Advertising Law

May 4, 2012

In This Issue

Manatt Expands Intellectual Property Practice in New York

Manatt is pleased to welcome Mark I. Peroff and Darren W. Saunders to the firm. Mr. Peroff and Mr. Saunders have extensive experience counseling clients in a wide variety of industries on the protection of their intellectual property rights and representing them in trademark, copyright and patent litigation.

With 30 years of experience, Mr. Peroff has earned a reputation for having a deep understanding and appreciation of the inherent value that intellectual property assets possess and the importance of protecting them. Much of his work involves helping high-profile clients develop and implement creative and practical strategies for protecting their intellectual property assets in order to maximize their potential either through establishing, enforcing, and defending underlying rights in these assets. Mr. Saunders has more than 20 years of experience in intellectual property litigation and transactions, as well as domestic and international anti-counterfeiting strategy and enforcement.

back to top

Federal Court Rules Muscle Milk Lawsuit Needs More Muscle

CytoSport Inc., the makers of Muscle Milk and similar products, succeeded in having a majority of the allegations dismissed from a class action case alleging violations of multiple California consumer protection laws, including false advertising and negligent misrepresentation.

Ruling on defendant's motion to dismiss, U.S. District Court Judge Claudia Wilken held that only one of the marketing allegations at issue was specific enough to constitute a violation of the law. The lead plaintiff, Claire Delacruz, was given seven days to file a more specific amended complaint.

Plaintiff Delacruz filed the class action suit against CytoSport in July 2011, claiming it misrepresented the nutritional value of Muscle Milk's products, including the "Ready to Drink" beverage and "Muscle Milk Bars." Specifically, Delacruz alleged that CytoSport used false and

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

Practice Overview
Members

Upcoming Events

May 17, 2012
Response Expo 2012
Topic: "Counterfeits, Knockoffs and Digital Reputation Management"
Speaker: Linda Goldstein
San Diego, CA
For more information

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 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
Dana Point, CA
For more information

Awards

misleading terms like “ideal nutritional choice,” “healthy fats,” “Healthy, Sustained Energy,” “nutritious shake,” and “good carbohydrates” to persuade consumers that its products “should be regularly consumed to help them live a healthy lifestyle.” The class action also called into question the legality of CytoSport’s use of such slogans as, “Go from cover it up to take it off,” “From invisible to OMG,” and “From frumpy to fabulous” to market its Muscle Milk products.

Plaintiff characterized defendant’s nutritional claims as bogus, claiming that Muscle Milk products were actually the nutritional equivalent of “fat-laden junk food.” In support, plaintiff argued that the “Muscle Milk Bars” were high in fat—especially saturated fats—and contained “almost no vitamins and minerals,” and that the “Ready to Drink” beverage was “loaded with as much, if not more, total fat and saturated fat as a doughnut.”

CytoSport filed a motion to dismiss, claiming plaintiff’s allegations were unsubstantiated by the facts. According to the defendant, “Plaintiff offers no cognizable legal theory to support why she believes that products that contain levels of fat well below the recommended daily amounts, at least twice as much protein as fat, and a host of vitamins, minerals and other nutrients are not properly labeled ‘healthy and nutritional.’”

For the most part, the court agreed with CytoSport. Judge Wilken found plaintiff’s complaint to be vague—especially with regards to the use of the term “healthy.” Because Delacruz “has not alleged that the drink contains unhealthy amounts of fat, saturated fat or calories from fat, compared to its protein content, based on any objective criteria,” the court was unable to determine if the Muscle Milk drinks were healthy or not. Similarly, Judge Wilken rejected plaintiff’s allegation that CytoSport deceived consumers by claiming Muscle Milk’s bars, which contain saturated fats, fractionated palm kernel oil, and partially hydrogenated palm oil, were “healthy,” on the basis that plaintiff did not allege the fats were trans fats.

The only allegation that survived the defendant’s motion to dismiss regarded Muscle Milk’s claim on the 14oz Muscle Milk “Ready To Drink” packaging that it contains “healthy fat.” According to the court, such a claim could amount to deceptive product labeling because “A reasonable consumer would be likely to believe that the drink contains unsaturated, not saturated, fats.” Given that unsaturated fats are typically considered the “healthy fat,” and that the label also states that the product is a “nutritional shake,” the court found that the defendant’s representation “contributes to a sufficient claim of deceptive product labeling.” As a result, the court refused to dismiss the causes of action relating to those phrases on the basis that the “representation is more specific than simply that the product is ‘healthy.’” To the extent that Delacruz relied on those phrases, Wilken allowed her claims to proceed.

The court concluded by noting that “Plaintiff alleges that Defendant has concealed material facts about its products, but does not specify what

has been concealed and why it is material. In sum, the sole cognizable misrepresentation that Plaintiff has plead [sic] is the 'healthy fats' statement on the fourteen ounce Muscle Milk® RTD container, buttressed by the 'nutritious snack' statement."

To read Judge Wilken's order in CytoSport's motion to dismiss, click here.

To read the CytoSport Muscle Milk false advertising class action lawsuit, click here.

Why it matters: Judge Wilken's decision in this case is part of a growing trend of cases that highlight the need to allege false statements of material fact when attacking product advertising. In the past few years, advertising and marketing practices have been scrutinized by consumers, the government, and courts. Recently, courts have started to become more comfortable protecting sellers who use "puffery" statements to sell their products. Unquantifiable statements, such as the ones at issue in this case, are non-actionable as a matter of law. Marketers should carefully consider the difference between puffery and false statements in determining how to best advertise a particular product by asking themselves if a "reasonable consumer" would be likely to believe a particular claim.

back to top

How Much Is That App in the Window?

An iPhone-owner whose daughter downloaded $200 worth of "Zombie Toxin" and "Gems" games through in-app purchases on his iPhone was recently granted the right to pursue a class action suit against Apple for compensation of up to $5 million.

San Jose District Federal Court Judge Edward J. Davila rejected Apple's motion to dismiss the suit on all but one count. As a result, the case may proceed to trial.

Pennsylvania resident Garen Meguerian launched the 2011 class action case against Apple soon after he discovered his nine-year-old daughter had been draining his credit card account through in-app purchases on "free" games including *Zombie Cafe* and *Treasure Story*. According to the plaintiff's complaint, Apple is ultimately responsible for the purchases because it failed to disclose (1) that game currency was embedded in the apps, and (2) that the currency could be bought for up to 15 minutes after the app was purchased without requiring re-entry of a password. As a result, children were able to download and play paid apps without the knowledge or consent of their parents for 15 minutes after the parent entered his or her password.

The lawsuit alleges that Apple violated the US Consumer Legal Remedies Act "by actively marketing and promoting certain gaming apps as free or costing a nominal fee with the intent to induce minors to purchase in-app game currency." According to Meguerian, Apple unfairly targeted children by allowing "bait apps"—free or nominally priced games that require the purchase of virtual goods to progress to higher or more advanced levels—to be geared to children.

While numerous gaming apps are offered for free, some such games are designed to induce purchases of what Apple refers to as "In-App

Purchases" or "In-App Content" within the game in order to play the game with any success. These "In-App" items include (but are not limited to) virtual supplies, ammunition, fruits and vegetables, cash and other fake "currency"). As Meguerian learned, the costs can add up to more than $100 per purchase.

Plaintiff alleges the games at issue are deliberately designed to be highly addictive, so as to compel the children who play them to buy large quantities of game currency. The Federal Trade Commission recently criticized the game *Smurfs' Village* for this very reason. In that game, "players are lured in by enticing pictures of huge bucketfuls of Smurfberries" which can be purchased for $4.99 for 50 or $59 for 1,000. As an article quoted in the court case contends, "just a couple of taps is all it takes [in *Smurfs' Village*] to drain money out of an iPhone account holder's credit card."

In its motion to dismiss, Apple argued that parents who didn't want their children to make in-app purchases shouldn't give them their iTunes passwords. In response, the court reiterated plaintiff's claims that Apple misled consumers into thinking the games at issue were free and did not adequately inform them of the potential costs. As the complaint alleges, "Had any Plaintiff or other member of the class known what their children were purchasing and for how much, they would not have permitted the sales transaction from being consummated." Judge Davila held there was sufficient evidence to allow the case to move forward.

Apple changed its purchase protection policy in 2011, thereafter requiring the iTunes password to be entered every time a purchase is made.

To read the court judgment on defendant's motion to dismiss, click here**.**

Why it matters: While businesses are constantly seeking ways to make it easier for their customers to purchase their products and services, they must be careful not to create situations such as this where unintentional sales occur without the consent or knowledge of the account holder who will be charged. Businesses must ensure that the technology they use protects customers—and their children—from making purchases they never intended to make. Federal and state regulators are likely to be even more watchful when there is a potential for children to be involved, as that may raise the issue whether the business intended to target minors for easy sales.

back to top

City Ordinance Banning Outdoor Tobacco Advertisements Is Unconstitutional

A U.S. District Court ruled that an ordinance banning outdoor tobacco advertisements passed by the City of Worcester in Massachusetts was unconstitutional.

The court found that the ordinance violated the commercial free speech rights of tobacco companies.

In 2011, the City of Worcester amended its ordinance regulating tobacco products by adding the following prohibition: "No person shall

display any advertising that promotes or encourages the sale or use of cigarettes, blunt wrap or other tobacco products in any location where any such advertising can be viewed from any street or park shown on the official map of the city or from any property containing a public or private school or property containing an educational institution."

The tobacco industry, including R.J. Reynolds Tobacco Company and Philip Morris USA, filed a lawsuit against Worcester, arguing that the City's amendments violated their First Amendment rights to engage in commercial free speech. The City argued that the amendments were constitutional under the City's legitimate interests to protect minors from tobacco advertisements and products. The City also argued that the amendments protected the health of adults. The U.S. District Court disagreed with the City, and granted plaintiff's motion for summary judgment.

Specifically, the court found that "Worcester may not prohibit tobacco advertisements in order to prevent adults from making the choice to legally purchase tobacco products." The court further noted that "The broad sweep of the ordinance suggests that the defendants did not consider how to tailor the restrictions so as not unduly to burden the plaintiffs' free speech rights and the rights of adults to truthful information about tobacco products."

The City's ordinance also banned "advertising" of "blunt wraps," defined as "cigarette-like rolling paper that is thick and dark and usually made from tobacco leaves … that come in flavored varieties and are heavily marketed to the youth and often used as drug paraphernalia." The court found this ban unconstitutional as well, noting, "While an advertisement in Worcester specifically promoting sales of blunt wraps in Worcester promotes unlawful activity, an advertisement in Worcester promoting such sales in the nearby city of Fitchburg (where sales are apparently lawful) or an advertisement promoting such sales generally, without reference to location, is within the scope of First Amendment protection …. The City of Worcester may not bar the dissemination of information to Worcester residents about the characteristics of various brands of blunt wraps for sale outside of Worcester, so long as the advertising does not specifically propose a sale in Worcester or some other locale where such a transaction would be illegal."

The City could not prove that the amended ordinance was not more extensive than necessary to prevent minors from smoking. The City further failed to draft the new ordinance to determine which types of advertisements were most harmful to minors. While the City has a substantial government interest to prevent minors from smoking, any law to carry out such an interest must be narrowly tailored to protect minors and cannot infringe on the tobacco industry's right to engage in protected commercial free speech, such as marketing tobacco products to adults.

To read the U.S. District Court's Memorandum and Order, click here.

Why it matters: The ruling reminds us that there are limits on government regulations, especially when these regulations hamper a business's commercial free speech rights. Businesses should not be afraid to challenge regulations that go too far under the guise of public health or protecting minors. As the court noted, "the City has no

legitimate interest in prohibiting non-misleading advertising to adults to prevent them from making decisions of which the City disapproves."

back to top

Oracle Advised to Stop Making Certain Comparative Pricing Claims Against IBM

Following a challenge from IBM Corporation, the National Advertising Division of the Council of Better Business Bureaus (NAD) has recommended that Oracle stop making "certain comparative performance and pricing claims" about one of its computer systems and systems made by competitor IBM.

The ads at issue claimed Oracle's T4-4 server was 2x faster and 66% cheaper than IBM's comparable P795 server.

As part of its inquiry, NAD examined the following express and implied advertising claims regarding the SPARC SuperCluster T4-4 computer system:

- **Express claims:** Oracle's system "runs Oracle & Java twice as fast as IBM's fastest computer, [identified by Oracle as] the IBM P795 server," and Oracle's system costs $1.2 million compared to the P795 server costs $4.5 million.
- **Implied claims:** Oracle's computer system runs all Oracle and Java software products twice as fast as all of IBM's Power 795 server designs (including all TurboCore mode designs), and Oracle's computer system runs all Oracle and Java software products twice as fast as any IBM computer.

Given that Oracle and IBM both make "high-quality computer systems for businesses," the main issue before NAD was whether or not Oracle's express and implied claims "conveyed a truthful, accurate, and non-misleading message regarding the performance and price of Oracle Corporation's SPARC SuperCluster T4-4 computer systems compared to the featured IBM computer system."

Based on the evidence, NAD concluded that a reasonable interpretation of Oracle's "twice as fast" claim is that Oracle's computer system "runs all Oracle and Java applications twice as fast as any IBM computer configuration in the Power 795 line" – a claim that was not supported by [Oracle's] evidence and could not be cured by the disclosure at [its] Web site. Specifically, Oracle disclosed on its Web site: "Sources for Comparison of Systems: Systems cost based on server, software and comparable storage list prices (without discounts), as well as third party research. Performance comparison based on Oracle internal testing, together with publicly available information about IBM Power 795 TurboCore system with highest processor speed commercially available (4.25 GHz) as of Sept 28, 2011."

In its decision, NAD recommended that Oracle stop advertising its SPARC SuperCluster T4-4 as running "Oracle and Java twice as fast as IBM's fastest computer." In addition, to prevent any potential misunderstanding about the $4.5 million price tag for the IBM Power 795 system, NAD recommended that Oracle disclose in the "main body" of its advertisements that IBM's price includes "a separate storage unit." NAD further recommended that Oracle give consumers "the specific model and configuration of the IBM Power 795 [and] the

assumed prices for both units."

Oracle issued an Advertiser's Statement disagreeing with certain portions of NAD's findings. Nonetheless, Oracle noted that it "wishes to inform the NAD that the advertisement at issue in this proceeding has been discontinued and Oracle does not intend to disseminate it in that form in the future. Oracle supports the NAD and the self regulatory process, and will take the NAD's concerns into account should it disseminate the advertisement in the future."

To read NAD's decision, click here.

Why it matters: NAD's review of IBM's challenge against Oracle serves as a reminder for advertisers to carefully review their advertisements for implied and express claims. Advertisers should be extra careful to ensure the veracity of their statements in advertisements when making comparative reference and pricing claims regarding specific competitor products, especially when mentioning the competitor and its product in the advertisement.

back to top