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In This Issue

FTC Targets Marketers of Acai Berry and Colon Cleansing Products

The Federal Trade Commission requested, and a federal judge granted, a temporary restraining order that prevents several makers of acai berry and colon cleansing products from further advertising their respective products in a false and misleading way.

The order directs Central Coast Pharmaceuticals, i.e. Life Health and Wellness, Simply Naturals, Fit for Life, Health and Beauty Solutions, and others, from using false celebrity endorsements, from maintaining that their products are available for a nominal fee and from otherwise advertising their products in any false or misleading manner. The order also froze the defendants' assets and directed them to make full refunds to all consumers who make requests.

According to the FTC, the companies falsely promised "free" trials of products like AcaiPure for a small shipping fee, but instead enrolled consumers in a monthly membership with charges of up to $64.90 per month without their consent. They also used misleading ads that claimed celebrities like Oprah Winfrey endorsed their product.

The makers of AcaiPure, for example, made claims like: "WARNING! AcaiPure Is Fast Weight Loss That Works. It Was Not Created For Those People Who Only Want To Lose A Few Measly Pounds. AcaiPure was created to help you achieve the incredible

body you have always wanted …USE WITH CAUTION! Major weight loss in short periods of time may occur."

The makers of Colopure, a colon cleanse product, cited frightening statistics about colon cancer and promised consumers that its product would help them prevent the onset of the disease.

The FTC is seeking a permanent injunction against the defendants.

To read the FTC's complaint, click here.

To read the TRO, click here.

Why it matters: The FTC noted that since 2007, the Better Business Bureau and law enforcement agencies received more than 2,800 complaints about the defendants. Marketers receiving complaints from consumers should closely consider their marketing practices before regulators do – especially if those complaints relate to free trials and negative options, which are currently under close scrutiny.

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Bankruptcy Judge Orders Personal Info Destroyed

After receiving a letter from David Vladeck, the Director of the Bureau of Consumer Affairs at the Federal Trade Commission, a bankruptcy judge allowed the destruction of personal information of gay teens who subscribed to the now defunct *XY* magazine.

After the magazine and its companion Web site folded, founder Peter Ian Cummings filed for personal bankruptcy. He listed editorial content from the publications and personal information from subscribers and users – including e-mail addresses, names and street addresses, personal photos, and online profiles – as part of his assets.

After two creditors expressed interest in purchasing the information, the FTC intervened and warned all parties that the sale, transfer, or use of the information could violate federal law in light of *XY*'s privacy policy, which read: "Please note our amazing privacy policy. We never give your info to anybody."

The Director wrote that "any sale or transfer of the data to a new company, new owner, or other third party would directly contravene the privacy representation and could constitute a

UPCOMING EVENTS

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WOMMA's Best Practices in Ethical and Effective WOM and SM Marketing Webinar
Topic: "The Ins and Outs of Proper Disclosure"
Speakers: Tony DiResta
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September 15, 2010
PRSA Pittsburgh Professional Development Day
Topic: "FTC Regulations Affecting Social Media Outreach"
Speakers: Tony DiResta
Pittsburgh, PA
For more information

September 21-23, 2010
2010 ERA D2C Convention
Topic: "Best Practices in Advance-Consent Marketing"
Speaker: Linda Goldstein
Las Vegas, NV
for more information

September 24, 2010
ACI Conference
Topic: "Sweepstakes, Contests, and Promotions"
Speaker: Linda Goldstein
New York, NY
For more information

October 17-20, 2010
SOCAP International Annual

deceptive practice by the original company or its principals. Such practice also could be unfair. In addition, the receipt of such data by a third party, knowing that such receipt violated the privacy policy, could be unfair." Given the sensitive nature of the information, it should be destroyed, Vladeck said.

In response, Michael Kaplan, the U.S. Bankruptcy Judge for the District of New Jersey set a 14 day timeline for the destruction of the data and ordered that Cummings destroy all personally identifiable information "by shredding, erasing, or otherwise modifying the personally identifiable information…to make [it] unreadable, undecipherable or nonreconstructable."

Cummings must then certify with the court within five days that the data was destroyed.

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

Why it matters: The story highlights the importance of a company's privacy policy and the fact that it can be enforced even when the company no longer exists. When drafting a privacy policy, companies should consider the impact future changes – bankruptcy or the sale or transfer of information, for example – could have on any promises that have been made. It also provides another example of the FTC's monitoring of privacy issues.

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Is High Fructose Corn Syrup "Natural?" FDA to Decide

A federal judge has stayed a class action lawsuit against Snapple in which the Plaintiffs maintain that the beverage company misled consumers by labeling its products "all natural," when, in fact, the drinks actually contain high fructose corn syrup.

U.S. District Court Magistrate Judge Lois H. Goodman stayed the suit for six months, pending a ruling by the Food and Drug Administration as to whether high fructose corn syrup qualifies as a natural ingredient. The FDA has not defined "natural" and has a policy of qualifying individual ingredients as "natural" on a case-by-case basis.

"The Court believes that it makes more sense to stay this action and seek the guidance of the FDA on whether [high fructose corn syrup] is indeed a natural ingredient or not, given that this issue is

Conference
Topic: "The FTC's Efforts to Regulate Social Media Marketing and Privacy: The Impact on Customer Care Professionals"
Speaker: Tony DiResta
San Francisco, CA
For more information

October 19, 2010
2010 PMA Digital Marketing Summit
Topic: "Legal POV on Social Media Marketing"
Speaker: Linda Goldstein
New York, NY
For more information

November 17-19, 2010
WOMMA Summit 2010: Creating Talkable Brands – Next Practices & Best Practices
Topic: "FTC Regulations and Privacy"
Speaker: Tony DiResta
Las Vegas, NV
For more information

November 18-19, 2010
32nd Annual Promotion Marketing Law Conference
Topic/Speaker: "To Tweet or Not to Tweet: How to Stay Current as Technology Changes the Game," Linda Goldstein
Topic/Speaker: "Negative

fundamental to the case presented by Plaintiff," Judge Goodman wrote. "The interests underlying such a determination, including comity and consistency of decision making, will be better served by referring this question to the agency charged with regulation of the product at issue."

Judge Goodman relied upon orders in similar suits against Snapple. In *Coyle v. Hornell Brewing Co.*, also in New Jersey federal court, the plaintiffs challenged the "100% Natural" claims made on bottles of Snapple's Arizona Iced Tea, which also contained high fructose corn syrup. And in *Ries v. Hornell Brewing Co*., a California federal judge similarly stayed the case to refer the issue to the FDA.

The decisions all expressed concern that without the FDA's involvement, the cases would be subject to "inconsistent judicial constructions of 'natural' and as to whether [high fructose corn syrup]…is a natural ingredient."

The court noted that the order could be extended beyond the six-month time period "if the FDA indicates an intention to promptly resolve the issue."

To read the order in *Holk v. Snapple Beverage Corp.*, click here.

To read the decision in *Coyle v. Hornell Brewing Co.*, click here.

To read the order in *Ries v. Hornell Brewing Co.*, click here.

Why it matters: While it is waiting to hear from the FDA in California and New Jersey, Snapple recently scored a victory in a similar case in New York. There, consumers filed suit alleging that Snapple deceptively advertised the "All Natural" label on Snapple's non-diet beverages because the drinks contained high fructose corn syrup.

But a federal judge refused to certify a class. The named plaintiffs admitted that they had reasons other than the "All Natural" label for purchasing Snapple (such as taste), high fructose corn syrup was listed as an ingredient, and the plaintiffs had failed to demonstrate that they paid a premium for the "All Natural" label, U.S. District Court Judge Denise Cote ruled.

To read the decision in *Weiner v. Snapple*, click here.

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Option/Advance Consent/Affiliate Upsells," Marc Roth

Topic/Speaker: "Children's Marketing," Christopher Cole

Chicago, IL

For more information

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