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Advertising Law

In This Issue

Uniform Ads a Slam Dunk for NBA Teams

Hoping to score an estimated $100 million in annual revenue, team owners in the National Basketball Association voted to allow advertisements on uniforms in the 2013-14 season.

The two-by-two inch shoulder patch ads will mark the first time that one of the four major professional sports leagues in the United States has accepted uniform ads.

Team owners voted to accept the ads in late July; a formal vote by the NBA Board of Governors in September will confirm the decision.

Guidelines for the jersey ads will likely be released in the fall to give sponsors, teams and Adidas (which makes the NBA uniforms) enough time to finalize agreements. The ads, which will appear above the heart on players’ jerseys, will also appear on jerseys sold at retail.

“This is very much a loose projection, but our view is, on an aggregate basis league-wide, our 30 teams could generate a total of $100 million by selling that patch on the jersey, per season,” NBA Deputy Commissioner Adam Silver said at a press conference after the vote. “I think it’s fair to say that our teams were excited about the opportunity and think there is potentially a big opportunity in the marketplace to put [the patch] on the shoulder of our jerseys.”

Some fans expressed disapproval while industry insiders noted that jersey sponsorships will have to jive with league and arena corporate sponsors, complicating the process. For example, the Boston Celtics play at TD Garden, named for TD Bank. So a sponsorship deal with a competing bank would be an unlikely proposition for the team.

Why it matters: Teams will likely focus on the estimated $100 million in revenue rather than grumbling from fans. The NBA will be guided by the experience of the Women’s National Basketball Association, which struck individual teams deals as well as multi-team sponsorships in 2009.

back to top

FTC Asked to Investigate Gatorade "Flu Game" Ad

In a letter to the Federal Trade Commission requesting an investigation and a corrective advertising campaign, the Public Health Advocacy Institute called Pepsi's "Win from Within" television commercial and Web site deceptive, saying it could create an unreasonable risk of harm.

The commercial focuses on Michael Jordan's "Flu Game" in game 5 of the 1997 NBA Finals, when the basketball superstar played with a fever and flu-like symptoms. According to the PHAI, the Gatorade ad asserts that the sports drink was a key to his game-winning performance and that Jordan "was able to persist" because he had "the fuel to help him do it" – the fuel being Gatorade.

PHAI said in its letter that the ad encourages viewers – particularly teens – to engage in dangerous behavior and "openly promotes engaging in vigorous physical activity while suffering from a very high fever, in Jordan's case 103 degrees."

"It is a generally recognized safety principle that teens and even professional athletes suffering from a severe fever and flu-like symptoms should not engage in vigorous physical activity.… The Jordan ad conveys the message that one can improve his athletic performance when he has the flu or a high fever by drinking Gatorade. This assertion is not substantiated by reliable scientific evidence and shows a disregard for the health and safety of teens and athletes as they should not participate in sports when suffering from a fever or the flu," the group asserted in its letter.

The PHAI also questioned whether Gatorade actually provided the fuel to help Jordan persist. Despite footage of Jordan holding a Gatorade-branded cup filled with vibrant orange liquid, later images from the game show a clear liquid in Jordan's cup.

Additionally, the PHAI's letter targeted the sequencing of the ad, noting that actual game footage "reveals a different story" than was portrayed in the commercial. The television ad intersperses images of Jordan playing with shots of him covered in towels on the bench holding a Gatorade cup, "creating the distinct impression that the viewer is watching actual game footage of Mr. Jordan 'refueling' with Gatorade during the game in order to give him the ability to win." According to the letter, "In reality, this footage occurred when Mr. Jordan came out of the game for the final time. There were 6.2 seconds remaining on the game clock and he never re-entered the game."

The PHAI asks the FTC to take enforcement action because it believes that the ad contains deceptive product imagery and presents historical events in sequences that falsely enhance the role of Gatorade in Jordan's game-winning athletic performance. The PHAI requested that Pepsi be made to halt the ads and be required to undertake a corrective advertising campaign.

To read the PHAI's letter to the FTC, click here.

Why it matters: The FTC acknowledged that it received the letter but did not comment on whether it planned to initiate an investigation. Advertisers making health claims should take care to substantiate their claims as industry watchdog groups and consumers are keeping a close eye on such issues.

back to top

How Did Kirstie Alley Lose 100lbs? False Ad Suit Claims It Wasn't Diet Drug

Kirstie Alley is facing a putative class action suit as a spokesperson for the Organic Liaison weight loss program, which the plaintiff alleges is "nothing more than run-of-the-mill fiber and calcium supplements." Claims that the Organic Liaison products are "proven" to "designed to optimize" weight-loss results "quickly and easily," "reduce cravings," and "boost energy" are false and the use of "before" and "after" shots of Alley are deceptive, the plaintiff asserts.

In advertisements for the Organic Liaison products, Alley – who functions not just as celebrity spokesperson but also owner and/or board member of Organic Liaison LLC – claims to have lost 100 pounds while using the weight loss supplement program. But according to Marina Abramyan, who says she purchased the products in reliance upon the actress's statements, Alley really lost

her weight as a contestant on the reality television competition *Dancing With the Stars*. The television program tracked Alley's weight loss as a result of hours and hours of dancing every day for several months while on a restricted calorie diet, according to the complaint.

In addition, the plaintiff alleges that although the Organic Liaison products claim to be "the first USDA Certified Organic Weight Loss Product," the Department, in fact, did not certify the product as an effective weight loss program, but only as an "organic product."

Calling the program "nothing more than a healthy deception," Abramyan seeks an injunction as well as an unspecified amount of actual and punitive damages.

To read the complaint in *Abramyan v. Organic Liaison*, click here.

Why it matters: The suit makes two primary contentions: First, that the claims made by Alley and the manufacturer are false, misleading and lack any scientific substantiation. Second, that the defendants made material omissions in the ads by failing to disclose that because of Alley's participation on *DWTS* and intense exercise regime, her results while using the product are not typical. But in a statement to *Entertainment Tonight*, a representative for Organic Liaison called the allegations in the suit "patently false." "Ms. Alley participated in *DWTS* for only a short period of time during her approximately one and a half year participation in the Organic Liaison program; the vast majority of her weight loss had nothing to do with her participation in that show," the spokesperson said. "It is Ms. Alley's persistence over one and a half years on the Organic Liaison program, coupled with regular exercise, that lead to her dramatic weight loss over that time period; this is consistent with Organic Liaison's advertising and representations, none of which create false net impressions to the reasonable consumer."

back to top

California, Feds Up the Pressure on Privacy Issues

Federal lawmakers and the California Attorney General are focusing yet again on privacy-related issues.

California AG Kamala Harris announced the creation of a new unit focused on consumer privacy. The six-person Privacy Enforcement and Protection Unit "will focus on protecting consumer and individual privacy through civil prosecution of state and federal privacy laws," she said in a statement.

Noting that the California constitution "guarantees all people the inalienable right to privacy," Harris said the new unit will have a broad mission. "It will enforce laws regulating the collection, retention, disclosure, and destruction of private or sensitive information by individuals, organizations, and the government. This includes laws relating to cyber privacy, health privacy, financial privacy, identity theft, government records and data breaches."

The new unit reinforces Harris' focus on privacy issues after the settlement reached earlier this year with six major mobile app makers for alleged violations of California's privacy law, an agreement which Facebook recently joined.

In other privacy-related news, Reps. Ed Markey (D-Mass.), Joe Barton (R-Tex.), and six other members of the House of Representatives launched an investigation into the practices of nine national data brokers.

Sending letters to Epsilon, Equifax, Experian, Harte-Hanks, Intelius, FICO, Merkle, and Meredith Corp., the lawmakers expressed concern that by combining offline and online information the companies have "developed hidden dossiers on almost every U.S. consumer."

"This large scale aggregation of the personal information of hundreds of millions of American citizens raises a number of serious privacy concerns," the lawmakers wrote, particularly for children and teens. Further, the data brokers have also reportedly engaged in a ranking system of consumers akin to "redlining," the legislators said.

The letters request a list of each entity from which the companies have received data about consumers, the type of data received and pose specific queries about whether social media and mobile activity are used to collect data. The letters ask whether

consumers can obtain information about themselves, opt out of collection, or have their information deleted. Details about the storage of data and security measures are also part of the inquiry.

To read the press release about California's new privacy enforcement unit, click here.

To read the letters to the data brokers, click here.

Why it matters: Privacy remains a hot button issue for both state and federal lawmakers. California's AG Harris has called privacy one of her "top priorities" and the new unit will likely result in more enforcement actions in the state. As co-chairs of the Bipartisan Congressional Privacy Caucus, Reps. Markey and Barton have focused on a broad range of privacy issues, from concerns about mobile privacy to children's online privacy.

back to top

NAD: Gillette Should Discontinue Product Name, Descriptor

Gillette should discontinue the use of the term "MoistureRich" both as a product name and as a descriptor in isolation as it conveys the misleading message that the "Gillette Venus ProSkin MoistureRich" women's razor moisturizes while shaving, the National Advertising Division recently recommended.

Undisputed in the case was the fact that the Venus ProSkin MoistureRich razor does not moisturize during or after shaving. Rather, it features gel bars that contain moisturizers incorporated into the cartridge which obviate the need for shave cream.

Schick challenged Gillette's "MoistureRich" ads and product packaging, arguing that it explicitly and implicitly claims the razor moisturizes the skin as it shaves. The company conducted a consumer perception study which found that 45.3 percent of respondents played back a moisturization message after reviewing the Gillette product packaging.

Dismissing Gillette's arguments that the study was flawed, the NAD said it was both well-conducted and sufficiently reliable, adding that the 45.3 percent was a "significant proportion" of respondents, "considerably higher" than the threshold deemed sufficient.

Reviewing the totality of the Venus ProSkin's advertising communications, the NAD said it was "troubling" that the term "MoistureRich" was used "prominently without reference to the gel bars or to describe that the moisture obviates the need for shave cream or that its purpose is to protect the skin via lubrication for a closer shave. Although Gillette argued that the advertising clearly links 'MoistureRich' with the shave gel bars, NAD determined that this argument is inconsistent with the product packaging claims [which] clearly convey the unsupported message that the [razor] conveys a moisturization benefit during the shave process beyond mere lubrication."

"Context is everything," the NAD emphasized. "Not only the context in which words and claims appear in advertisements or on product packaging, but the context of an ever-changing marketplace as well." Although Gillette argued it had used the term "MoistureRich" since 1994, Schick subsequently introduced its Intuition Plus, a razor which lathers and provides moisturization, the NAD said. Gillette's prior use of the term did "not shield the advertiser from providing a reasonable basis for the claims conveyed by its current advertising," particularly in light of innovations in the industry.

The NAD said that Gillette could still use the "MoistureRich" term in context, i.e., referring to "MoistureRich Gel Bars" in body copy, but should be careful to avoid conveying the unsupported moisturization or hydration message.

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

Why it matters: While the NAD acknowledged the burden upon an advertiser when it recommends changes to a product name or descriptors, it cautioned advertisers that the self-regulatory body "may revisit and reconsider whether the meaning of words within an industry have changed over time or whether certain phrases may, over time, have become confusing – particularly where

product innovations have changed the marketplace."

back to top

Noted and Quoted . . . Manatt Attorneys Offer Insight on Increased Regulatory Risks for Data Brokers

On July 31, 2012, ***BNA Bloomberg's Social Media Law & Policy Report*** published commentary by Marc Roth and Chuck Washburn concerning the anticipated uptick in regulatory activity by the Federal Trade Commission and Consumer Financial Protection Bureau involving data brokers that collect consumer data through social media sites and sell this information to third parties. In a recent action by the FTC against Spokeo, the agency alleged that the company's collection of data for the purpose of marketing to human resources professionals as an employment screening tool brought Spokeo under the umbrella of a consumer reporting agency, and as such, Spokeo was required to ensure that its activities were in compliance with the Fair Credit Reporting Act (FCRA).

According to Marc and Chuck, this FTC action "serve[s] as a reminder that companies that collect and market data to third parties must be careful about making representations that could inadvertently trigger laws governing specific regulated industries." Moreover, the authors cautioned: "Companies must therefore be careful about how and to whom they market their products, lest they attract the attention of regulators charged with enforcing the FCRA."

Click here to read the full article.

back to top