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ADVERTISING LAW @MANATT

NEWSLETTER OF THE ADVERTISING, MARKETING & MEDIA PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

IN THIS ISSUE

FTC to Kellogg: Pay Closer Attention to Ad Claims

Kellogg Company has settled charges by the Federal Trade Commission over an ad claim that cereal brand Frosted Mini-Wheats is "clinically shown to improve kids' attentiveness by nearly 20%."

The FTC said the claim, which was made in a nationwide multimedia marketing campaign, was false and misleading because the study referenced in the ads produced results that differed from what was claimed. In fact, the FTC said, only about half of the children in the study who breakfasted on Frosted Mini-Wheats showed any enhanced attentiveness, and only about one in nine (11%) improved by 20% or more.

According to the packaging, Frosted Mini-Wheats improves attentiveness because it helps "keep kids full so that they can stay focused throughout the morning." As proof, Kellogg relied on a study comparing kids who ate Frosted Mini-Wheats for breakfast to kids who had no breakfast. The study allegedly found that the Frosted Mini-Wheats group "had up to 18% better attentiveness three hours after breakfast" than the control group.

In a statement, Kellogg said it "has a long history of responsible advertising. We stand behind the validity of our clinical study, yet

UPCOMING EVENTS

May 13-15, 2009
American Intellectual Property Law Association (AIPLA) Spring Meeting

Speaker: Linda Goldstein

San Diego, CA
for more information

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May 19, 2009
International Trademark Association Annual Meeting

have adjusted our communication to incorporate FTC's guidance."

According to the FTC press release, Kellogg does not have to pay any fines under the settlement. However, the company is prohibited from making deceptive or misleading cognitive health claims for its breakfast foods and snack foods, and from misrepresenting any tests or studies in the future. Kellogg must also keep records to enable compliance monitoring by the agency.

Why it Matters: The FTC's action against Kellogg appears to be a shot across the bow aimed at kid food and other marketers. In its statement announcing the settlement, FTC Chairman Jon Leibowitz warned marketers: "In the future, the Commission will certainly be more attentive to national advertisers."

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FTC Names Consumer Advocate, Others to Senior Staff Spots

Federal Trade Commission Chairman Jon Leibowitz has appointed David C. Vladeck, a Georgetown University law professor and former director of Public Citizen Litigation Group, to lead the agency's Bureau of Consumer Protection.

At the same time, Chairman Leibowitz filled five other senior staff positions, including head of the Bureau of Competition. That post will be filled by Richard A. Feinstein, currently an antitrust partner at Boies, Schiller & Flexner.

Vladeck's appointment signals a stronger pro-consumer focus at the agency. At Georgetown, Vladeck taught federal courts, government processes, civil procedure, and First Amendment litigation. He also co-directed the law school's Institute for Public Representation, a clinical program for civil rights, civil liberties, First Amendment, open government, and regulatory litigation. Prior to entering academia, Vladeck worked for close to 30 years with Public Citizen Litigation Group, including 10 years as the consumer group's director. He has argued several First Amendment and civil rights cases before the U.S. Supreme Court, and more than 60 cases before the federal courts of appeal and state courts of last resort. His mother, Judith Vladeck, was a prominent labor lawyer and advocate for women's rights until her

Topic:
"Recent Developments in Right of Publicity Law"

Speaker: Jeff Edelstein

Washington State Convention & Trade Center
Seattle, WA
for more information

...

May 19-21, 2009
Response Expo Panel

Speaker: Linda Goldstein

San Diego, CA
for more information

...

June 4-6, 2009
American Advertising Federation National Conference 2009

Speaker: Jeff Edelstein

Crystal Gateway Marriott
Arlington, VA
for more information

...

June 17-19, 2009
Personal Care Products Council

Speaker: Linda Goldstein

Vancouver, British Columbia
for more information

...

June 18-19
ABA Antitrust Section's Consumer

death in 2007.

Richard Feinstein, who will lead the Bureau of Competition, is rejoining the agency where he had previously served as an assistant director in the Bureau of Competition's Health Care Services and Products Division. He was a partner in the Washington office of Boies, Schiller. Prior to those jobs, Feinstein practiced law at the former McKenna & Cuneo and the Antitrust Division of the U.S. Department of Justice.

Other appointments included Joseph Farrell as director of the Bureau of Economics. Farrell was an economics professor at the University of California, Berkeley, where he chaired the Competition Policy Center. He has served as deputy assistant attorney general and chief economist for the Antitrust Division of the U.S. Department of Justice, and as chief economist for the Federal Communications Commission.

Susan S. DeSanti was named director of policy planning. She will rejoin the agency where she previously served in various positions over a 15-year span, including director of policy planning, deputy general counsel for policy studies, senior attorney adviser to Chairman Robert Pitofsky, and attorney adviser to Commissioner Dennis Yao. Most recently, DeSanti was an antitrust lawyer at Sonnenschein Nath & Rosenthal.

Jeanne Bumpus was reappointed director of the Office of Congressional Relations, a position she has held since June 2006. Prior to that post, Bumpus was a principal adviser to Senator John McCain, R-Arizona, and staff director and chief counsel for the U.S. Senate Committee on Commerce, Science, and Transportation.

Joni Lupovitz was appointed chief of staff to the chairman. Lupovitz joined the FTC's Bureau of Consumer Protection's Division of Enforcement in 1999. Since 2005, she has served as an attorney adviser in the Office of Commissioner (now Chairman) Leibowitz, focusing on consumer protection matters.

Why it Matters: President Obama's appointment of David Vladeck as the head of the FTC's Bureau of Consumer Protection, coupled with the appointment of Jon Leibowitz as FTC chairman, strongly suggests that the agency will be more focused on consumer protection than it was under the Bush Administration.

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Burger King's SpongeBob Promo Draws

Protection Conference

Topic:
Use, Misuse, and Disregard of Evidence of Actual Confusion in Federal and State Regulatory Proceedings

Speaker: Christopher Cole

Georgetown University Law Center
Washington, D.C.
for more information

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June 25-26, 2009
Food and Drug Law Institute
Introduction to Drug
Law and Regulation:
A Program on Understanding How the Government Regulates the Drug Industry

Speaker: Ivan Wasserman

for more information

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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 Internet-driven promotional

Criticism

A promotion by fast-food chain Burger King for a kid's value meal featuring Nickelodeon's cartoon character SpongeBob SquarePants is drawing the ire of children's advocate Campaign for a Commercial-Free Childhood.

Burger King's offer requires that consumers purchase an adult value meal at the same time as the 99-cent B.K. Kids Meal, so the promotion takes an adult approach. It includes a TV spot featuring the irreverent Burger King character, who typically appears in adult-oriented Burger King ads, and a version of the song "Baby Got Back" by rapper Sir Mix-A-Lot. The song includes the phrases "square butts" and "booty is booty." Dancing women with SpongeBob-like square-shaped rear ends wiggle their rears. A longer version of the spot is available on YouTube.

The Campaign for a Commercial-Free Childhood criticized the ad campaign as "highly sexualized." In a statement, Director Susan Linn said: "It's bad enough when companies use a beloved media character like SpongeBob to promote junk food to children, but it's utterly reprehensible when the character simultaneously promotes objectified, sexualized images of women." Claiming that her group has received more than 2,600 complaints from members, Linn is urging Burger King and Nickelodeon to pull the campaign.

In a statement, the Burger King Corporation said the campaign was aimed solely at adults and, like all of its adult ad campaigns, "airs only during adult shows targeting adult audiences." A "separate and dedicated SpongeBob advertising campaign for kids … is running simultaneously on kid-targeted programming," the company stated.

In a separate statement, a Nickelodeon spokesperson said: "The Burger King ad is intended to be an adult-targeted and humorous take on the SpongeBob character's iconic 'square' pants set to a famous pop song from the '90s." The "SpongeBob SquarePants" series has "a monthly adult viewership of 45 million people above the age of 18, and the intention was to offer a funny and playful take on the character for that audience," the company stated.

Why it Matters: For now, neither Burger King nor Nickelodeon is backing off from their position that the ad campaign is appropriate for the adult audience at which it is aimed. However, the Campaign for a Commercial-Free Childhood has successfully pressured advertisers to pull ads in the past and, depending on how it plays out, may succeed in its goals in the present case as

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Coke Pushes Pay-for-Performance Approach

Coca-Cola Company is urging fellow advertisers to adopt a "value-based" approach similar to one it is rolling out that ties compensation to ad agency performance.

The company unveiled its plans at an April 20 conference of the Association of National Advertisers. If it successfully convinces others to follow its lead, ad agencies will no longer be able to count on booking profits before they deliver their work. "We want our agencies to earn their profitability, but it's not guaranteed," Sarah Armstrong said at the conference. "[T]hey have to earn it through performance." Armstrong is Coke's director of worldwide media and communication operations and the motivating force behind the company's new approach.

Coke started rolling out its pay-for-performance model last year, and plans to add another 35 accounts this year. By 2011, Coke expects to use the model for all of its relationships with advertising and media agencies.

Agencies typically define the value of any given assignment based on the number of people and amount of time needed to complete it. In contrast, Coke's new model values projects based on factors including strategic importance, talent required, and the agency's unique qualifications. Once the project's value is established, agency performance and business results determine what, if anything, the agency will get paid in addition to its costs. If all targets are met, the agency could earn up to 30% on a project, but if all targets are missed, the agency will not earn any profit at all.

Although the new approach comes in the midst of a recession in which ad budgets—and fees—are sharply down, Armstrong said cost savings were not the main motivating factor. She declined to reveal whether Coke saved any money in the five test markets—Australia, China, Germany, the U.K., and the Philippines—in which it tested the new model last year.

Why it Matters: Value-based compensation models have been around for at least ten years, but only a handful of marketers have tried them. For instance, Procter & Gamble uses a pay-for-performance system for about a dozen of its brands. Coke's move, however, may be a harbinger of things to come, especially in a recessionary economy where marketers are looking to save money wherever they can.

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Supreme Court Upholds FCC's Fleeting Expletive Rule

The U.S. Supreme Court has upheld a policy by the Federal Communications Commission that subjects public broadcasters to punishment for instances of isolated, unscripted vulgarities on live programs.

The ruling focused on whether the agency had adequately explained its reversal of a long-standing policy that excused "fleeting expletives" from fines. "The commission could reasonably conclude," Justice Antonin Scalia wrote for the 5-4 majority, "that the pervasiveness of foul language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children."

The ruling, which was grounded in administrative law, did not address the First Amendment issue. Writing that the question "will be determined soon enough, perhaps in this very case," Justice Scalia suggested the Court could approach the constitutional issue differently. Justice Clarence Thomas, who was in the majority, wrote in a concurrence that he was "open to reconsideration" of two cases that gave television broadcasters far less First Amendment protection than books, newspapers, cable programs, and Web sites have. Some dissenting justices also hinted that they would be receptive to a First Amendment challenge. Writing that "there is no way to hide the long shadow the First Amendment casts over what the commission has done," Justice Ruth Bader Ginsberg said, "Today's decision does nothing to diminish that shadow."

In its last major decision on broadcast indecency, *FCC v. Pacifica Foundation* in 1978, the Supreme Court upheld the agency's finding that George Carlin's classic "seven dirty words" routine, with its deliberate, repetitive, and creative use of vulgarities, was indecent. But the Court did not rule on whether the use of "an occasional expletive" was constitutionally protected.

The current case, *FCC v. Fox Television Stations*, arose from celebrity appearances on the Billboard Music Awards: one, in particular, by Nicole Richie, who in 2003 described in vulgar terms the difficulties in cleaning cow manure off a Prada purse.

In a policy reversal, the commission ruled in 2006 that both broadcasts were indecent. The FCC said it did not matter that some of the offensive words did not refer directly to sexual or excretory functions, or that the cursing was isolated and apparently impromptu. Although it did not punish the broadcasters, the FCC suggested it would consider fining such offenses in the future.

The Court of Appeals for the Second Circuit ruled against the FCC in 2007, finding its stated reasons for the policy shift to be inadequate. In reversing the lower court, Justice Scalia wrote, "It was certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words, requiring repetitive use to render only the latter indecent."

In dissent, Justice John Paul Stevens noted that not every use of a swear word meant the same thing, writing, "As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent." At the same time, Justice Stevens wrote, "It is ironic, to say the least, that while the FCC patrols the airwaves for words that have a tenuous relationship with sex or excrement, commercials broadcast during prime-time hours frequently ask viewers whether they are battling erectile dysfunction or are having trouble going to the bathroom."

The decision was split along conservative-liberal lines. Justice Scalia's majority opinion was joined by Chief Justice John G. Roberts and Justices Thomas and Samuel A. Alito Jr. and, for the most part, by Justice Anthony M. Kennedy. Justices Stevens, Ginsburg, and David H. Souter joined Justice Breyer's dissent.

Why it Matters: The Supreme Court's decision reflects the difficulties in trying to ascertain the legal status of vulgarities, which are, to a large degree, arbitrarily labeled as such. It will be interesting to see if media and/or First Amendment groups take the Court up on its invitation to subject the "fleeting expletives" rule to a constitutional challenge. The Court has created a potentially dangerous precedent for such groups. However, the Obama FCC will probably be less inclined to continue the agency's campaign against broadcast indecencies, and may even restore the safe harbor for "fleeting expletives," obviating the need for an immediate Court challenge.

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FTC Pushes Back "Red Flags Rule" Enforcement

The Federal Trade Commission is again pushing back the enforcement of the new "Red Flags Rule" until August 1, 2009. The move is aimed at giving covered entities additional time to develop and implement written identity theft prevention programs.

Originally, the rule was supposed to take effect on November 1, 2008, but last year the FTC moved the deadline to May 1, 2009. The agency promulgated the rule according to its mandate under the Fair and Accurate Credit Transactions Act. Critics of FACTA argue that its coverage is far too broad, including many low-risk entities, such as healthcare providers and universities.

In the agency's announcement of the delay, FTC Chairman Jon Leibowitz strongly suggested that Congress consider amending the law to narrow the definition. "Given the ongoing debate about whether Congress wrote this provision too broadly, delaying enforcement of the Red Flags Rule will allow industries and associations to share guidance with their members, provide low-risk entities an opportunity to use the template in developing their programs, and give Congress time to consider the issue further," Leibowitz said.

FACTA directed the FTC and other financial regulatory agencies to issue rules requiring "creditors" and "financial institutions" with covered accounts to design and put programs in place to identify, detect, and respond to patterns, practices, or specific activities that could indicate identity theft. This is not a heavy burden for many traditional financial institutions, which have had such programs in place for years.

However, FACTA's definition of "creditor" applies to any entity that regularly extends or renews credit—or arranges for others to do so—as well as all entities that regularly permit deferred payments for goods or services. Thus, it includes anyone who handles loans or provides accounts that can be accessed, including municipal utilities, hospitals, educational institutions, and other businesses outside the financial sector.

Why it Matters: Identity theft is a real problem, affecting thousands of victims a year. Everyone agrees that institutions handling sensitive financial information should take steps to prevent that data from being stolen. However, as it now stands, the Red Flag Rule could create unnecessary and expensive administrative burdens for a wide range of entities that are outside the financial sector and for which the risk of identity theft is low. The further delay indicates that the FTC recognizes the problems the rule generates for such entities, and may put pressure on Congress to act.

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