Advertising Law manatt

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NAD: General Mills Can Support "Now Even Better" Claim

The National Advertising Division determined that General Mills can support the advertising claim "Now Even Better" as it is used on reformulated versions of Progresso Light Soups.

Competitor Campbell Soup Company challenged the claim, arguing that it was an unsubstantiated comparative superiority claim from which consumers could infer that General Mills was comparing its new light soup to a prior version of the same product or to a competitive soup brand, given the history of comparative advertising between the parties.

After General Mills reformulated 12 of its Progresso Light Soups – adding larger pieces of chicken and decreasing sodium levels, among other things – it added the "Now Even Better" claim to its labels. Campbell argued that the labels did not indicate what product the soups were "Now Even Better" than, and that consumers could reasonably infer that General Mills was comparing Progresso to other soup brands.

The NAD disagreed. "[T]he clear, plain meaning of the phrase 'Now Even Better' is an express reference to previous versions of Progresso Light Soups. The word 'now' invites consumers to make a temporal comparison between the current soup and its predecessor," the NAD said, adding that the message is reinforced by the fact that the soup cans do not mention competitors, either expressly or by implication. The NAD also noted that it was unlikely an advertiser would make a claim like "Now Even Better" when making a comparative claim against a competitor, as it would suggest that the competitor was at one point better than the advertiser – and that the competitor produces a good, quality product.

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

Why it matters: "A claim that a product is 'better' may be a comparative superiority claim or a monadic claim of product improvement depending on the context in which it appears," the NAD emphasized. The NAD also dismissed Campbell's argument that General Mills should be required to disclose the basis of improvement to the soup on the can labels, noting that nothing in the law requires advertisers to disclose the nature of a product improvement when it makes a "new and improved" claim.

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Plaintiff Claims Nutella is "The Next Best Thing to a Candy Bar"

The mother of a four-year-old child filed a federal class action lawsuit alleging that Nutella falsely marketed its hazelnut spread as healthy

for children, even though the product contains saturated fat and processed sugar.

The plaintiff claims she repeatedly bought Nutella for herself and her child because she "sought a healthy snack or breakfast alternative for her household." She relied upon a labeling statement that presented Nutella as "an example of a tasty yet balanced breakfast." The statement was combined with images of whole wheat bread, juice, and fresh fruits, according to the complaint.

Nutella also made "healthy meal" claims on television and on a Web site by portraying a mother feeding the spread to "happy, healthy children." The plaintiff claimed she was "shocked" to learn that Nutella was "the next best thing to a candy bar" and contained roughly 70 percent saturated fat and processed sugar.

Her complaint states that these ingredients could "create a substantial health risk, raise cholesterol levels, cause disease, damage the heart, and increase the risk and severity of type-2 diabetes."

Alleging violations of state advertising law, the suit seeks to certify a class of consumers who purchased the product dating back to January 2000. The suit requests monetary damages (including punitive damages), and makes a demand for a corrective advertising campaign and an order enjoining Nutella from making certain marketing claims.

To read the complaint in *Hohenberg v. Ferrero USA*, click here.

Why it matters: While Ferrero USA, the maker of Nutella, did not comment specifically about the lawsuit, a spokesperson told *The National Law Journal* that the company "stand[s] behind the quality and ingredients of Nutella hazelnut spread and the advertising of our product." The issue of health claims related to children is a hot topic; the First Lady's "Let's Move!" campaign geared toward reducing childhood obesity and the U.S. Department of Agriculture's "Innovations for Healthy Kids" campaign are at the forefront of this initiative.

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Suit Filed Over Tropicana Juice

A class action lawsuit was filed in Florida state court against Tropicana Products, claiming that promotions for the company's Trop50 Pomegranate Blueberry Juice Beverage are deceptive.

The suit alleges that Tropicana created a misleading label "with many elements not required by state or federal regulations" hoping to "tap into the enormous new market" of consumers interested in the antioxidant benefits of blueberries and pomegranates.

Instead, the juice is really "a mixture of cheap apple juice and grape juice concentrates," according to the complaint. In addition to Tropicana, the suit names a local grocery store, Publix Supermarkets, where named plaintiff Nicole Cruz purchased the product.

To support its claim that Tropicana's label was misleading, the suit references last year's deceptive advertising lawsuit by pomegranate juice maker Pom Wonderful against Welch Foods. Pom filed a federal lawsuit alleging that Welch's White Grape Pomegranate Juice deceived consumers about the amount of pomegranate juice in the product, which caused Pom to lose money.

After a week-long trial in September 2010, a California jury agreed with both parties: while it found that Welch did in fact deceive consumers, jurors said that Pom did not lose sales of its own drink as a result. The Tropicana suit also claims that other companies make products that contain primarily pomegranate and/or blueberry juice, which added to the consumer confusion about the Trop50 juice product. In addition to false advertising, the suit – which seeks less than $5 million damages for a statewide class of plaintiffs who purchased the product over the last four years – alleges violation of Florida's unfair competition law and breach of warranty.

To read the complaint in *Cruz v. Tropicana,* click here.

Why it matters: Juice manufacturers have recently been the target of a number of false advertising suits. A class action was filed against Gerber Products over claims made about its fruit juice (which the suit alleged was

primarily corn syrup and sugar), and Welch is facing a class action suit over deceptive marketing of its white grape and pomegranate juice blend.

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Taco Bell Responds to Lawsuit: Thanks

After a California woman filed a highly-publicized class action against Taco Bell late last month claiming that the fast food company misleads consumers about the make-up of its meat, the company has taken the offensive.

Declaring "Thank you for suing us," Taco Bell took out full-page ads in national and local newspapers and online.

The suit, filed in California federal court, alleges that Taco Bell misrepresented its meat fillings by calling them "seasoned ground beef" or "seasoned beef" when in fact a "substantial" amount of the filling is actually volume-increasing extenders and other non-meat substances, such as water, isolated oat product, wheat oats, soy lecithin, maltodrextrin, anti-dusting agent, autolyzed yeast extract, modified corn starch and sodium phosphate.

Alleging violations of truth in advertising, consumer protection, and unfair competition laws, the suit seeks corrective advertising and not damages. Taco Bell immediately responded by vowing to vigorously defend its meat, calling the suit "bogus" and "filled with completely inaccurate facts."

The company then launched a public relations campaign that included a video from company president Greg Creed discussing the controversy, and full-page advertisements in major newspapers like *The New York Times*, *The Wall Street Journal*, and *USA Today*, proclaiming: "Thanks for suing us. Here's the truth about our seasoned beef."

The ads then state that Taco Bell's beef recipe is 88 percent beef and 12 percent seasonings and spices (like salt, chili pepper, and onion powder), as well as water and other ingredients. "Plain ground beef tastes boring. The only reason we add anything to our beef is to give the meat flavor and

quality. Otherwise we'd end up with nothing more than the bland flavor of ground beef, and that doesn't make for great-tasting tacos," the ad states.

To read the complaint in *Obney v. Taco Bell Corporation*, click here.

To view the Taco Bell ad, click here.

To watch Taco Bell President Greg Creed discuss the suit and the content of the company's beef, click here.

Why it matters: The complaint argued that Taco Bell should more accurately label its meat "taco meat filling," a term found in the U.S. Department of Agriculture's Policy Book. The Policy Book provides guidance to help manufacturers prepare product labels and requires food labeled as "taco filling" to contain "at least 40 percent fresh meat." Internally, Taco Bell labels its meat containers shipped to restaurants as "taco meat filling," according to the suit. Concurrent with the ad campaign, Taco Bell released an updated statement about the suit, saying the lawyers who filed it "got their facts wrong. We take this attack on our quality very seriously and plan to take legal action against them for making false statements about our products. There is no basis in fact or reality for this suit and we will vigorously defend the quality of our products from frivolous and misleading claims such as this." The suit faces an uphill battle, as neither the USDA nor the Federal Trade Commission have addressed how to advertise "meat" or "beef."

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California Supreme Court Rules on Standing for False Ad Suits

Interpreting a ballot initiative intended to limit false advertising suits, the California Supreme Court held that consumers who buy a product based on misleading advertising can sue the manufacturer simply by alleging that they would not have bought the mislabeled product.

In *Kwikset Corp. v. Benson*, a consumer sued a California-based company that made locksets labeled "Made in U.S.A." even though many of its components were made in Taiwan and assembled in Mexico.

After a bench trial, a judge ruled for the plaintiff. But while an appeal was pending, California citizens passed Proposition 64, a ballot initiative which limited standing in false advertising suits to plaintiffs who have "lost money or property."

Kwikset argued that the ballot measure limited suits to plaintiffs who suffered an actual injury and lost money as a result of the allegedly false advertising. The court disagreed, saying that merely buying a product as a result of a false claim was enough to support a suit.

"[P]laintiffs who can truthfully allege they were deceived by a product's label into spending money to purchase the product, and would not have purchased it otherwise, have 'lost money or property' within the meaning of Proposition 64 and have standing to sue," the court held.

Recognizing that the intent of Proposition 64 was to curtail the number of false advertising suits and limit standing, the court said voters "plainly preserved standing for those who *had* had business dealings with a defendant."

"Simply stated: labels matter. The marketing industry is based on the premise that labels matter, that consumers will choose one product over another similar product based on its label and various tangible and intangible qualities they may come to associate with a particular source," the court said.

Processes and places of origin matter to some consumers, the court said, citing examples of kosher or halal products, conflict-free diamonds, organic foods, and Rolex watches.

"For each consumer who relies on the truth and accuracy of a label and is deceived by misrepresentations into making a purchase, the economic harm is the same: the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to pay if the product had been labeled accurately. This economic harm – the loss of real dollars

from a consumer's pocket – is the same whether or not a court might objectively view the products as functionally equivalent."

To read the decision in *Kwikset Corp. v. Superior Court of Orange County*, click here.

Why it matters: The dissent took issue with the court's interpretation of Proposition 64, arguing that the plaintiff did not suffer "an actual measurable *loss* in the transaction." While the decision is a blow to tort reform, defendants in a California false advertising suit can take some solace in the majority opinion's discussion of remedies. The court said the standard for restitution is "wholly distinct" from the standing issue, and that injunctions are "the primary form of relief available" under the law to protect consumers.

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Credit Report Resellers Settle with FTC

The Federal Trade Commission reached a proposed settlement with three credit report resellers over what the agency said were lax security practices, resulting in hackers accessing the credit reports of more than 1,800 people.

Under the terms of the proposed settlement, all three companies must create a comprehensive security program and undergo independent audits every other year for 20 years. SettlementOne Credit Corporation (and its parent company, Sackett National Holdings, Inc.), ACRAnet Inc., and Fajilan and Associates Inc. (and its owner, Robert Fajilan) were all charged by the FTC with violating the Fair Credit Reporting Act, the FTC Act, and the Gramm-Leach-Bliley Safeguards Rule, the FTC said.
The FTC alleged the companies purchased credit reports from Equifax, Experian, and TransUnion and combined them into "trimerge reports" that they then sold to parties interested in determining a consumer's eligibility for credit (like mortgage brokers).

But due to a lack of information about security policies and procedures – like failing to require that end-user clients submit documentation to demonstrate

their systems were virus-free or otherwise properly protected – the companies allowed clients to access reports without even basic security measures, according to the complaint.

According to the FTC, those individuals lacking firewalls or updated antivirus software made it possible for hackers to access more than 1,800 credit reports without authorization between October 2006 and June 2008, and even after learning of the security breaches, the three companies did not make reasonable efforts to improve their security.

Under the proposed settlement, the resellers agreed to establish comprehensive information security programs intended to protect consumers' personal information and to establish procedures to ensure that credit reports are given only to those with a "permissible purpose," pursuant to the FCRA. The companies would also be subject to independent audits every other year for 20 years, and must designate an employee to administer the security program. Public comment on the proposed settlement will be open for 30 days, ending March 7, 2011.

To read the complaint against SettlementOne, click here.

To read the proposed settlement, click here.

To read Commissioner Brill's statement, click here.

Why it matters: The FTC said this was the agency's first action against credit report resellers for data security failures, and part of the agency's ongoing campaign to protect consumers' personal information. In a statement accompanying the Commission's unanimous vote to accept the proposed settlement agreement, Commissioner Julie Brill (joined by Chairman Jon Leibowitz and Commissioners J. Thomas Rosch and Edith Ramirez) said that "in the future we will call for imposition of civil penalties against resellers of consumer reports who do not take adequate measures to fulfill their obligations to protect information contained in consumer reports, as required by the Fair Credit Reporting Act. . . . Looking forward, the actions we announce today should put resellers – indeed, all of those in the chain of handling consumer data – on notice of the seriousness with which we view their legal obligations to proactively protect consumers' data."

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California Counties Settle Over *Hoodia* Dietary Supplements

Ten counties in California settled with Irwin Naturals, Inc., a dietary supplement distributor, for $2.65 million over charges of unfair competition and false advertising. District attorneys in these counties alleged testing revealed that the company's *Hoodia* products – like the Dual Action Cleanse, Fast Action *Hoodia* Diet, and the 10-Day *Hoodia* Diet – didn't actually contain any of the *Hoodia gordonii* herb, contrary to the product labels, and they sought an injunction against the company for false advertising and misbranding, as well as violation of Proposition 65.

The ballot measure requires companies to include a warning label on products that contain more than 0.5 micrograms of lead in a daily serving. Tests revealed that some of the company's products (the Green Tea Fat Metabolizer, System Six, and Green Tea Fat Meltdown) contained more than 0.5 micrograms of lead per daily dose, 10 times the allowed daily level of lead, according to the complaint, while the Green Tea Fat Burner product tested at 14 times the limit.

California State Judge David McEachen approved the settlement. Los Angeles-based Irwin Naturals agreed to pay a total of $2.65 million: $1.95 million in civil penalties, $600,000 in costs, and up to $100,000 in restitution to California consumers. In addition, the company agreed to accurately market and sell its products and include appropriate lead warnings if necessary.

In a statement, a company spokesperson said Irwin Naturals stands by its products: "This settlement acknowledges that our products are safe and that we are in compliance with California laws."

According to the statement, the company did not agree that it intentionally mislabeled or falsely advertised its products, and noted that it could not

confirm the DA's testing of the *Hoodia* products "because no validated test method exists for identifying *Hoodia* in the softgel product form" used by the company. "The company relied instead on the industry standard method of confirming the input of *Hoodia*, and all manufacturing records confirmed that *Hoodia* had been put into the products."

To read the Orange County District Attorney's press release announcing the settlement, click here.

Why it matters: The Orange County District Attorney's office said the settlement was the largest multijurisdictional settlement in the state involving a dietary supplement manufacturer. Dietary supplement manufacturers should be cognizant of state enforcement actions, in addition to increased scrutiny from the Federal Trade Commission and the Food and Drug Administration.

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FTC Settles with "Scareware" Marketers

The Federal Trade Commission settled with two individuals who allegedly used deceptive ads to trick consumers into thinking their computers were infected with malicious software and then sold them Winfixer, Drive Cleaner, and Antivirus XP products to fix their nonexistent problem.

The "scareware" defendants agreed to pay more than $8 million to reimburse consumers and are barred from future misrepresentations.

In its complaint, the FTC alleged that the defendants used Internet advertisements to scam consumers. The defendants informed consumers on networks and on popular Web sites that a "system scan" had discovered dangerous programs or objectionable files on their computer, such as viruses, spyware, or illegal pornography.

The scan ads also encouraged consumers to buy the defendants' software to clean their computers for $40 to $60, and more than one million consumers purchased the defendants' products.

In the settlement, Marc D'Souza and his father, Maurice D'Souza, agreed to pay the agency $8.2 million to reimburse consumers. Marc D'Souza, who the FTC alleged was "one of the key defendants behind the scam" also agreed to be banned from any involvement with software that interferes with consumers' computers and making deceptive claims regarding computer security software.

To read the press release regarding *FTC v. Innovative Marketing*, click here.

To read the court's final order against the D'Souzas, click here.

Why it matters: The FTC noted that the case was part of its crackdown on Internet scams. Another individual and one other company previously settled with the agency over similar claims, and the FTC obtained default judgments against three other individual defendants. Litigation against one additional individual is pending.

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Judge Halts Scam Immigration Operation

A U.S. District Court judge granted a motion from the Federal Trade Commission seeking to shut down Immigration Center and Immigration Forms and Publications, Inc., a company that allegedly posed as an official arm of the U.S. government and convinced consumers to pay fees ranging from $200 to $2,500 to cover processing charges for immigration services.

In an attempt to imitate the work of the U.S. Citizenship and Immigration Service, an agency which helps immigrants with paperwork and other counseling, the two companies and various officers of the business created Web sites with URLs like www.uscis-ins.us and www.immigrationhelpline.org

and used various symbols like American eagles and the United States flag to imply they were government Web sites. The sites also included advice and immigration application forms and directed consumers to call a number where a person answered "Immigration Center."

Callers then spoke with persons who identified themselves as "immigration officers" or "caseworkers," and who offered advice and helped with forms. In reality they were merely telemarketers who were not authorized to provide such services, the FTC alleged.

As callers were charged the same fee by the defendants as the government charged for submitting application forms, the applicants believed that the fees would cover all their costs to submit their application forms. Instead, some applicants were charged twice, once by the company and again by the government, while others paid for help with an application that was never processed by the U.S. government for failure to include the necessary filing fee.

Nevada District Court Judge Edward C. Reed Jr. granted the FTC's motion to freeze the company's assets and appointed a receiver. The agency is seeking a permanent injunction and restitution for those who purchased its services.

To read the complaint in *FTC v. Immigration Center*, click here.

To read the court's order granting a halt to operations and an asset freeze, click here.

Why it matters: In addition to alleging the defendants misrepresented that the fees paid would cover all of their costs to submit immigration documents, the FTC charged the defendants with falsely claiming they were authorized to provide immigration and naturalization services and that they were affiliated with the U.S. government.

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