Advertising Law

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In This Issue

Manatt's Advertising Practice a Finalist for 2012 Chambers USA Awards for Excellence

The national Advertising, Marketing & Media practice of Manatt, Phelps & Phillips, LLP, has been named a finalist for the Chambers USA 2012 Awards for Excellence. The awards honor outstanding law firms and lawyers across the United States, reflecting "both preeminence in key practice areas and achievements over the last 12 months." The awards are based on research conducted by Chambers & Partners for the upcoming 2012 edition of its publication *Chambers USA: America's Leading Lawyers for Business*. Manatt is one of six finalists named on March 20. The awards ceremony will be held on June 7 in New York, NY.

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Back to the Drawing Board: Federal Judge Rejects FTC Settlement

Posing a threat to a common aspect of settlement agreements with federal agencies, a federal court judge recently rejected a deal between diet supplement maker Circa Direct and the Federal Trade Commission.

As part of a coordinated law enforcement sweep last April, the agency brought an action against the marketer of acai berry weight-loss products, Circa Direct.

The parties reached an agreement that required Circa Direct to pay $11.5 million to settle the charges that it engaged in false advertising by using fake news Web sites, with domain names like "BreakingNewsat6.com" and headlines that read "Acai Berry Diet Exposed: Miracle Diet or Scam?" Under the settlement, the monetary judgment would be suspended due to certain conditions, but a permanent injunction against the company and its owner would be in effect.

Circa Direct admitted no wrongdoing, however.

U.S. District Court Judge Renee Marie Bumb declined to approve the

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Practice Area Links

Practice Overview
Members

Upcoming Events

March 28–30, 2012
60th ABA Section of Antitrust Law Spring Meeting
Topic/Speaker: "Pot to Frying Pan—Settlement Agreements as Antitrust Violations," Chris Cole
Topic/Speaker: "The FTC's Use of Federal Court for Consumer Remedies," Ed Glynn
Washington, DC
For more information

April 3-4, 2012
April 19-20, 2012
PLI Information Technology Law Institute 2012
Topic: "Social Media Issues in Technology"
Speaker: Marc Roth
San Francisco, CA
New York, NY
For more information

May 4, 2012
New York City Bar Association's Sweepstakes, Promotions, & Marketing Laws: Comprehension & Compliance Seminar
Topic: "Mobile Marketing—Certainties & Uncertainties"
Speaker: Marc Roth
New York, NY
For more information

May 5–9, 2012
INTA's 134th Annual Meeting
Topic: "Social Media—An Ever Changing, Challenging and Competitive World: How to Provide Legal and Business Advice to Clients"
Speaker: Linda Goldstein
Washington, DC
For more information

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

Awards

settlement, writing that she could not determine whether the monetary award or other terms were appropriate without "established facts as to the extent of the alleged wrongdoing at issue."

She also expressed concern over part of the settlement that allowed money to be set aside to pay Circa Direct's attorneys' fees, an amount that was left uncapped. That left open the possibility that the company could end up paying the government nothing, as the parties have yet to reach an agreement on fees, and Judge Bumb noted "that could threaten to swallow the damages award."

Judge Bumb cited a similar order from a federal court judge sitting in New York who rejected a defendant's settlement with the Securities and Exchange Commission for similar reasons. In that case, the judge refused to approve a settlement with a large investment bank, which agreed to pay $285 million over charges of security fraud without an admission of guilt.

However, not long after Judge Bumb issued her decision, the 2nd Circuit issued an unsigned opinion indicating that the New York order was unlikely to stand on appeal. "Requiring such an admission would in most cases undermine any chance for compromise," the panel wrote. "We have no reason to doubt the SEC's representation that the settlement it reached is in the public interest."

Judge Bumb ordered Circa Direct and the FTC to brief the issue of whether their settlement should be considered under the same or a different standard used in the SEC case. Under either analysis, the parties must articulate whether the settlement is "fair, adequate, reasonable and in the public interest," particularly in light of the court's concerns.

The FTC said it will comply with the judge's order but stands by the settlement. "We believe that our settlements serve the public interest and meet any applicable standard of judicial review," David Vladeck, Director of the FTC's Bureau of Consumer Protection, said in a statement.

To read the court's opinion and order in *FTC v. Circa Direct LLC*, click here.

Why it matters: In response to the rejection, Circa Direct filed a motion seeking that the court unfreeze its assets in order to pay its legal fees, which currently stand at $256,215.97 (after an initial retainer of $150,000). The defendant argued in its March 8 motion that the majority of its legal expenses were incurred answering the FTC's discovery demands. Should other federal court judges follow Judge Bumb's lead, settlements with governmental entities could face greater scrutiny and risk of being rejected. The practice of neither admitting nor declining fault is common, particularly with entities that could face civil suits as a result of a settlement with the government. However, the 2nd Circuit's opinion provides support for the practice and could undermine Judge Bumb's order in the FTC case. Federal court judges should not substitute their own judgment for agencies "on wholly discretionary matters of policy," the panel said. "It is not . . . the proper function of federal courts to dictate policy to executive administrative agencies."

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“Cruelty-Free” Claims Subject of False Advertising Suit

Three major cosmetics companies were sued by a class of consumers alleging that their “cruelty-free” claims constitute false advertising because the companies actually test their products on animals.

The suit, which was filed against Estée Lauder, Avon, and Mary Kay, seeks $100 million in compensatory damages, plus punitives.

Each of the defendants advertised that their cosmetics were “cruelty-free,” which is, according to the plaintiff, commonly understood as not being tested on animals. Using packaging, store displays, paid testimonials, Web sites and press releases, the defendants “consistently and repeatedly” represented that their products were not tested on animals. “For years, defendants marketed and advertised their companies and their cosmetic products as not being tested on animals, when in fact defendants were testing their cosmetic products on animals so that they could sell products in China and other foreign countries, thereby reaping hundreds of millions of dollars in sales.”

The defendants made a willful and profit-driven decision to enter the Chinese market and begin animal testing, according to the complaint, yet failed to then be honest and forthright with American customers, knowing that they would lose “significant sales, profits, and market share.”

Although the defendants later placed a representation on their Web site that their products were not cruelty-free, “that disclosure was wholly inadequate to properly inform consumers,” the suit claims.

According to the complaint, even PETA, the People for the Ethical Treatment of Animals, placed the defendants on their “Do Not Test” list, a designation that positively influenced sales.

The five named plaintiffs all claim to have purchased the defendants’ cosmetic products based on their “cruelty-free” representations.

To read the complaint in *Beltran v. Estée Lauder*, click here.

Why it matters: Although Estée Lauder has not commented on the suit, the other defendants issued statements to *Courthouse News*. A spokeswoman for Avon said that “except where required by local law, Avon neither conducts nor requests animal testing in order to substantiate the safety of its products.” However, Avon does business in over 100 countries, the spokeswoman said, “and some select products may be required by law in a few countries to undergo additional safety testing under the directive of a government or health agency. In these instances, Avon will first attempt to persuade the requesting authority to accept non-animal test data. When those attempts are unsuccessful, Avon must abide by local laws and comply with that government’s testing requirements.” In its statement, Mary Kay said that it did not conduct animal testing “except when absolutely required by law.” “There is only one country where we operate where that is the case and where we are required to submit our products for testing—China . . . .We are working closely with the Chinese government to demonstrate

that alternative testing methods ensure safe and effective products." PETA also responded to the suit, telling the news site that the organization was "extremely upset" when it found out that the defendants had engaged in animal testing. "It appears these companies have misled some consumers, and it appears that the plaintiffs may have a valid complaint here," PETA spokesperson Cathy Guillermo told *Courthouse News*.

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Actress's Suit Against Amazon Has Data-Mining Implications

The suit originally filed by an anonymous actress against Amazon and IMDb.com for divulging her true age has taken on wider implications for companies engaging in data-mining.

Last October an actress filed a Jane Doe suit against IMDb.com and Amazon claiming that her career had been harmed by the revelation of her true age on her professional profile. She used a stage name and listed her age as a few years younger. She alleged that the defendants ascertained her actual age by using her credit card information to search publicly available data after which it posted her true age on her public profile. As a result she lost employment opportunities and earnings.

A federal court judge ruled in January that the actress must either face dismissal of her $1 million suit or reveal her name. Continuing the litigation, she revealed herself as Junie Hoang, with acting credits to her name like the Zombie Postwoman in *Z: A Zombie Musical* and the Headless Woman in *Domain of the Damned*.

With the suit moving forward, companies that engage in comparable data-mining activity are paying close attention, as a judgment or verdict in favor of Hoang could open the door to potential liability.

Hoang's attorney told *The New York Times* that he has been contacted by "hundreds" of other potential clients and that "hundreds or thousands of people" may have claims.

In its court filings, however, Amazon denied that Hoang's credit card information was used to identify her true age. Even if it did use her credit card information to identify her actual age, the company asserted that it was allowed to under the terms of its privacy policy. The IMDb policy states that it uses information given to the site for "improving our site," with examples of collected data like names, e-mail addresses, age, and gender.

Why it matters: The Washington federal court judge overseeing the case set a trial date of January 7, 2013, for Hoang's suit if no settlement is reached or the case isn't decided at the summary judgment stage. Hoang's lawyer told *The Hollywood Reporter Esq.* that his client is prepared to see the case to its conclusion. The Screen Actors Guild also weighed in, supporting Hoang's suit in a statement. "Screen Actors Guild and its members stand in support of efforts to curtail this invasion of privacy done to enhance a corporate balance sheet."

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Damages Unavailable for Data Retention Under VPPA

In reversing a district court decision, the 7th Circuit ruled that consumers cannot recover damages under the Video Privacy Protection Act (VPPA) when a business keeps their rental histories longer than allowed by law.

Redbox Automated Retail, which rents DVDs, video games, and Blu-ray Discs to consumers from automated kiosks, faced a national class-action suit alleging that the company violated the VPPA by maintaining consumers' information—like their names, addresses, and the movies they have rented—longer than one year.

In setting aside the decision below, the 7th Circuit noted that although the VPPA allows consumers to recover damages when their viewing history and other personal information have been illegally disclosed, they may not receive a monetary award when the retention and deletion requirements are violated. The decision turned on the placement of certain VPPA provisions.

Thus, the statute delineates violations of the law and provides for civil suits. In subsequent sections, however, it sets forth the retention and deletion requirements. As these requirements appear after the section on consumers' rights to sue, the placement implies that damages are therefore unavailable to plaintiffs who sue over record retention violations, the court said.

"This placement could be an accident, but . . . the more plausible interpretation is that it is limited to enforcing the prohibition of disclosure," the 7th Circuit reasoned. Further, the court noted, plaintiffs who sue under the VPPA can recover damages for disclosure of their information.

"How could there be injury, unless the information, not having been destroyed, were disclosed? If, though not timely destroyed, it remained secreted in the video service provider's files until it was destroyed, there would be no injury," the court said. If disclosure never occurred, then "the only possible estimate of actual damages for violating the subsection would be zero."

To read the court's opinion in *Sterk v. Redbox Automated Retail*, click here.

Why it matters: The court cited a similar result from the 6th Circuit, the only other federal appellate court to consider the issue. But it also acknowledged that the decision wasn't a foregone conclusion. "We cannot be certain that we have divined the legislative meaning correctly. But since we can't grill Congress on the matter, it is enough that we think our interpretation is superior to the district court's," the panel said.

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Keeping Up with Kardashian Lawsuits

As if reality TV staple the Kardashian family hadn't received enough headlines recently, sisters Kim, Khloe and Kourtney were sued in New York federal court for false advertising.

The sisters, who all endorse weight-loss product QuickTrim, made false and misleading statements about the effectiveness of the caffeine-based product, according to the complaint.

QuickTrim is marketed as a "clinically proven formula" that will increase metabolism, curb appetite, and promote weight-loss, but its main ingredient is a large dose of caffeine, "which the Food and Drug Administration has determined is not a safe or effective treatment for weight control," the suit alleges.

Despite the lack of reliable scientific evidence for the advertising claims, the plaintiffs contend that the sisters have marketed the drug as safe and effective and appear in nearly every advertisement as the principal endorsers of the system. Their surname is even incorporated into one of the primary Web addresses selling the product, www.kardashianquicktrim.com. According to the complaint, "They personify the product" and promote it on their television shows, Web sites and social media like Facebook and Twitter.

QuickTrim print advertisements feature three elements, the plaintiffs claim: statements attesting to the clinical proof of QuickTrim's efficacy for weight loss, statements suggesting QuickTrim is effective at suppressing appetite and reducing cravings, and photos of one or more of the Kardashian sisters in a bikini or other revealing attire. Several examples are included.

Kim, who has 13 million followers, has tweeted about using the product to get ready for her ill-fated nuptials last year and stated that QuickTrim helped her lose 15 pounds. She also claimed on her own Web site that one of the products, Cellulism, "attacks cellulite by breaking down excess fat stored in cells" —a claim that has no competent and reliable scientific evidence for support, the suit contends.

Not to be outdone, Khloe tweeted to her more than 6 million followers that "The Kardashian Sisters Create Miracle Diet Product: 'Quick Trim' Hey Girls!"

The suit seeks to certify a nationwide class of QuickTrim purchasers, with subclasses of California, Florida and New York residents, and requests injunctive relief as well as compensatory and punitive damages.

To read the complaint in *Cowan v. Windmill Health Products*, click here.

Why it matters: The issue remains whether the Kardashian sisters can be held liable for the QuickTrim product claims. Under the Federal Trade Commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising (which the complaint did not reference), both advertisers and endorsers may be liable for false or unsubstantiated statements made in the course of advertisements.

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Controversy for Chrysler Over Online Contest

The blogosphere is alive with the sound of controversy over a recent contest sponsored by Chrysler.

The "Blogger Faceoff" contest involved five "mommy bloggers" posting

on the topic “How do you keep the kids occupied on road trips?” Readers then voted for their favorite post, and the blogger who received the most votes would win an iPad2 or a trip to New York City.

But controversy ignited over the voting rules.

The official rules stated: “Limit one (1) vote per person, per category, per day. Votes garnered by using multiple email addresses or any other device or artifice to vote multiple times will be disqualified.”

However, Ignite Social Media, the company that ran the contest for Chrysler, apparently informed the bloggers that the rules actually allowed one vote per person, per category, per day, *per computer*.

The bloggers informed readers as much, and the contest continued until a reader of one of the blogs made a rude comment about one of the other bloggers. The defamed blogger then accused the first blogger of violating the voting rules and cheating.

Ignite responded by disqualifying the blogger who was accused of cheating. Controversy erupted because the blogger hadn’t been the one to insult her competitor and because the company disqualified her entirely, not just the votes for her entry, as set forth in the official rules. The other bloggers, who also encouraged their fans to vote via different IP addresses or browsers multiple times per day, were not disqualified.

As the story snowballed, Ignite tried to placate the masses. Ignite’s president, Jim Tobin, responded to the controversy by saying that the company “did the only thing we could do given the rules and the situation. Having said that, it’s clear that our promotion, which was designed to be fun for all of the bloggers participating, has clearly not been fun for some of them.”

Tobin then proposed to provide each of the bloggers with either an iPad2 or a $500 gift card to donate to the educational cause(s) of their choice.

“Hopefully this will make up for some of the more unfortunate drama,” Tobin wrote.

Why it matters: The drama provides a lesson to companies considering engaging in a social media-based contest about the power of bloggers and the potential for controversy. The official rules form the contract between the players and the contest sponsor and if properly written give the sponsor the necessary protection if things go wrong and the latitude to make adjustments as necessary. Sponsors should draft rules carefully and enforce them as written. When they deviate or do not apply the rules uniformly to all contestants or create the impression that preferential treatment has been given, problems like this arise. In the era of social media, everyone has a forum and the word of alleged “impropriety” quickly spreads.

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