against defendants, including Kashi, Snapple, Nutella and Ben & Jerry's.

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Suit Alleges Weather App Used Geolocation Data for Behavioral Advertising

Users of an AccuWeather mobile app have filed a federal suit alleging that the application can track users "to within a few feet" and then transmit the information in unencrypted form to be used to display behaviorally targeted advertising.

Worse, there is no way to disable the app, which comes pre-installed on certain smartphones (HTC EVO 3D and 4G), according to the complaint. The suit alleges that the AccuWeather app collects "unnecessarily precise" longitude and latitude along with date and time. The data, which is transmitted in unencrypted form, is sent at regular intervals throughout the day in addition to when users tap the AccuWeather widget on their phones, providing frequent updates.

Plaintiffs claim such detailed information is unnecessary to provide weather conditions and forecast information, and is instead used to derive revenue for the defendants for behavioral advertising targeted to specific users. "AccuWeather uses the location information it unnecessarily receives from plaintiffs and class members to identify individuals, analyze their behavior based on their smartphone uses and locations, build profiles about them, and profit from sharing the profile information and/or using the profile information in providing services to yet other third parties," according to the complaint.

The plaintiffs contend reasonable consumers would not expect that consent to use their location for weather information would result in the sharing of such detailed data for the defendants' purposes. The suit seeks a refund or a replacement phone for the plaintiffs, who also want any personal information collected by the defendants purged.

To read the complaint in *Goodman v. HTC America*, click here.

Why it matters: Geolocation and its use in applications have caught the attention of legislators as well as plaintiffs' attorneys. Earlier this year, Sens. Al Franken (D-Minn.) and Richard Blumenthal (D-Ct.) introduced the Location Privacy Protection Act, which would require that companies obtain users' consent before collecting or sharing geolocation data. Companies would also be required to provide notice to consumers separate from any final end user license agreement about why their geolocation information will be collected as well as the specific entities to which it may be disclosed. Under the legislation, companies would also be mandated to delete users' data upon request and plaintiffs would be able to bring private civil suits with damages of $2,500 per violation.

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Ouch! NAD Recommends Ceasing Sensitive Toothpaste Claims

In a challenge brought by competitor Colgate-Palmolive, the National Advertising Division recommended that Procter & Gamble discontinue ad claims for its Crest Sensitivity Treatment

& Protection Toothpaste.

The claims challenged included "Relief Within Minutes" and "When used as directed [the product] provides relief from sensitivity pain within minutes…." NAD noted that dentin hypersensitivity is a serious problem affecting millions of Americans and claims promising relief from sensitive tooth pain in minutes instead of weeks – the time frame for most sensitivity toothpastes on the market – are "particularly attractive" to consumers, requiring competent and reliable scientific support.

After analyzing studies conducted by both the advertiser and the challenger, NAD said that while P&G's studies were "generally robust and well-designed," the results did not reflect the claim of near-immediate pain relief. NAD expressed concern about certain elements of the studies – like the brushing instructions given to participants as well as the use of only one stimulus to assess sensitivity at the five-minute time point.

"Given that the strong performance claim at issue in this case is one of speed of relief, NAD determined that the studies offered in support of an immediate pain relief claim should have incorporated a tactile probe within the immediate time point while taking into account the need to minimize interactions, thereby providing more robust support as to the relief claim reflecting the real world conditions (e.g. food) that sensitive teeth encounter," NAD said.

The decision also expressed concern that the advertiser's study results were not statistically significant nor clinically meaningful. "While there is improvement in tooth sensitivity *over time*, with more clinically meaningful achievements at days three and after two weeks for both studies," NAD said, the evidence was insufficient to support the "relief within minutes" claims, ultimately recommending that they be discontinued.

To read the NAD's press release about the decision, click here.

Why it matters: The decision repeatedly emphasized that because of P&G's use of a "very strong claim" of relief within minutes, it failed to provide sufficient evidence. The NAD said that nothing in its decision precluded the advertiser from claiming steady sensitivity relief over time, but reminded advertisers that "Results from clinical studies must not only be statistically significant but also clinically meaningful."

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Parents Help Kids Violate COPPA

Parents are helping their children circumvent the Children's Online Privacy Protection Act and many are unfamiliar with the law, according to the results of a new study.

In the report, "Why parents help their children lie to Facebook about age: Unintended consequences of the Children's Online Privacy Protection Act (COPPA)," researchers polled 1,007 parents nationwide above the age of 26 with a child between the ages of 10 and 14 about their use of the social networking site. One in three parents said their children joined Facebook before reaching the required age of 13 and two-thirds of those parents helped their children join.

Parents told researchers their reasons for violating the company's terms of service included communicating with parents and other family members or friends, using the site for educational purposes, or because the child's classmates use the site. When asked why they thought a minimum age restriction existed on the site, the majority replied "I don't know." Other responses included "because it's more for adults," "children don't need to have a social media presence," and "to protect minors from perverts." Just two parents referenced privacy.

Parents also overwhelmingly told researchers that they – not the government or the company providing the service – should have the final say about whether or not their child should be able to access Web sites or online services, the report found. The research shows that age-based restrictions as a result of COPPA are ineffective, the report says.

"Rather than providing parents and children with greater options for controlling the use of youth personal information as they expand their online activities, it appears that in many circumstances, COPPA has encouraged limitations on children's access to online services," according to the report. "In response, parents are, in fact, taking matters into their own hands to circumvent these restrictions; however, they do so at the cost of their children's privacy and at the risk of acting unethically and potentially in violation of the law."

Instead, based on the research data, the report "propose[s] that policy-makers shift away from privacy regulation models that are based on age or other demographic categories and, instead, develop universal privacy protections for online users."

To read the report, click here.

Why it matters: The report comes as the Federal Trade Commission considers updates to COPPA and federal legislators debate the enactment of national privacy legislation, including the "Do Not Track Kids Act of 2011," which would expand the protections of COPPA.

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