Advertising Law @ manatt

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In This Issue

Lawsuit Accuses Snapple of Unnatural Ads

A federal appeals court has revived a lawsuit accusing Dr Pepper Snapple Group, Inc. of deceptively promoting Snapple iced tea as "all natural."

In an August 12 decision, the U.S. Court of Appeals for the Third Circuit restored a consumer fraud suit that had been dismissed in 2008, after finding that Food and Drug Administration regulations covering food labeling did not bar the lawsuit. The complaint contends that the beverage contained an artificial sweetener.

Dr Pepper Snapple had argued that under the preemption doctrine, federal regulations governing food barred state court suits over such products. The court rejected the defendant's argument, finding that "neither Congress nor the FDA intended to occupy the field of food and beverage labeling and juice products" in a way that would preempt state court suits challenging the accuracy of product labels, according to the court's ruling.

The complaint, which was originally filed in New Jersey state court, charges Dr Pepper Snapple officials with violating state consumer fraud laws by marketing Snapple as "all natural" when one of the ingredients was an artificial sweetener. The case, which sought class-action status,

UPCOMING EVENTS

was moved to federal court in 2007, and the next year a federal district court dismissed the case on the grounds that it was preempted by FDA regulations governing food labels. The same year, the company replaced the artificial sweetener with sugar, according to court filings.

In the Snapple case, the Third Circuit found that Congress had not intended to dominate the regulatory scheme for the food labeling industry so completely that state court suits over label claims were barred. "It does not appear that Congress has regulated so comprehensively in either the food and beverage or juice fields that there is no role for the states," the court wrote.

Why it matters: The court's rejection of Snapple's preemption argument is obviously not the end of the story. Presumably, the case will now return to the lower court to be decided on the merits – i.e., whether Dr Pepper Snapple violated the state consumer fraud laws by promoting Snapple iced tea as "all natural."

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BetOnSports Founder Pleads Guilty and Forfeits $43 Million

Gary Kaplan, the founder of BetOnSports, the defunct U.K. online betting operation, has pleaded guilty in a U.S. court to charges of conspiring to violate the federal racketeering and other U.S. laws. Kaplan has also agreed to forfeit more than $43 million in criminal proceeds, the Justice Department said.

In preparation for the plea deal entered in U.S. District Court in St. Louis on August 14, Kaplan has transferred $43,650,000 here from a Swiss bank account.

If the judge accepts the terms of the plea deal, Kaplan will be sentenced to a prison term of 41 to 51 months, the Justice Department said. Kaplan's sentencing is scheduled for October 27. He has been in prison without bail since his arrest in March 2007.

Kaplan admitted in court that starting in the mid to late 1990s, he set up offshore business entities in Aruba, Antigua, and eventually Costa Rica to provide betting services to U.S. residents through Internet Web sites and toll-free telephone numbers. Some of his Web servers were located in Miami, and U.S. customers placed wagers over U.S. telephone lines.

In mid-2004, BetOnSports issued an IPO on the London Stock Exchange's AIM market that earned Kaplan more than $100 million, the Justice Department said. In 2006, under pressure from the Justice

Department, BetOnSports shut down.

In June, three former employees of BetOnSports – the brother and sister of Gary Kaplan and his former personal assistant – pleaded guilty to federal racketeering charges in a U.S. District Court in St. Louis.

Why it matters: The Justice Department has engaged in a multiyear campaign against Internet gambling, using laws that critics contend are vague, ambiguous, and in some cases are contradicted by state law. Yet anti-online-gambling efforts continue. Over the summer, the U.S. Attorney of the Southern District of New York seized $34 million in funds belonging to a reported 27,000 online poker players. Meanwhile, the U.S.'s battle against online betting is the source of an ongoing dispute with the European Union. It remains to be seen how this complex and multifaceted matter ultimately plays out.

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Court Revives Taster's Choice Lawsuit

California's highest court has revived a long-running dispute over Nestlé USA's use of a former model's image on its Taster's Choice instant coffee label.

On August 17, the California Supreme Court sent the case back to the trial court for a determination on how statute of limitations deadlines should be calculated in defamation lawsuits involving product labels.

Russell Christoff first sued Nestlé USA in 2003 for an alleged act of misappropriation of his likeness that started in 1998. According to Christoff's complaint, in 1986, Nestlé Canada, an affiliate of Nestlé USA, hired him to pose for a photo shoot. After being photographed gazing at a cup of coffee with an expression conveying he enjoyed the aroma, Christoff was paid $250 and given a contract providing that if the company used his picture on a coffee brick label, it would pay him $2,000 plus an agency commission. It also stated that payment for any other use would require further negotiation. The company eventually used Christoff's image on the coffee brick label, but did not inform or pay him, he alleged.

While working on a new Taster's Choice label design in 1997, Nestlé USA came across Christoff's image on the coffee brick label. Allegedly believing the company had usage rights because the image had been widely used in Canada, the employee never contacted Christoff or investigated the scope of Christoff's consent.

In 1998, Nestlé USA began using a new label design with Christoff's

Las Vegas, NV

for more information

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September 24, 2009

From The Source: AAF's Web Seminar Series

Topic: "Budget Busters: Bongs, Blogs and Brand Wars"

Speaker: Jeff Edelstein

for more information

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October 5-6, 2009

NAD Annual Conference 2009

Moderator: Jeff Edelstein

W Hotel

New York, NY

for more information

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October 7-9, 2009

Digital Music Forum West

Topic: "Digital Music Innovation: What's Next?"

Speaker: Aydin Cajinalp

The Roosevelt Hotel

Los Angeles, CA

for more information

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October 27, 2009

American Conference Institute's 3rd Annual Forum on Sweepstakes Contests and Promotions

Speaker: Linda Goldstein

The Carlton Hotel

New York, NY

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image on a variety of Taster's Choice jars and ads. In 2003, Nestlé USA redesigned its label using a different model.

Christoff claimed he discovered the use of his picture in 2002 when he happened to see a Taster's Choice can on a shelf at a Rite Aid store. He sued Nestlé the next year for appropriation of likeness.

The trial court applied a two-year statute of limitations and instructed the jury to determine whether Christoff knew or should have known earlier that Nestlé had used his image. The jury found that Christoff did not know, and should not reasonably have suspected that his image was being used without his consent, and awarded him more than $15 million in damages.

The Court of Appeal reversed, holding that under the single-publication rule, because Christoff had not filed his lawsuit within two years after Nestlé first "published" the label, his cause of action is barred by the statute of limitations unless, on remand, the trier of fact finds that Nestlé had hindered Christoff's discovery of the use of his photograph, or that the label had been "republished."

The California Supreme Court granted review. In its August 17 ruling, it agreed with the Court of Appeal that the judgment must be reversed because the trial court erroneously ruled that the single-publication rule does not apply to claims for appropriation of likeness. But it did not agree with the Court of Appeal that this meant Christoff's action necessarily is barred by the statute of limitations unless he can show that Nestlé had hindered his discovery of the use of his photograph, or that the label had been "republished."

"The Court of Appeal's ruling presupposes that Nestlé's various uses of Christoff's likeness, including its production of the product label for a five-year period, necessarily constituted a 'single publication' within the meaning of the single-publication rule," the court ruled. "Because the parties were prevented by the trial court's erroneous legal ruling from developing a record concerning whether the single-publication rule applied, we remand the matter for further proceedings."

Why it matters: The California Supreme Court's decision centers around a complex interplay of legal doctrines, including the statute of limitations, the single-publication rule, and rights of publicity, as they apply to a somewhat unusual fact pattern. Nevertheless, it is an interesting issue and we will keep you apprised of further developments in this long-running dispute.

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November 5-6, 2009
31st Annual Promotion Marketing Law Conference
Topic: "The Battle of the Brands"
Moderator: Chris Cole
Fairmont Hotel
Chicago, IL
for more information

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November 5-6, 2009
31st Annual Promotion Marketing Law Conference
Topic: "Sweepstakes & Contests: Lend Me Your Ear and I'll Sing You a Song..."
Speaker: Linda Goldstein
Fairmont Hotel
Chicago, IL
for more information

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November 18-20, 2009
4th Annual Word of Mouth Marketing Association Summit
Topic: "FTC Developments"
Speaker: Anthony DiResta
Paris Hotel
Las Vegas, NV
for more information

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Newsday Rejects Ad Criticizing Cablevision

Newsday has rejected an ad by the Tennis Channel criticizing the newspaper's parent company, Cablevision, for not carrying the network.

"Thanks for nothing Cablevision," says the ad, which shows a tennis racket smashing a cable box. It adds, "You've dropped the ball by preventing your subscribers from seeing Tennis Channel's round-the-clock coverage of the U.S. Open." It invites Cablevision customers to switch to DIRECTV, Dish TV, or Verizon FiOS for access to coverage.

The Tennis Channel said the ad, which ran two weeks before the U.S. Open, was accepted by all other newspapers it was offered to, including _The New York Times, New York Post, Daily News, Westchester-Rockland Journal News_,and the _Record of New Jersey_.

Neither Cablevision nor _Newsday_ would say who decided not to run the ad. In a statement, Cablevision wrote, "The Tennis Channel ads are nasty, unfair and intentionally misleading, and we don't think anyone should carry them."

Tennis Channel CEO Ken Solomon told _The New York Times_ that after four years of negotiations with Cablevision, the ad was "a court of last resort." He said the network has received "thousands of emails" from Cablevision subscribers wanting to know why it doesn't carry the channel.

In its statement, Cablevision said Tennis Channel's management was "only interested in money," and it would add the channel to its lineup "tomorrow" if Solomon would agree to a fair deal.

Why it matters: Media platforms have been known to reject ads that have the potential to unfairly injure other parties. But this ad is closer to home – attacking the newspaper's parent company. _Newsday_'s action raises the question of the paper's independence from its parent. On the other hand, the Tennis Channel, which ran the ads to build consumer sentiment for its cause, generated extra publicity by playing up _Newsday_'s rejection of the ad.

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Regulators and Plaintiffs' Lawyers Target Misleading Ads

Advertising is coming increasingly under attack by plaintiffs' lawyers

and regulators, according to observers.

According to a 2008 Federal Judicial Center report, the number of "consumer protection/fraud" class actions has climbed from 191 in 2001 to 489 in 2007. In 2007, such cases accounted for roughly one in five class-action filings.

For example, Dannon Company is defending class actions in Ohio, Florida, Arkansas, and New Jersey that allege the company overstated the health benefits of its probiotic yogurt products Activia and DanActive. Airborne Health, Inc. recently agreed to pay a total of $37 million to settle charges by consumers, the FTC, and a group of state attorneys general that it made unsubstantiated claims about its cold-prevention remedies.

Defense lawyers say the plaintiffs' bar is increasingly turning its sights onto advertising cases in lieu of personal injury actions, where it has become much more difficult to get class-action certification.

State attorneys general are also active on the ad front. For instance, New York Attorney General Andrew Cuomo recently extracted a $300,000 settlement from Lifestyle Lift for posting fake online consumer reviews.

Under the Obama Administration, the Federal Trade Commission has also ramped up its enforcement efforts on false and deceptive advertising. One area the FTC is focusing on is behavioral advertising. In February, the agency published guidelines calling for companies to inform consumers how their online behavior is tracked, is collected, what is done with that data, and how to opt out of any monitoring.

Why it matters: In the current environment of enhanced governmental scrutiny of advertising and a plaintiffs' bar that is targeting allegedly misleading claims in class-action suits, marketers would be smart to vet all their claims carefully, or face the possibility of defending expensive regulatory probes and class-action lawsuits.

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Facebook Faces Invasion of Privacy Lawsuit

Facebook may be all about shameless self-promotion, but that isn't stopping five people from suing the social networking company for violating California privacy laws and for false advertising.

The complaint filed in California state court alleges that Facebook users assume that personal information and photos they post on the site are

shared only with authorized friends. "Users may be unaware that data they submit ... may be extracted and then shared, stored, licensed or downloaded by other persons or third parties they have not expressly authorized," the suit reads.

The complaint includes a lengthy description of an alleged massive data-mining operation at Facebook, which it claims has transformed Facebook from a social networking company to a data-mining company. It charges the company with gathering and analyzing site content without the knowledge or consent of its users.

Facebook said the lawsuit has no merit and that it intends to fight it.

This is not the first time Facebook has been criticized for its privacy policies. Earlier this year, it changed its terms of use to claim, in essence, perpetual ownership of all content loaded on the site. After users complained, it omitted that provision from its terms of use.

Why it matters: Consumer advocates and some lawmakers express concern over the privacy implications of behavioral advertising, in which ads are targeted to individual users based on data collected from them. However, social networking sites are experimenting with ways of making their businesses profitable, and an obvious choice is behavioral advertising. We expect to see more lawsuits against social networking sites in the near future as this issue evolves.

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