Advertising Law

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Manatt Partners Christopher Cole and Edward Glynn Invited to Speak at ABA Section of Antitrust Law Spring Meeting

On March 28-30, 2012, the American Bar Association Section of Antitrust Law will host its 60th annual spring meeting which will convene leading practitioners, government officials and thought leaders to highlight recent legal and regulatory developments in the areas of antitrust and consumer protection.

Christopher Cole will moderate a session titled "Pot to Frying Pan—Settlement Agreements as Antitrust Violations" in which he and other panelists—including The Honorable Edith Ramirez (Commissioner, Federal Trade Commission)—will focus on important considerations for marketers in settling competition and comparative advertising cases.

Edward Glynn has been asked to chair a panel on "The FTC's Use of Federal Court for Consumer Remedies" that will examine how FTC enforcement activity has changed since the landmark *Singer* decision. As the FTC has increasingly shifted its enforcement efforts away from the use of administrative actions to stop violations, the speakers—including Heather Hippsley (Assistant Director, Division of Advertising Practices, FTC) and Rebecca Tushnet (Georgetown University Law Center)—will also provide insight as to whether there is still a role for administrative proceedings.

The conference will be held at the JW Marriott Hotel in Washington, D.C. For more information or to register for this event, click here.

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Battle Over "Coach" Needs a Ref

In a trademark dispute between handbag manufacturer Coach and Triumph Learning, an educational materials publisher, the Federal Circuit found that Coach's brand was not diluted by the publisher's use of "Coach" marks for educational materials.

The decision affirmed a ruling from the Trademark Trial and Appeal Board dismissing Coach's opposition to Triumph's trademark applications. Coach argued that Triumph's use of the mark was merely descriptive for educational materials and test preparation and,

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Practice Area Links

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Upcoming Events

March 19–20, 2012
ACI's Legal & Regulatory Summit on Food & Beverage Marketing & Advertising
Topic: *"From Weight Loss to Healthy Eating*—How to Prevent Health Claim Nightmares: Practical Guidance for Structuring Claims that Will Withstand Government Scrutiny and Private Litigation*"*
Speaker: Linda Goldstein
Washington, DC
For more information

March 28–30, 2012
60th ABA Section of Antitrust Law Spring Meeting
Topic/Speaker: "Pot to Frying Pan—Settlement Agreements as Antitrust Violations," Chris Cole
Topic/Speaker: "The FTC's Use of Federal Court for Consumer Remedies," Ed Glynn
Washington, DC
For more information

May 4, 2012
New York City Bar Association's Sweepstakes, Promotions, & Marketing Laws: Comprehension & Compliance Seminar
Topic: "Mobile Marketing—Certainties & Uncertainties"
Speaker: Marc Roth
New York, NY
For more information

May 5–9, 2012
INTA's 134th Annual Meeting
Topic: "Social Media—An Ever Changing, Challenging and Competitive World: How to Provide Legal and Business Advice to Clients"
Speaker: Linda Goldstein
Washington, DC
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

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therefore, not entitled to protection. Coach also argued that consumers would be confused by Triumph's use of the mark.

The Federal Circuit disagreed and said that the marks had different meanings and "create distinct commercial impressions. This is particularly true given that the word 'coach' is a common English word that has many different definitions in different contexts. . . . Triumph's Coach mark, when applied to educational materials, brings to mind someone who instructs students, while Coach's mark, when used in connection with luxury leather goods. . . . brings to mind traveling by carriage."

These distinct commercial impressions outweigh the similarities in sound and appearance of the marks, especially because the parties' goods are unrelated, the court said.

Acknowledging some overlap in the classes of purchasers for the parties' products, the court said it was unlikely that "customers would associate Coach's brand products with educational materials used to prepare students for standardized tests."

While the court found that the Coach mark had acquired fame—noting factors like the $30 million to $60 million a year spent on advertising and the company's use of the mark since 1961—fame alone is insufficient to establish likelihood of confusion.

The court declined to declare that Coach's marks had achieved fame for the purposes of a trademark dilution analysis, and fell short of showing widespread recognition of its mark by the general population.

Accordingly, the Circuit court held that the lower court incorrectly determined that Triumph's marks had acquired secondary meaning in the marketplace and it remanded the case for further proceedings on that issue.

In sum, the Court, in balancing all of the relevant factors, said they weighed heavily in favor of Triumph.

To read the court's opinion in *Coach Services, Inc. v. Triumph Learning*, click here.

Why it matters: The decision was a split ruling for the parties. While the court affirmed that Coach's brand was not diluted by Triumph's use of the Coach mark, it also put Triumph's trademark registration in jeopardy by remanding the case. The Trademark Trial and Appeal Board must now reevaluate the evidence—in particular, all predecision third-party use of the term "coach"—to determine if Triumph's mark has acquired secondary meaning in the minds of the public.

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The FTC's Top 10 . . . Complaints, That Is

David Letterman didn't appear for the announcement, but the Federal Trade Commission released its annual list of the Top 10 Consumer Complaints for 2011. For the 12th year in a row, identity theft topped the list.

Of the 1.8 million complaints filed with the agency last year, 15 percent, or 279,156, were identity theft-related. The identity theft complaints most commonly related to government documents or bank fraud, followed by credit card fraud and phone and utilities fraud. Florida had the highest per capita rate of reported identity theft complaints, followed by Georgia and California.

Debt-collection complaints came in second with 10 percent of the overall complaints, followed by complaints related to prizes, sweepstakes, and lotteries; shop-at-home and catalog sales; and banks and lenders.

Finishing off the Top 10 were Internet services, auto-related complaints, imposter scams, telephone and mobile services, advance-fee loans, and credit protection and repair. Other categories included healthcare-related fraud, Internet auctions and buyers clubs scams.

The report indicated that the number of consumer complaints jumped in the last year. In 2009 the FTC received a total of 1,419,030 complaints, rising slightly to 1,460,368 in 2010 before surpassing 1,800,000 in 2011.

The report was generated by the Consumer Sentinel Network, an online database of consumer complaints made not only to the FTC but also to other federal agencies and state organizations. All told, the group received over 7 million complaints in calendar year 2011 and an additional 9 million do-not-call complaints.

To read the report in its entirety, click here.

Why it matters: In a statement about the report, David Vladeck, the Director of the FTC's Bureau of Consumer Protection, called it a "powerful tool" for law enforcement, as it is "used by agencies across the country and around the world to enhance their enforcement efforts." The database of complaints looks like it will continue to grow, as the director of the newly created Consumer Financial Protection Bureau, Richard Cordray, announced that the agency plans to take part and contribute its consumer complaints to the system as well.

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Fight Over Google's Privacy Policy Continues

Even though Google's hotly contested privacy policy has already taken effect, consumer groups and government agencies are still fighting the changes.

Earlier this year Google announced a plan to update its privacy policy on March 1 to combine user information across all of its products, including Android, Gmail and YouTube.

Legislators held hearings and sent letters, while the Electronic Privacy Information Center (EPIC) filed suit against the Federal Trade Commission, seeking to have the agency enforce the terms of its recent settlement agreement with Google.

U.S. District Court Judge Amy Berman Jackson denied the group's motion and dismissed the suit. "At bottom, the FTC's decision whether to take action with respect to a potential violation of the consent order is a quintessential enforcement decision that is committed to the agency's discretion and is not subject to judicial review," she wrote.

EPIC has already appealed the decision.

Not to be outdone, the National Association of Attorneys General sent a letter to Google's CEO Larry Page expressing "strong concerns" about the changes. "On a fundamental level, the policy appears to invade consumer privacy by automatically sharing personal information consumers input into one Google product with all Google products," wrote a group of 36 state AGs. "Consumers have diverse interests and concerns, and may want the information in their Web history to be kept separate from the information they exchange via Gmail."

The letter also challenged Google on its claim that users would want their information shared across the platforms and urged the company to make the change something to which users could opt in. "Unfortunately, Google has not only failed to provide an 'opt-in' option, but has failed to provide meaningful 'opt-out' options as well," according to the letter.

And the controversy doesn't end at the U.S. border. The Commission Nationale de l'Informatique et des Libertes, or CNIL, the privacy regulatory body in France, said that the new policy appears to violate European data-protection law.

CNIL and the Article 29 Working Party have "strong doubts about the lawfulness and fairness" of the changes, wrote Isabelle Falque-Pierrotin, head of CNIL, in a letter to Google CEO Larry Page. "Rather than promoting transparency, the terms of the new policy and the fact that Google claims publicly that it will combine data across services raises fears about Google's actual practices. Our preliminary investigation shows that it is extremely difficult to know exactly which data is combined between which services for which purposes, even for trained privacy professionals."

To read the federal court's decision in *EPIC v. FTC*, click here.

To read the letter from the state AGs, click here.

To read CNIL's letter, click here.

Why it matters: Google refused to bow to the continuing pressure and implemented the privacy policy changes on March 1. But the controversy continues unabated, as the Center for Digital Democracy subsequently filed a complaint with the FTC, arguing that the company misrepresented its privacy policy and failed to adequately inform consumers about the impact of the changes on their privacy. Google "should have informed users that its need to collect more information on them and their social networks is due to business reasons related to its digital marketing business, and not to make its consumer privacy policy 'shorter and easier to read,'" the CDD contended. And European Union Justice Commissioner Viviane Reding released a statement, calling it "unfortunate" that Google went ahead with the new policy before addressing EU regulator concerns.

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You Scream, I Scream, We All Scream for an Ice Cream Settlement

Ending three separate class action suits over the use of "all natural" claims for ice cream products, Ben & Jerry's and Unilever agreed to pay a total of $7.5 million to a national class of consumers.

The plaintiffs in three separate suits—two against Unilever, maker of Breyers ice cream, and one against Ben & Jerry's—argued that the "all natural" claims amounted to false advertising because the ice cream contained cocoa alkalized with potassium carbonate, a man-made, synthetic substance.

The settlement comes after a federal court judge denied Ben & Jerry's motion to dismiss the case last June when the company argued that the suit was preempted by Food and Drug Administration regulations.

The parties reached the settlement after a daylong mediation session followed by five weeks of extensive negotiations. Consumers are eligible to receive $2 per package of Breyers ice cream product with no proof of purchase required for the first three packages claimed. Cash for up to 10 packages is available from a $2.5 million settlement fund with proof of purchase.

Plaintiffs in the Ben & Jerry's suit are entitled to the same cash amount, but because the company had approximately double the sales volume of Unilever, it will establish a $5 million settlement fund.

In addition to monetary relief, both defendants agreed to discontinue the use of the term "all natural" not only on their ice cream products, but also on all other ice creams, yogurts and sorbets in the future that contain alkalized cocoa. The defendants estimated that it will cost $7,500 per flavor to change the product labels, a total of $435,000 for the 23 Ben & Jerry's and 35 Breyers flavors at issue. The defendants also agreed to pay the cost of settlement logistics, like claims administration and notice, as well as attorneys' fees and expenses.

The parties will appear before U.S. District Court Judge Phyllis J. Hamilton for an approval hearing at the end of March.

To read the settlement agreement in *Astiana v. Ben & Jerry's*, click here.

Why it matters: "All natural" claims remain risky in the food industry, as plaintiffs continue to file lawsuits alleging false advertising against a broad array of products, from the ice cream suits to corn oil made from genetically modified organisms, and to recent suits brought against Kashi and Trader Joe's, which allege the companies traded on their wholesome, natural images while using artificial ingredients.

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