Advertising Law @ manatt

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IN THIS ISSUE

Manatt Attorneys Take Center Stage at Leading Industry Events

Advertising on Social Networking Sites and Other Media

On **June 17-19**, in Vancouver, British Columbia, Linda Goldstein, Chair of Manatt's Advertising, Marketing, and Media Division, will discuss "Advertising on Social Networking Sites and Other Media," at the Personal Care Products Council 2009 Legal and Regulatory Conference. David Green, Senior Attorney at Microsoft Corporation will join Goldstein as a panelist, and Farah K. Ahmed, Assistant General Counsel of Personal Care Products Council, will moderate.

For more information, please click here.

Consumer Protection

On **June 18-19**, at the Georgetown University Law Center in Washington, DC, Manatt Partner Christopher Cole will speak on the topic "Use, Misuse, and

CHAMBERS USA 2008

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

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Upcoming Events

June 17-19, 2009
Personal Care Products Council
Speaker: Linda Goldstein
Vancouver, British Columbia
for more information

Disregard of Evidence of Actual Confusion in Federal State Regulatory Proceedings" at the ABA Antitrust Section's Consumer Protection Conference.

For more information, please click here.

Drug Law and Regulation

On **June 25-26**, Manatt Partner Ivan Wasserman will present at the Food and Drug Law Institute's "Introduction to Drug Law and Regulation: A Program on Understanding How the Government Regulates the Drug Industry" in Washington, D.C.

For more information, please click here.

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Actors Unions OK Ads Contract

Members of SAG and AFTRA have overwhelmingly voted in favor of a three-year ad contract covering about $1 billion in annual earnings.

The contract received a 93.8% endorsement seven weeks after the unions and ad industry struck a tentative deal.

The unions estimated that the new agreement, which is retroactive to April 1, will produce more than $108 million in additional earnings, including $24 million more in contributions to the unions' health and pension funds.

The pact retains the current pay-per-play Class A residuals structure, but also includes a provision for a pilot study on a ratings-based compensation model. In a first, the deal also includes a payment structure for online and new media ads, to kick into effect in the third year.

The ad industry kept annual salary gains to about 2%, or 5.1% for the life of the agreement, notably lower than the 3% and 3.5% increases provided by last year's entertainment union contracts, and in a first, it negotiated a cap on employer contributions to pension and health plans.

June 18-19
ABA Antitrust Section's Consumer 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
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for more information

June 25-26, 2009
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Why it matters: The recession, coupled with last fall's shift in power at SAG to a more moderate faction, helped smooth the way for an easy ratification of the agreement. Its first-time compensation structure for Internet and new media ads also helps create clarification in this rapidly growing marketing arena.

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Google Faces Class Action Over Trademarked Keyword Search Ads

Google is facing yet another trademark infringement lawsuit over its AdWords policy, yet this time there's a twist. In an apparent first, software development company Firepond is seeking class-action status in its complaint filed last month in the Eastern District of Texas.

Through its AdWords program, Google typically allows advertisers to use rivals' trademarks as "keywords" that trigger their ads when consumers search for the trademarked terms. Firepond, a Texas-based software developer, alleges that this policy "enables Google and plaintiff's competitors to use the 'Firepond' trademark to place their advertising hyperlinks in front of consumers who specifically search for the plaintiff, thereby confusing Internet users and diverting a percentage of such users from plaintiff."

In addition to class-action status, Firepond is requesting unspecified damages and a court order banning Google from allowing trademarks to serve as ad triggers.

Firepond faces several formidable hurdles in its case against Google. Class-action status is typically granted only where the plaintiff can show common legal and factual issues for all proposed members of the class. Trademark issues, however, are usually case-specific. In a post on his blog, Eric Goldman, director of the High Tech Law Institute at Santa Clara, wrote that he considered a class certification unlikely. "Every trademark is different, the identity of each competitive (or other) advertiser is different, every AdWords ad copy is different, the informational needs of every trademark owner's customers are different," Goldman wrote.

Firepond must also show consumers were confused when they searched for "Firepond" and were served rival ads. In the only case that has gone to trial on this issue, the court ruled in favor of Google. In that case, brought by insurance company Geico, a Virginia federal judge ruled that Geico had not shown that people were confused when its name triggered ads for rivals.

Why it matters: Although the chances that Firepond will prevail appear low, the stakes for Google are potentially higher. "If a plaintiff's lawyer could win an injunction on behalf of every trademark owner in the state of Texas, that could bring Google to its knees,"

Goldman wrote on his blog.

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FTC Sues to Stop Warranty "Extension" Robocalls

The Federal Trade Commission is requesting that a federal court shutter a two-year-old telemarketing campaign that has been sending hundreds of millions of allegedly deceptive "robocalls" to U.S. consumers.

In two related complaints, the FTC alleges that the defendants are running a vast telemarketing scheme that uses random, prerecorded phone calls to trick consumers into believing that their vehicle warranty is about to expire. Consumers who respond to the robocalls are pushed into buying vehicle service contracts that the telemarketers deceptively describe as an extension of the original manufacturer's warranty.

According to the FTC, the campaign, which has allegedly generated more than $10 million in sales, has resulted in more than 30,000 complaints from people who are either on the Do Not Call Registry or who have requested not to receive further calls. In addition to consumers' home and cell phones, businesses, government offices, and even 911 dispatchers have received the calls.

People who answer the phone get a message telling them that their vehicle warranty is about to expire and that they should "extend coverage before it is too late." They are told to "press one" to speak to a "warranty specialist." The "specialists" then mislead consumers into believing that their company is affiliated with the dealer or manufacturer of the consumer's vehicle. They try to sell consumers a service contract for between $2,000 and $3,000, which they falsely portray as an extension of the vehicle's original warranty.

The companies automatically dial every phone number within a particular area code and prefix in sequence, the FTC alleged. Consumers requesting that the calls be stopped often were met with "abusive behavior" or were simply hung up on, according to the agency. Some of the defendants used offshore shell corporations to try to avoid scrutiny, and a top official in the telemarketing company boasted to prospective clients that he could operate outside the law without being caught, the FTC's court papers stated. This defendant also claimed that he makes 1.8 million dials per day and that he had done more than $40 million worth of dialing for extended warranty companies, including 1 billion dials on behalf of his largest client.

The FTC is charging the defendants with violations of the FTC Act and the agency's Telemarketing Sales Rule by calling consumers whose numbers were on the National Do Not Call Registry, calling consumers who previously had asked not to be called, concealing their phone numbers so they would not show up on caller ID, failing to identify

themselves, and failing to disclose that the call was a sales pitch.

The complaints, filed on May 14 in the Northern District of Illinois, name as defendants a Florida-based company called Voice Touch Inc., and two of its principals, James and Maureen Dunne. They also name an Illinois-based company affiliated with Voice Touch called Network Foundations, LLC, and a principal in that company, Damian Kohlfeld. The second complaint names a Florida-based company called Transcontinental Warranty Inc., which sells extended auto warranties, and the company's president and CEO, Christopher D. Cowart.

Why it matters: If the FTC's allegations are true, the robocall campaign violates a number of federal statutory provisions and agency regulations. Agency efforts to go after rogue telemarketers are a welcome development for legitimate marketers, who must contend with the bad press and consumer antipathy generated against all telemarketers as a result of such scams.

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Ad Groups Urge FCC Not to Rate/Block TV Ads

In comments filed with the Federal Communications Commission, a group of advertising trade groups is objecting to a proposal to extend the V-Chip rating system to ads as well as programming content.

The V-Chip is a parental control device that is required by law to be included in most televisions. Through a voluntary system called "TV Parental Guidelines," the broadcast industry rates programs with sexual or violent content. These ratings appear on the screen for the first 15 seconds of a show and, through the V-Chip, permit parents to block selected programs.

In a response to an FCC notice of inquiry examining whether to apply the V-Chip rating system to ads, the Association of National Advertisers, the American Association of Advertising Agencies, and the American Advertising Federation have filed comments arguing that such an extension is unnecessary, would be a practical and administrative nightmare, goes beyond congressional intent, and would undermine the economic viability of much programming.

According to the comments, when Congress called on the FCC to examine rating and blocking issues, it specifically admonished the agency not to include in its report parental control technologies that "affect the packaging or pricing of content." In the current economy, the last thing the FCC should consider is a speculative regulatory regime that would seek to target and eliminate advertising, the groups wrote.

"(T)he growth and diversity of market-based options should lead the Commission to conclude that the V-Chip is unsuited to be revamped to become a universal solution to blocking all types of content that individuals may prefer to avoid. Instead, the diverse

technologies and strategies are a positive development that permits parents to choose the approach that best meets their needs," the comments continued.

The FCC can best assist consumers by promoting media education and by focusing on specific ways to inform parents of strategies they might employ in making family media choices, the groups wrote. "Such an approach would best serve parents' needs while avoiding the bureaucratic burdens and constitutional confrontation that would come with more regulatory approaches to this issue."

Why it matters: According to the ad groups, Congress never intended that the V-Chip rating system be extended to advertising, given the difficulties it would create in packaging and pricing content. Moreover, such a regime would create practical and administrative problems for marketers and broadcasters alike. Anyone who is potentially affected by this proposal can get more information from the press release "Commission Implements Child Safe Viewing Act by Seeking Comment on Parental Control Technologies for Video or Audio Programming," on the FCC Web site.

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Battle of the Buns: Sara Lee Sues Kraft Over Hot Dog Ads

As the grilling season gets under way, Sara Lee Corporation, which makes Ball Park hot dogs, is suing Kraft Foods Inc. over taste test claims the latter is running for its Oscar Mayer hot dog brand.

The dispute between the nation's two biggest hot dog purveyors centers on ads claiming that Oscar Mayer Jumbo Beef franks bested Ball Park and ConAgra Foods' Hebrew National hot dogs in a national taste test. In a footnote, the ads note that the Oscar Mayer Jumbo Beef frank is being compared to the "leading beef hot dogs" made by its rivals.

The complaint filed in Chicago federal court argues that the ads are false and misleading because the large type implies that one Oscar Mayer dog beat the taste of all Ball Park dogs, while the "very small type" in the footnote states that Oscar Mayer compared its hot dogs only to "the leading beef franks" of its main rivals.

The suit also alleges that Oscar Mayer's claim that its Jumbo Beef franks are "100 percent pure beef" is false because they contain other ingredients. Sara Lee alleges that Oscar Mayer has refused requests to shelve its 100 percent pure beef claims.

The complaint alleges that the offending Oscar Mayer ads have been appearing in print, on Oscar Mayer's Web site, and in special promotions. For instance, a recent *USA Today* ad for Oscar Mayer read, "Today only, taste the beef dog that beat Ball Park and Hebrew

National – for free." The company gave away coupons for a pack of Jumbo Beef franks—one per household—for 15 hours (while supplies lasted).

In response, a Kraft Foods spokesperson said in a statement, "We stand by our reputation for accurate advertising."

Why it matters: Taste tests are enjoying a resurgence, as marketers opt for more hard-hitting ads to keep sales up during the recession. However, aggressive advertisers must ensure that their claims are resistant to false advertising challenges.

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Congress Weighs Liability for Credit-Rating Agencies

Congressional lawmakers who fault credit-rating agencies for their role in the near breakdown of the financial markets are pushing to expose them to lawsuits from investors and issuers.

Senator Jack Reed (D-R.I.) recently introduced a bill that would expose ratings firms to the possibility of class-action lawsuits if they "knowingly or recklessly" fail to review key data in rating debt.

"The view that the agencies are mere publishers issuing opinions bears little resemblance to reality, and the threat of civil liability would force the industry to issue more accurate ratings," Representative Paul Kanjorski (D-Pa.) said at a recent hearing on the industry.

Reed and Kanjorski, both of whom chair key subcommittees overseeing securities issues, have both blamed credit-rating firms for issuing overly positive ratings on certain kinds of debt. In a statement, Reed said the practice of having issuers pay top ratings agencies to rate their debt gives agencies incentive to offer "unjustifiably favorable ratings."

Kanjorski suggested firms were at worst "grossly negligent" in recent years in their evaluation of mortgage-backed securities and structured finance products. "Stronger oversight and smarter rules are therefore needed to protect investors and the overall credibility of our markets," he said.

The idea of greater liability met resistance from other subcommittee members. Representative Scott Garrett (R-N.J.) said at the hearing that instead of regulating the ratings industry, the government should encourage investors to conduct their own due diligence and not just rely on ratings. "Investors have become increasingly, and too often, solely, reliant on the use of these ratings in determining the safety and soundness of any investment," Garrett said.

Why it matters: With a Democratic majority on the Hill and a Democrat in the White House, it seems inevitable that some regulation will come out of the recent market meltdown and banking crisis. Whether that regulation will cover the credit-rating agencies,

it is clear that congressional lawmakers have them in their sights.

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