Advertising Law

June 8, 2012

In This Issue

Manatt's National Advertising Practice Earns Top Rankings in Chambers USA 2012

Manatt, Phelps & Phillips, LLP is pleased to announce that the firm's Advertising, Marketing & Media Practice Group has been recognized for excellence in the newly published Chambers USA 2012, achieving national rankings for advertising litigation, transactional and regulatory work. The practice was one of 10 at Manatt honored by the publication.

"The advertising group is world class," Chambers said. "They are extremely experienced, provide pragmatic and on point legal advice and fight like tigers for their clients."

Linda A. Goldstein, chair of Manatt's Advertising, Marketing & Media Division, was honored with a "Star Individual" recognition, one of the publication's highest distinctions, given to lawyers with exceptional recommendations in their field, and she was also recognized as a "leading lawyer." Beyond these achievements, three other of Manatt's advertising attorneys were honored as "leading lawyers": Christopher Cole – Advertising: Litigation (National); Jeffrey S. Edelstein – Advertising: Transactional & Regulatory (National); and Thomas C. Morrison – Advertising: Litigation (National).

Each year, Chambers USA identifies and ranks leading lawyers for business in the United States based on in-depth, objective research. The qualities on which rankings are assessed include technical legal ability, professional conduct, client service, commercial astuteness, diligence, commitment, and other qualities most valued by clients.

To read the full press release, click here.

back to top

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Practice Area Links

Practice Overview
Members

Upcoming Events

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, 2012
***The National Law Journal's* 2012 Complex Litigation Breakfast Series**
Topic: "Developments & Considerations in False Advertising Claims"
Speaker: Chris Cole
New York, NY
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

Litigating and Resolving Advertising Disputes Conference

To help companies protect their brands against challenges filed in court and before the National Advertising Division, the American Conference Institute will host its annual conference on Litigating and Resolving Advertising Disputes on June 19-20, 2012 in New York. This year, three Manatt partners – Chris Cole, Steve Raptis and Linda Goldstein – have been invited to speak at this important event.

At the conference, Chris will participate in a panel presentation called "**Buckle Up: We're Headed to Trial**" during which he and other leading litigators will discuss how to establish a false advertising claim under the Lanham Act, offer strategies for bringing and defending against advertising challenges and explore the importance of developing a consistent approach to internal and external communications while a lawsuit is under way.

Steve has been invited to serve on a panel titled "**Defining Advertising Injury: Protecting Coverage Rights When the Company is Sued for False or Misleading Advertising**." He will offer insight on how advertisers and other companies can protect their rights to insurance coverage if they are the subjects of a lawsuit and what they can do to prepare for potential secondary litigation with an insurance carrier.

Linda will take the stage to present "**Developing a Strategy to Combat the Uptick in Litigation Challenging the Marketing and Labeling of Food Products**" where she and other panelists will provide practical guidance on drafting, evaluating and deciding on proposed health benefit claims that are compliant with FTC and FDA regulations.

NOTE: Be sure to take advantage of Manatt's friend-of-the-firm discount by using the code provided in the registration materials available here.

back to top

FTC Sends Refunds to Consumers Who Purchased Certain Oreck Products

In compliance with the terms of a settlement reached last year between the Federal Trade Commission and Oreck Corporation, refunds were recently sent to thousands of consumers who purchased the Oreck Halo vacuum and Oreck ProShield Plus air cleaner.

The settlement resolved charges brought by the FTC against Oreck claiming the company made deceptive claims that using the Halo vacuum or ProShield Plus reduces the risk of flu and other illnesses, and eliminates most common germs and allergens.

Specifically at issue were Oreck's claims that its products were "flu fighters" that "capture viruses" and/or produce a "99% reduction in

Recognized for Excellence in the areas of Advertising, Marketing and Media

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airborne particles." The FTC claimed that Oreck did not have any competent and reliable scientific evidence to support such representations, which appeared in various print advertisements, television commercials and infomercials.

Under the settlement, Oreck agreed to cease claims that its Oreck Halo vacuum and Oreck ProShield Plus air cleaner (1) reduce the risk of flu; (2) reduce the risk of other "illnesses or ailments caused by bacteria, viruses, molds, and allergens, such as the common cold, asthma, and allergy symptoms"; and (3) "eliminate all or almost all common germs and allergens from a user's floor." In addition, Oreck agreed to stop alleging that the ultraviolet lights on its products effectively remove "germs, bacteria, dust mites, mold, and viruses embedded in carpets," and that the "ProShield may eliminate indoor airborne particles under normal living conditions."

Oreck also agreed to pay $750,000 for restitution and disgorgement of any remaining funds paid to consumers. As a result of the settlement, any consumer who purchased the Oreck Halo vacuum will receive $25. Any consumer who purchased the Oreck ProShield Plus air cleaner is also eligible for a refund, averaging approximately $24.65 for each item purchased.

The FTC used Oreck's sales records to identify eligible consumers. A claims administrator is assisting the FTC with the claims process, and has mailed 27,339 checks to consumers for a total of $698,000. Consumers will have 60 days to cash their checks after receiving them in May.

To read the FTC's press release, court papers, and settlement, click here.

Why it matters: Businesses that make health claims about their products not only draw attention from class counsel, but also from regulators, such as the FTC. The Oreck settlement is a reminder that businesses must be prepared to show federal or state regulators competent and scientific evidence that supports their health claims. Otherwise, such claims may lead to costly litigation and settlements and potentially negative press about their products.

back to top

NAD Recommends Ocean Spray Discontinue Certain Claims

The National Advertising Division is recommending that Ocean Spray Cranberries, Inc., "discontinue certain implied claims for Ocean Spray cranberry juice, including claims that the sodium content of a competing juice is alarmingly high . . . . "

Campbell Soup Company, maker of V8 Vegetable Juice, originally challenged the Ocean Spray advertisements on the basis that they disparaged the taste and sodium content of V8 juices and made false claims about its products.

At issue before the NAD were Ocean Spray's television commercials, which featured a taste test between "Ocean Spray Cranberry Juice versus vegetable juice" conducted by the brand's "iconic" growers in a cranberry bog. In the advertisement, one grower drinks the Ocean

Spray juice and proclaims it to be “tasty,” but after hearing that the vegetable juice has “more than 10 times the sodium of cranberry juice,” the taster refuses to drink it. Instead, he pours it into the bog and declares the cranberry juice to be the “winner.” According to the NAD, the advertisement also included a graphic which claimed Ocean Spray’s juice has 35 milligrams of sodium, as opposed to vegetable juice, which allegedly has more than 400 milligrams.

Campbell’s took issue with the following claims allegedly made by Ocean Spray in the advertisement:

- In a taste test conducted by Ocean Spray, consumers claimed its cranberry juice tastes better than V8 vegetable juice;
- V8 vegetable juice has a dangerous and unhealthy amount of sodium; and
- Every variety of V8 vegetable juice has 10 times more sodium than Ocean Spray Cranberry Juice.

After conducting its review of Campbell Soup’s challenge, the NAD found that Ocean Spray failed to substantiate the implied claim of superior taste conveyed in the commercial. As such, NAD recommended the company discontinue any such allegations that might suggest otherwise.

NAD did, however, determine that the evidence substantiated Ocean Spray’s claim that V8 juices have significantly more sodium than Ocean Spray cranberry juice. Soon after Campbell Soup brought its challenge, Ocean Spray voluntarily modified the disclosure in its advertisement to exclude “low sodium” juices from its sodium comparison claims. In so doing, the company alleviated concerns that the comparisons made in the commercials at issue were to all versions of vegetable juices. Since the sodium levels in Campbell’s V8 are significantly higher than those found in Ocean Spray cranberry juice, NAD held that Ocean Spray is permitted to include such facts in its advertisements.

The portion of the commercial where one of the growers poured the vegetable juice into the cranberry bog because it contained so much sodium was, however, criticized by the NAD on the basis that it could be misleading to consumers. According to the NAD, this visual image—in conjunction with the language contained in the advertisement—could mislead consumers into believing the Campbell’s juice contains an unhealthy amount of sodium. It was therefore suggested that Ocean Spray be careful not to overstate the significance of sodium content in future statements so as not to falsely malign Campbell’s product.

In its advertiser statement, Ocean Spray said it will appeal the NAD’s findings on these issues to the National Advertising Review Board. Likewise, according to the Advertising Self-Regulatory Council’s press release on the NAD’s recommendations, Ocean Spray “intends to appeal the NAD’s conclusion that the commercial communicates any false message that disparages V8 juice, especially considering: (1) the undisputed evidence advanced by Ocean Spray that a serving of original V8 contains an amount of sodium that may be of dietary concern to many consumers, and (2) the fact that the challenged commercial was created in response to a recent advertising campaign by Campbell’s that is at least equally disparaging of Ocean Spray products.”

To read the NAD's recommendation, click here.

Why it matters: Advertisers must be prepared to substantiate any comparative claims made in print or broadcast advertisements with reasonable—and reliable—research. In addition to compromising the integrity of the advertiser, advertising claims that exceed the breadth of any supporting research might cause them to be easy prey for competitors that are carefully watching the marketplace.

On the flip side, advertisers must also be the ones monitoring the competition. As the instant case demonstrates, they should know the strengths and weaknesses of any competition and be knowledgeable about any claims being made against them. The decision is a reminder to businesses that they may pursue deceptive product comparison claims against their competitors before the NAD. Doing so is less costly and time consuming than formal litigation, and may prove to be just as effective.

back to top

Crate & Barrel Settles Insurance Dispute Resolving Underlying Class Actions Over ZIP Codes

Crate & Barrel has preliminarily resolved seven California class action lawsuits over the company's alleged unlawful collection of zip codes during credit card transactions in violation of California law.

The resolutions were made as part of a preliminary settlement of an insurance coverage dispute in an Illinois federal court between Crate & Barrel and its insurer, Hartford Fire Insurance Co., whereby Crate & Barrel alleged Hartford had to indemnify it in the underlying zip code lawsuits under an insurance policy. Although the settlement was reached in the Illinois federal court, it resolves the underlying class actions pending in various California state and federal courts.

According to the underlying class actions, Crate & Barrel violated California's Song-Beverly Credit Card Act, which prohibits retailers from collecting and recording personal identification information from consumers during a credit card transaction. The Act prohibits the collection of personal information during such transactions to prevent retailers from using the information for marketing purposes. Last year, the California Supreme Court in *Pineda v. Williams-Sonoma Stores Inc.* held that collecting and recording a consumer's zip code alone triggered a violation because retailers could use zip codes for marketing purposes. Since the *Pineda* decision, there have been numerous class actions in California against retailers that have collected zip codes during credit card sales. Crate & Barrel has not been immune from such lawsuits.

While the underlying actions were filed in California courts, Hartford Fire Insurance Co. filed an action in Illinois federal court alleging that it did not have to provide coverage to Crate & Barrel in the California lawsuits under a general commercial liability policy issued by Hartford since the plaintiffs in the underlying lawsuits sought "civil penalties" (not "damages"), which are not covered by the Hartford policy. However, according to Crate & Barrel, consumer requests for relief are common law claims covered under the policy.

To avoid further litigation, Crate & Barrel and Hartford reached a settlement resolving their dispute and the underlying class actions. The terms of the settlement are not yet known to the public. The parties notified the court during a May 15, 2012, status hearing that they had reached a settlement. According to the court's Minute Order, "Counsel for both parties reported that a global settlement in principle has been agreed upon, including the underlying class-action suits for which [Crate & Barrel] was seeking defense and indemnity."

To read Hartford's amended complaint, click here.

To read Crate & Barrel's answer to the amended complaint, click here.

To read the court's minute order, click here.

Why it matters: The settlement reached between Crate & Barrel and Hartford is potentially significant for retailers since it means they may have coverage under their general commercial liability policies in class actions alleging violations of California's Song-Beverly Credit Card Act. Of course, the potential coverage also means that class counsel will more vigorously pursue these types of lawsuits since the insurance company provides another potential deep pocket other than the retailer.

back to top

Kraft, Cadbury "Stuck" with Class Action Over Sugarless Gum Ads

Named plaintiff Susan Ivie filed a putative class action against Kraft Foods Global Inc. and Cadbury Adams USA LLC in the U.S. District Court for the Northern District of California alleging that Kraft and Cadbury deceived consumers over the health benefits of their sugarless gums, breath mints and other hard candy products.

Plaintiff filed the action on behalf of thousands of consumers who purchased Trident, Dentyne and Halls products over the past four years.

The lawsuit alleges that Kraft and Cadbury failed to provide certain consumer disclaimers telling them that their products – such as Halls Sugar Free Drops and Trident and Dentyne Ice sugar-free gums – are not low in calories and do not help with weight control since "they all contain more than the 40 calories per 50 grams which is the maximum amount allowed" under federal law when making health claims. In addition, according to the complaint, most "of the defendants' [gum and candy products] exceed the low calorie cutoff by more than two or three times." Plaintiff claims that although Kraft's and Cadbury's sugar-free gums contain more than 80 calories per 50 grams, their product labeling does not include any of the required FDA disclosures: "not a reduced calorie food," "not a low calorie food," or "not for weight control."

Plaintiff also claims that Kraft and Cadbury ignored FDA guidance letters sent to the food industry warning the industry about using deceptive "sugar free" claims or deceptively advertising serving sizes in order to mislead consumers into thinking that the products contain low calories and low sugar. Plaintiff argues that Kraft and Cadbury designed

their “business models and marketing strategies” on “sugar free” and “sugarless” claims to promote the health benefits of their products to meet “consumer demand for sugar free, low-calorie food….” Based on these allegedly deceptive strategies, plaintiff concluded that Kraft and Cadbury unlawfully “misbrand” their products in violation of federal and state laws.

Plaintiff brings claims alleging unfair business acts and practices; fraudulent acts and practices; misleading and deceptive advertising; untrue advertising; unjust enrichment; and violations of California’s Consumer Legal Remedies Act, Song-Beverly Act, and Magnuson-Moss Warranty Act. On behalf of herself and all class members, plaintiff seeks to enjoin the challenged advertisements and product labeling and seeks restitution, disgorgement, punitive damages, interest, attorneys’ fees and costs.

To read the plaintiff’s complaint, click here.

Why it matters: With consumers more and more concerned about the health benefits of the products they consume, a business’s health claims have become fertile ground for more litigation and regulatory proceedings. Because these lawsuits may result in high costs for the food industry, businesses in the industry should carefully review their advertisements and product labeling to minimize any risk of consumer class actions or regulatory enforcement proceedings by the FDA.

back to top

Senators Feel Burned By FDA’s Sunscreen Label Delay

The Food and Drug Administration recently agreed to give major sunscreen makers an additional six months to comply with labeling regulations set forth last summer.

The regulations, which were originally slated to go into effect on June 18, establish a standard test to determine whether a sunscreen product may be labeled “Broad Spectrum.” Although the FDA had hoped to roll out revised labels this summer, it agreed to postpone the deadline so as to allow sunscreen makers additional time to revise package labeling and get their bottles on store shelves nationwide—a decision that has since drawn criticism from consumers and lawmakers alike.

Background

In June 2011, the FDA announced it would implement significant changes in the labeling and marketing requirements of over-the-counter sunscreen products made in the United States. According to the FDA’s Web site, the changes were made “as part of the Agency’s ongoing efforts to ensure that sunscreens meet modern-day standards for safety and effectiveness and to help consumers have the information they need so they can choose the right sun protection for themselves and their families.”

The FDA’s “Final Rule” is one of four regulatory measures that outline the new sunscreen requirements. As explained on the FDA’s Web site, the new “Final Rule” provides a “broad spectrum test procedure, which measures a product’s ultraviolet A (UVA) protection relative to its ultraviolet B (UVB) protection.” Only sunscreen products that provide protection against both UVB and UVA may be labeled “Broad Spectrum”

and (at a minimum) “SPF 15” on the front of the package. According to the FDA, “Only Broad Spectrum sunscreens with an SPF value of 15 or higher can claim to reduce the risk of skin cancer and early skin aging if used as directed with other sun protection measures. Non-Broad Spectrum sunscreens and Broad Spectrum sunscreens with an SPF value between 2 and 14 can only claim to help prevent sunburn.”

In addition, the FDA’s Final Rule requires sunscreen products that are either not broad spectrum or that are broad spectrum but only have an SPF value between 2 and 14 to carry a label that reads “Skin Cancer/Skin Aging Alert: Spending time in the sun increases your risk of skin cancer and early skin aging. This product has been shown only to help prevent sunburn, not skin cancer or early skin aging.” The rule also prevents sunscreen manufacturers from claiming their product is a “sunblock” or that it is “waterproof” or “sweatproof.” Any claims about water resistance must indicate whether the sunscreen remains effective for 40 minutes or 80 minutes based on standard testing procedures.

In addition to the Final Rule, the FDA proposed a regulatory measure that would limit the maximum SPF value on sunscreen labeling to “SPF 50+” (“Proposed Rule”) and requested data and information on the safety and effectiveness of sunscreen products formulated in other dosage forms (such as oils, creams, sticks, sprays and lotions) (“Advance Notice of Proposed Rulemaking”). In its final regulatory measure, the “Draft Guidance for Industry,” the FDA issued provisions to help sunscreen manufacturers understand how to label and test their products in light of the new measures.

FDA Extension

When the new sunscreen requirements were announced last summer, the FDA gave manufacturers a full year to complete testing and relabel their products. All major brands were expected to be in compliance with the Administration’s terms by June 18, 2012. However, as the Associated Press recently reported, on May 11, 2012, the FDA extended the deadline to December 17, 2012, for products with sales of $25,000 or more. Products with annual sales of less than $25,000, however, now have until December 17, 2013, to comply.

The postponement has been widely criticized by lawmakers and consumers alike. On May 21, New York Senators Kristen Gillibrand and Charles E. Schumer wrote a letter to the FDA Commissioner Margaret Hamburg urging her to reconsider the FDA’s decision. According to the letter, “delaying the implementation of these standards by six months (for some manufacturers and 18 months for others) will allow the deceptive practices of the industry to continue. Americans will continue to think they are truly protected from the sun, that a product is “‘waterproof’” and “‘sweatproof,’” and provides “‘all day protection’” when that isn’t likely the case.” As such, the senators urge the FDA “to reverse the recent decision to delay these critical regulations and to do more to ensure that consumers can purchase sunscreen products and products containing sun protection with the knowledge that they meet FDA’s enforceable standards.”

In defense of the delay, the FDA claims it agreed to an extension after the Personal Care Products Council (PCPC) and the Consumer Healthcare Products Association (CHPA), both industry trade

associations, submitted a request for additional time that "provided several reasons, and supporting information, for requesting the additional time for implementation." As Farah Ahmed, chair of the sunscreen task force at the PCPC, told *USA Today*, "We asked for the additional time," because changing labels on thousands of products "is a huge undertaking." Manufacturers, she contends, would not be able to ship new products after June 18, which could very well result in shortages, a concern echoed by the FDA. According to the FDA's rule on the extension, published in the *Federal Register* on May 11, 2012, "The 2011 final rule requirements are intended to ensure that OTC sunscreen products are used safely and effectively. Therefore, allowing adequate time for the 2011 final rule requirements to be fully implemented is in the interest of public health."

Despite the delay, the FDA encourages manufacturers to bring products into compliance as soon as possible. Once labeling requirements are met, sunscreen products may be rolled out into stores.

To read the letter U.S. Senators Kristen Gillibrand and Charles E. Schumer wrote to the FDA, click here.

To read the FDA's *Questions and Answers* regarding new requirements for over-the-counter (OTC) sunscreen products [updated 6/23/2011], click here.

To read the FDA's May 11, 2012 announcement on the compliance extension (a Rule by the Food and Drug Administration), click here.

To read the *USA Today* article quoted above, click here.

To read the Associated Press article mentioned above, click here.

Why it matters: Changing product labeling to comply with new requirements is a costly and time-consuming process, not only for the manufacturer, but also for suppliers and retail operations. As such, it is not out of the ordinary for businesses to need additional time to adequately comply with new labeling and/or marketing requirements. Businesses and trade groups should remember that the FDA is receptive to reasonable requests for a deadline extension, especially when additional time is in the interest of public health.

Having said that, it is in a company's best interest to do whatever it takes to comply with government deadlines in a timely fashion. The court of public opinion can be very tough on businesses and manufacturers. Being one of the first to comply with the government can go a long way with consumers and lawmakers.

back to top

Noted and Quoted . . . *Advertising Age* Taps Linda Goldstein on Facebook's Possible Foray Into Under-13 World

On June 6, 2012, *Advertising Age* turned to Linda Goldstein, Chair of Manatt's Advertising, Marketing & Media Division, to shed light on the potential legal and regulatory implications for Facebook if it decides to officially open its site to children under 13 years of age.

In response to reports that Facebook is testing technology to make this

a reality, U.S. Reps Ed Markey and Joe Barton, co-chairmen of the Bipartisan Congressional Privacy Caucus, have voiced concerns regarding the social networking site's collection and use of children's personal information.

According to Ms. Goldstein, "I think [Facebook is] going to be buying a lot of additional regulatory headaches . . . . The value of the data and the ability to eventually capture this data at such an early age is interesting, but they're going to have to weigh that against consumer perceptions."

To read the full article, click here.

back to top