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Behavioral Advertising Suit Results in Split Decision

A Montana federal court dismissed claims under the Electronic Communications Privacy Act (ECPA) in a suit alleging that an Internet Service Provider (ISP) funneled its customers' Internet traffic to a third party that then used the information for behavioral advertising, but the court ruled that claims under the Computer Fraud and Abuse Act (CFAA) could go forward.

A class of plaintiffs claimed that Bresnan Communications diverted their Internet communications to NebuAd, a third-party Internet advertising company, in order to target them with preference-sensitive ads.

But U.S. District Court Judge Richard F. Cebull said that the ISP had warned its customers about the practice in its privacy notice and subscriber agreement, and it had given customers the opportunity to opt out. The subscriber agreement explicitly stated that customers agreed that "Bresnan Communications and its agents shall have the right to monitor

any . . . postings and transmission, including without limitation email, newsgroups, chat, IP audio and video, and web space content." Although the plaintiffs argued that Bresnan "construed their consent too broadly" and did not obtain "meaningful" consent, the court disagreed.

With the privacy notice, the subscriber agreement, and a specific notice of the NebuAd appliance trial that appeared on Bresnan's Web site, the plaintiffs were informed on at least three separate occasions of monitoring and possible transmissions of their activities to a third party, the court said, granting Bresnan's motion to dismiss the ECPA claims. However, the court ruled that because the ISP had modified the settings of customers' computers without authorization in the course of the data collection, claims under the CFAA could go forward.

The court said Bresnan "exceeded authorization" because the notice it provided did not tell the plaintiffs that their computer settings were going to be actively altered or tampered with. The company acted in concert with NebuAd by installing the appliance onto its network, and by doing so, altered the character of the plaintiffs' computer privacy and security control protocols.

Judge Cebull's decision on the state law claims followed the federal statutory rulings; the plaintiffs' invasion of privacy claim was dismissed but the trespass to chattels claim survived.

To read the court's decision in *Mortensen v. Bresnan Communications*, click here.

Why it matters: The decision is a mixed bag for companies engaged in behavioral advertising, but the court's dismissal of the plaintiffs' ECPA claims based on the ISP's privacy policy and subscriber agreement emphasize the importance of notice, consent, and conspicuous disclosures. And although the court said the CFAA claims can go forward, the decision suggests that companies may be able to successfully defend such claims with clear and explicit policies, as Bresnan's failure was not providing adequate notice to consumers that its settings were going to be altered.

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GAO Report Calls for Greater FDA Power

The Government Accountability Office (GAO) issued a report concluding that the Food and Drug Administration needs to reassess its approach to protecting consumers from false or misleading claims, suggesting that the agency seek legal authority to make companies provide scientific support for their health claims and provide guidance to the industry on the necessary evidence to support such claims.

The report was based on a review of FDA documents and consumer studies, as well as interviews of stakeholders from the health, medical, industry, and consumer groups at the request of Congress.

In the eight years since the FDA has allowed qualified health claims on food labels, the agency has received 16 petitions from companies proposing 60 claims on food labels, according to the report, and allowed the use of 12 of those claims. The FDA also issued two warning letters to food companies that it alleged cited health benefits which were not in the allowed qualified health claims or supported by scientific evidence.

The GAO said its research showed that consumers have difficulty distinguishing between different types of claims on food labels – like health claims, qualified health claims, and structure/function claims – and struggle to understand the differences in levels of scientific support. The report also indicated that companies are increasingly relying on structure/function claims to convey health benefits, as such claims are only subject to general statutory requirements that the labels are not false or misleading, and do not require scientific support like health claims.

Regulation of such claims poses a serious dilemma for the FDA, the report said. The FDA has not issued guidance on the scientific support needed to make structure/function claims or provided its inspectors with instructions about how to handle such claims, and it lacks the power to compel companies to turn over substantiation documents.

Calling the FDA's efforts to protect consumers from false or misleading claims "a complex and challenging legal and regulatory environment," the report

concluded that the FDA should seek express legal authority to establish the power to require companies to provide substantiation.

"To ensure that the health-related claims on food labels are not false or misleading to consumers, the Secretary of Health and Human Services should direct the Commissioner of FDA to identify and request from Congress the authorities needed to access evidence from food companies regarding potentially false or misleading structure/function or other claims on food that would allow the agency to establish whether there is scientific support for the claims," according to the report.

To read the GAO's report, "FDA Needs to Reassess Its Approach to Protecting Consumers from False or Misleading Claims," click here.

Why it matters: The GAO's suggestions would increase the FDA's power and make it similar to that of the Federal Trade Commission, which can require companies to submit any relevant evidence as part of an investigation of whether claims are substantiated. The GAO report explored the possibility of having the FTC take enforcement actions against companies for alleged false structure/function claims on food labels and advertisements, but concluded that it would be simpler for the FDA to seek greater legal authority and maintain its responsibility for health claims.

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Power Balance Faces False Advertising Suit Over Accessories

A federal lawsuit was filed against Power Balance and its owners alleging that the defendants falsely marketed their bracelets, wristbands, pendants, and other accessories that claim to give wearers physiological benefits like improved balance, strength, and flexibility.

The suit estimated that more than three million American consumers purchased the products over the last four years, including celebrities like Robert De Niro and athletes like Shaquille O'Neal and Lamar Odom.

Power Balance sells a variety of accessories – including pendants, wristbands and the most popular item, bracelets – that are worn sitting close to the body, so that wearers can receive physiological benefits from the "Mylar Holograms" contained inside the products, according to the company. The company asserts that the hologram reacts with the body's natural energy flow yielding benefits like improved balance, strength, and flexibility, making claims like "Power Balance holograms are designed to work with your body's natural energy field," "Use of the Power Balance results in lots of endurance and stamina," and "Power Balance holograms are embedded with frequencies that react positively with your body's natural energy field to improve balance, strength and flexibility."

According to the complaint, the company's claims are false, misleading and completely baseless. The complaint noted a recent investigation by the Australian Competition and Consumer Commission, which resulted in an admission that the company has "no credible scientific evidence that supports our claims," as well as a fine levied by the Italian consumer protection agency for 350,000 euros for unsubstantiated claims.

To read the complaint in *Batungbacal v. Power Balance*, click here.

Why it matters: Despite the Australian investigation, the Italian fine, and the class action suit, the company said it plans to defend itself and its products. "Contrary to recent assertions in the Australian press, Power Balance has made no claims that our product does not perform. This is simply untrue. Apparently, some previous claims in our marketing ads in Australia were not up to ACCC standards. Changes were voluntarily made immediately, approved and the issues were believed to have been resolved. We were obviously surprised to see the recent press coming out of Australia followed by a class action lawsuit here in the United States," the company said in a statement. "Power Balance stands by our products."

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Need a BOOST? FTC Settles with Nestle Over Probiotic Kids' Drink

The Federal Trade Commission finalized a consent order with a subsidiary of Nestle over charges that the company made deceptive health benefit claims about its children's drink BOOST Kid Essentials.

Nestle HealthCare Nutrition's BOOST Kid Essentials, a nutritionally complete drink intended for children ages one to 13, made claims about the benefits of the drink's probiotics, including that it could prevent upper respiratory tract infections in children, protect against colds and flu by strengthening the immune system, and reduce absences from daycare or school due to illness, according to the FTC complaint.

The FTC said that the claims appeared on product packaging, the company's Web site, magazine ads, and television commercials from the fall of 2008 to the fall of 2009. "Nestle's claims that its probiotic product would prevent kids from getting sick or missing school just didn't stand up to scrutiny," said David Vladeck, Director of the FTC's Bureau of Consumer Protection. "Parents want to do right by their kids, and the FTC is helping them by monitoring ads and stopping those that are deceptive."

Under the consent order, Nestle agreed to stop making claims that BOOST will reduce the risk of colds, flu, and other upper respiratory tract infections unless the claim is approved by the Food and Drug Administration; stop asserting that BOOST will reduce children's sick-day absences and the duration of acute diarrhea in children up to age 13 unless the claims are true and backed by at least two well-designed human clinical studies; and discontinue any claims about the health benefits, performance, or efficacy of any probiotic or nutritionally complete drinks unless the claims are true and backed by competent and reliable scientific evidence.

The consent order was tweaked slightly after a public comment period; the definition of an "essentially equivalent product" used in clinical studies was broadened, the FTC said, similar to the definition used in the recent settlement with Dannon, another case involving claims about probiotics.

To read the complaint in *In the Matter of Nestle HealthCare Nutrition*, click here.

To read the decision and order, click here.

Why it matters: While the settlement with Dannon was announced last month, the FTC noted that the Nestle action was its first against a company making claims about a probiotic product. Similar to the terms of that settlement, the FTC took the extra step of requiring FDA pre-approval for future claims by Nestle that BOOST can reduce the risk of colds, flu, and other respiratory tract infections. "[T]his will facilitate Nestle's compliance with the settlement order and will make the order easier to enforce," the FTC said.

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Those Bette Davis . . . Dresses?

The estate of Bette Davis filed suit against a California vintage clothing store alleging that it is violating the publicity rights of the late actress by selling a dress called the "B Davis Dress."

The suit claims that Stop Staring! sells vintage clothing from the 1940s and 1950s, and names many of their period era dresses after iconic people from that time period, including other actors.

The "B Davis" dress is named after Bette Davis, the complaint alleges, and some of the retailers specifically refer to it as the Bette Davis Dress.

Arguing that the conduct of the store and its owners was wanton, willful, and malicious, the suit claims that the defendants "have an obvious pattern and course of conduct of this behavior."

"[T]hey are selling dresses named after other iconic figures for which, on information and belief, [they] lack the appropriate licenses and rights of publicity. Defendants, recognizing that they lack such rights, often resort to minor typographical errors or other small changes to the respective celebrity's name in order to benefit from the celebrity's name in the sale of

goods while seeking to avoid liability for the clear misappropriation of the celebrity's right of publicity," according to the complaint.

Noting that Davis "was a legendary film actress whose name, persona and likeness are still worth substantial sums of money in the marketplace," the suit does not seek a specific amount of damages but asks for the cessation of sales, recall, and destruction of all B Davis dresses.

To read the complaint in *CMG Brands v. Stop Staring! Designs*, click here.

Why it matters: Over the last few decades, the courts have recognized an expanding definition of publicity rights for celebrities, from a ruling finding a "sound-alike" singer in a commercial violated Bette Midler's rights to a ruling that a robot wearing a blonde wig, gown, and jewelry in front of a Wheel of Fortune-like stage infringed on Vanna White's right of publicity. The Bette Davis suit poses a new question: can a dress violate a celebrity's personality?

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