Advertising Law @ manatt

September 15, 2010

In This Issue

FTC Settles Charges over Deceptive Reviews

In the first application of the new guidelines on testimonials and endorsements, the Federal Trade Commission reached a settlement with a public relations firm accused of illegally advertising its clients' gaming applications by having employees pose as consumers and post reviews on iTunes.

Under the proposed settlement, Reverb Communications will be required to remove any previously posted endorsements by authors posing as independent users who were in fact paid employees. The company and its sole owner, Tracie Snitker, will also be barred from making future claims without disclosing any relevant connections to the seller of the product or service.

The FTC alleged that Reverb, a public relations and marketing firm, posted reviews about its clients' mobile gaming applications at Apple's iTunes store between November 2008 and May 2009. The reviews did not disclose that the authors were hired to promote the games, according to the FTC complaint, nor that they received a percentage of the sales. Instead, they purported to be from independent consumers. Reverb employees gave their clients four and five star ratings and submitted glowing comments such as "Amazing new game," "ONE of the BEST," and "Really Cool Game," according to the complaint.

To read the consent order in *In the Matter of Reverb Communications, Inc.,* click here.

Why it matters: The action is the first complaint issued pursuant to the FTC's revised endorsements and testimonials guides. While the

agency investigated Ann Taylor earlier this year for giving gifts to bloggers, no charges were filed. Advertisers and marketers should remember that under the guides any endorsement by a person connected to the seller, or who receives cash or in-kind payment to review a product or service (including bloggers and celebrity endorsers), must disclose his or her material connection with the seller. The enforcement action against Reverb serves as a reminder that the guides apply to employees of both the seller and the seller's advertising agency.

back to top

"Shape-up" or Ship Out: Skechers Faces Suits over Strengthening Shoes

A third class action lawsuit has been filed in California federal court against shoemaker Skechers, alleging that the company deceived consumers about the health benefits of its "Shape-up" line of shoes.

Print, television, and Internet ads, according to the complaint, tout the "noticeable physiological benefits to consumers" of the shoes, including weight loss, firmer muscles, reduced cellulite, improved circulation, and improved posture. Plaintiff Venus Morga claims that she paid a premium for the shoes and did not experience any of the benefits described by Skechers in its advertising.

The Shape-ups contain what Skechers describes as a "unique kinetic wedge," or a piece of foam, that is, thicker at the heel and progressively thinner towards the toes, which alters the way the wearer stands and walks. Relying on clinical studies, Sketchers maintains that the altered posture results in health benefits that allow wearers to "[g]et in shape without setting foot in a gym." But the suit claims that the studies are bogus"marketing tools and that the shoes can actually harm wearers who have flat feet or preexisting difficulties with balance.

Morga is the third plaintiff in as many months to file suit over the shoes. Two other plaintiffs made similar claims in suits filed in June and July in California federal courts. All three suits argue that Skechers violated California's unfair business practices law by engaging in deceptive advertising.

To read the complaint in *Morga v. Skechers*, click here.

Why it matters: Advertisers should be careful to use claims that are substantiated, and that studies used in support produce accurate, verifiable results.

back to top

UPCOMING EVENTS

September 15, 2010
PRSA Pittsburgh Professional Development Day
Topic: "FTC Regulations Affecting Social Media Outreach"
Speakers: Tony DiResta
Pittsburgh, PA
For more information

September 21, 2010
Manatt/ACC False Advertising and Trademark Litigation Event
Topic: "How to Win Jury Trials in Trademark and False Advertising Cases"
Speakers: Tom Morrison
New York, NY
For more information

September 21-23, 2010
2010 ERA D2C Convention
Topic: "Best Practices in Advance-Consent Marketing"
Speaker: Linda Goldstein
Las Vegas, NV
For more information

September 24, 2010
ACI Conference
Topic: "Sweepstakes, Contests, and Promotions"
Speaker: Linda Goldstein
New York, NY
For more information

October 7, 2010

Potential California Ban on Labeling Plastics?

The California legislature initiated legislation that would prohibit labeling any plastic product sold in California as "biodegradable," "degradable," or "decomposable," absent standard specification for such terms. Currently, California law forbids such terms on food packaging or plastic bags, but Senate Bill 1454 would expand the scope of covered items to include all products that contain plastic components.

The American Society for Testing and Materials presently has no standard specification for the term "biodegradable" or "degradable" as it applies to plastic. According to the bill, the use of such terms on plastic items is inherently misleading to consumers, who will be more likely to litter an item labeled "biodegradable," resulting in harm to the state and environment.

"Littered plastic products have caused and continue to cause significant environmental harm and have burdened local governments with significant environmental cleanup costs," according to the legislation. "It is the intent of the Legislature to ensure that environmental marketing claims, including claims of biodegradation, do not lead to an increase in environmental harm associated with plastic litter by providing consumers with a false belief that certain plastic products are less harmful to the environment if littered."

The legislation leaves room for labeling a product "compostable" or "marine degradable," terms for which the ASTM has set a standard specification. The bill provides for civil penalties but expressly leaves room for actions under the state's consumer protection law as well.

Governor Arnold Schwarzenegger has until September 30 to veto the legislation or sign the bill into law.

To read SB 1454, click here.

Why it matters: The law could have implications for national retailers who sell products in California. The issue, however, could be mooted by the soon-to-be released updated Green Guides from the Federal Trade Commission. The Guides currently allow an item to be labeled "biodegradable" or "degradable" if the claim is "substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature." Such claims must also be qualified "to the extent necessary to avoid consumer deception about: (1) the product or package's ability to degrade in the environment where it is customarily disposed; and (2) the rate and extent of degradation."

back to top

WOMMA's Talkable Brands Exchange
Topic: "Legal Rapid Fire Panel with the FTC"
Speaker: Tony DiResta
New York, NY
For more information

October 17-20, 2010
SOCAP International Annual Conference
Topic: "The FTC's Efforts to Regulate Social Media Marketing and Privacy: The Impact on Customer Care Professionals"
Speaker: Tony DiResta
San Francisco, CA
For more information

October 19, 2010
2010 PMA Digital Marketing Summit
Topic: "Legal POV on Social Media Marketing"
Speaker: Linda Goldstein
New York, NY
For more information

November 17-19, 2010
WOMMA Summit 2010: Creating Talkable Brands – Next Practices & Best Practices
Topic: "FTC Regulations and Privacy"
Speaker: Tony DiResta
Las Vegas, NV
For more information

FTC Issues Subpoenas to 48 Food Companies

The Federal Trade Commission issued subpoenas to 48 food companies to gather information as part of a follow-up to its 2008 report, "Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities and Self-Regulation."

In 2007, the FTC sought information from 44 companies to examine how they marketed to children and teenagers.

The new round of subpoenas will measure changes over the last few years. "This is a follow-up to measure the effects that self-regulation has had over the last three years," said Carol Jennings, spokeswoman for the FTC's Division of Advertising Practices/Bureau of Consumer Protection. "We are supportive of industry voluntary efforts to limit their marketing to kids and this will see whether more is needed."

The list of companies – including Campbell Soup Co., Kellogg Co., Kraft Foods, and McDonald's Corp. – has changed slightly from 2007 to 2010. Thirty-six companies are repeats, with 12 new recipients, including Dunkin' Brands, Hostess Brands, and Sunny Delight Beverages Co.

Information sought includes the amount spent to communicate marketing messages about food products to youth; the nature of the marketing activities used to market food products to youth; the types of youth marketing to a specific gender, race, ethnicity, or income level; and any marketing policies, initiatives or research in effect or undertaken by the companies relating to the marketing of food and beverage products to children and adolescents. Specific nutritional data was also requested for each food product that the companies marketed to children or adolescents in 2009.

The FTC also requested expenditure data for new media, such as online display advertising, e-mail marketing, mobile marketing, and digital marketing.

For the full list of companies that received subpoenas, click here.

Why it matters: While the FTC spokesperson denied that the subpoenas were the first step in a process toward new legislation, the agency's concern regarding on marketing food products to children is clear.

back to top

November 18-19, 2010

32nd Annual Promotion Marketing Law Conference

Topic/Speaker: "To Tweet or Not to Tweet: How to Stay Current as Technology Changes the Game," Linda Goldstein

Topic/Speaker: "Negative Option/Advance Consent/Affiliate Upsells," Marc Roth

Topic/Speaker: "Children's Marketing," Christopher Cole

Chicago, IL

For more information

Newsletter Editors

Jeffrey S. Edelstein
Partner
jedelstein@manatt.com
212.790.4533

Linda A. Goldstein
Partner
lgoldstein@manatt.com
212.790.4544

Marc Roth
Partner
mroth@manatt.com
212.790.4542

Our Practice

Whether you're a multi-national corporation, an ad agency, a broadcast or cable company, an e-commerce business, or a retailer with

Trial Starts in Pom v. Welch's False Ad Case

Trial began earlier this month in which Pom Wonderful claims that Welch Foods, Inc. deceptively advertises its Welch's White Grape Pomegranate juice.

Pom filed its suit in January 2009. Although Welch's made several attempts to avoid trial, U.S. District Court Judge A. Howard Matz denied Welch's motion to dismiss as well as its summary judgment motion, in which Welch argued that Pom's suit was preempted by the Food, Drug, and Cosmetics Act.

"Congress did not intend federal law to exclusively occupy the fields of food labeling and advertising," Judge Matz wrote. As reported by *The National Law Journal*, Pom's attorney began his opening statement by holding up a 64 oz. bottle of Welch's White Grape Pomegranate juice to the eight jurors, announcing that it was the "sole focus" of the lawsuit. He told jurors that Welch's has reduced Pom's profits by 20% deceiving consumers about the amount of pomegranate juice in the product.

Pom contends that consumers were deceived by the juice's use of "crisp, luscious views" of a pomegranate to think that Welch's contains significant amounts of pomegranate, when in fact it has less than 1oz. of pomegranate juice. Pom's counsel promised the jury that eight people will testify that they bought Welch's juice – instead of Pom's – because it was less expensive and had the same health benefits. All eight switched back to Pom's after realizing the actual amount of pomegranate juice in Welch's, he added, noting that Pom has lost 20 percent of its sales to Welch's.

But in his opening statement, Welch's counsel told the jury that Welch's juice and Pom's products are not competitors, but are displayed in different parts of stores and have different target markets. He then held up a bottle of Pom – a different shape, size, and color than the Welch's juice – and told jurors the case was really about two juices, that don't look anything alike. Welch's sells to parents with kids, while Pom targets those aged 55 and older who have health concerns, Welch's lawyer told jurors. He argued that the label is meant to tell consumers how the juice tastes – not the actual percentage of juice in the bottle.

Why it matters: Pom is no stranger to litigation and legal scrutiny, having sued several other drink makers such as Ocean Spray Cranberries, Inc., and Tropicana Products. The company also received a warning letter from the Food and Drug Administration in February, cautioning it that the "therapeutic claims" about its pomegranate juice could violate the law by depicting it as a drug.

back to top