Advertising Law

January 12, 2012

In This Issue

Not a Dry Case – Judge Lifts Restrictions on Alcohol Advertising in Texas

In a victory for the alcohol industry, a U.S. District Court judge struck down parts of the Texas Alcoholic Beverage Code on First Amendment grounds.

A group of beverage manufacturers had challenged the statute, arguing that the Code’s prohibition on “tied house” arrangements and the requirement that beverages be labeled according to the state’s definition of “beer” or “ale” violated their rights of free speech.

Lamenting the Texas Alcoholic Beverage Commission’s “halfhearted” defense of the Code, U.S. District Court Judge Sam Sparks agreed.

The Code divided the alcohol industry into three levels – manufacturers, wholesalers, and retailers – and forbade any overlapping ownership or relationship between different levels. This included the ability to advertise which retailers carried which manufacturer’s or wholesaler’s products, although wineries were exempt from this restriction.

Although the Commission suggested the state was attempting to prevent vertical integration between the various levels, the court said it failed to demonstrate that the restriction directly advanced this interest in the least extensive format.

Going forward, “provided there is no financial remuneration, incentive, inducement, or compensation between producers and retailers,” the makers of beer, ale, and malt liquor may advertise which retailers carry their products, Judge Sparks wrote.

Turning to the Code’s definitions of “beer” and “ale” or “malt liquor,” the Court said the Code’s category distinction “is simply not that good at conveying information about the alcohol content of malt beverages.”

The court found “laughable” the Commission’s attempt to defend this distinction by contending that consumers are unaware of the legal definitions and therefore unable to compare the difference in the products’ alcohol by weight. “The court simply does not share [the Commission’s] apparently low estimation of Texans, and remains steadfast in its belief that they are capable of basic math.”

Accordingly, the Commission may not compel beverage producers to use only those terms in their advertising and labeling and they may use

Newsletter Editors

Linda A. Goldstein
Partner
Email
212.790.4544

Jeffrey S. Edelstein
Partner
Email
212.790.4533

Marc Roth
Partner
Email
212.790.4542

Practice Area Links

Practice Overview
Members

Upcoming Events

January 24-25, 2012
ACI's 25th National Advanced Forum on Advertising Law
Topic: "Capitalizing on the Mobile Marketing Message While Reducing Exposure to New and Unpredictable Liabilities"
Speaker: Linda Goldstein
New York, NY
For more information

February 13-14, 2012
Law Seminars International: Developing Applications for Mobile Devices
Topic: "Privacy: Practical Tips for Ensuring Regulatory Compliance"
Speaker: Linda Goldstein
San Francisco, CA
For more information

Awards

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

Named a Top Practice Nationally for Marketing and Advertising

Practice leaders included among the prestigious *Best Lawyers* in the country their own language.

Judge Sparks also struck down Code provisions that permitted the inclusion of alcohol content information on labels and yet prohibited the use of words like “strong” or “full strength” to describe a product.

Despite the Commission’s argument that the government had an interest in informing consumers about the strength of alcoholic beverages, the court said the regulations “frustrate this interest as much as they advance it.”

To read the Court’s order in *Authentic Beverages Co. v. Texas Alcoholic Beverage Commission*, click here.

Why it matters: The decision – while spending much time deriding the efforts of the Commission – clears the way for beverage manufacturers to advertise alcohol content in Texas and the location where their products are sold. The court noted that the state could still pass appropriate regulations requiring producers to include accurate statements about alcohol content or prohibiting undue collusion between different levels of the industry, but it must provide a constitutionally sound justification if it does so.

back to top

Tostitos, SunChips, Tropicana Targets of New Suits

In the latest illustration of the dangers of making claims like “all natural” or “pure,” new complaints have been filed against Frito-Lay and Tropicana.

Frito-Lay labeled 11 of its Tostitos and SunChips products as “made with ALL NATURAL ingredients,” a representation central to the marketing of the products but false, according to a class action complaint filed in California federal court.

In addition to product labeling, the complaint alleges that the Frito-Lay Web site includes a page called “Naturally Delicious” that repeatedly refers to the company’s use of “natural ingredients,” “all natural corn,” and suggests that consumers look for the “all natural stamp” when shopping.

The suit contends that although the company touts its products as healthy, they primarily contain corn and vegetable oils that are made from genetically modified plants and organisms (“GMOs”).

As GMOs, by definition, are altered to exhibit non-natural traits, the claims are very likely to deceive consumers.

Named plaintiff Julie Gengo relied upon the advertising when she purchased Tostitos and SunChips for her family and would not have purchased those products but for the misleading statements, she alleges.

The suit seeks to certify a nationwide class of consumers who purchased the products since December 2007 to receive monetary damages and an order to halt and remove the allegedly misleading natural claims.

Tropicana is facing similar allegations in a pair of complaints recently filed in California and New Jersey federal courts. Tropicana’s orange juice is "heavily processed, designed and modified," despite the company's claims that it is "100 percent pure" and "not made from concentrate," the New Jersey complaint argues.

Because fresh-squeezed orange juice is unstable and has a short shelf life, the suits contend Tropicana juice undergoes an extensive processing that includes the addition of aromas and flavors.

"It is not natural orange juice. It is instead a product that is scientifically engineered in laboratories, not nature, which explains its shelf-life of more than two months," according to the New Jersey complaint.

Knowing that consumers want and demand natural products, Tropicana seeks to take advantage by deceptively promoting its juice as "100 percent pure and natural" even though it has been "pasteurized, deareated, stripped of its flavor and aroma, stored for long periods of time before it ever reaches consumers, and then flavored."

Tropicana's "deceptive marketing campaign" includes a Web site, YouTube, Facebook, and Twitter sites "for the purposes of marketing Tropicana and [to tout] the purity, freshness, and health benefits of its [juice]," the California plaintiff claims.

The plaintiffs further maintain that the carton's illustration of an orange with a straw stuck in it is meant to convey that the juice is fresh from the orange. "Tropicana suggests that there is no space for anything other than pure, fresh, natural orange juice in its cartons," according to the California suit, with ads that state "We squeeze 16 fresh-picked oranges into each 59-oz carton of Tropicana Pure Premium orange juice, and absolutely no space for added sugar, water or preservatives."

Purchasers are entitled to compensatory, treble, and punitive damages as well as injunctive relief, both complaints assert.

To read the complaint in *Gengo v. Frito-Lay*, click here.

To read the complaint in *Lynch v. Tropicana Products*, click here.

To read the complaint in *Lewis v. Tropicana Products*, click here.

Why it matters: The suits are just the most recent examples of consumer class actions filed against marketers making "all natural" or "pure" claims. Advertisers that rely upon such claims should be prepared to face a similar lawsuit and should take care to substantiate their claims.

back to top

Literally True Claim May Still Convey False Message, NAD Cautions

Reviewing a claim that Coppertone sunscreen with an SPF of 15 or higher "Protects across 100% of the UVA UVB spectrum," the National Advertising Division recommended that Merck discontinue the claim.

The advertising, which was used for several Coppertone products, appeared in print, on the Internet, on point-of-purchase advertising and free-standing inserts, and in broadcast commercials.

The claim also implied that Coppertone SPF 15+ products provide 100 percent protection across 100 percent of the spectrum, the NAD said.

While Merck's evidence supported a claim that Coppertone SPF 15+ offers *some* skin protection for all wavelengths across the spectrum, the NAD said that it did not provide complete protection at every point in the spectrum, as implied by the claim.

"NAD was concerned specifically about the aspect of the claim 'across 100%' because '100%' is a quantified term of absolute completeness. Consumers care about both the breadth and completeness of sun screen protection. Due to its mathematical nature, unlike words such as 'absorb' or 'shield,' the claim 'protects across 100%' is imbued with the authority of dispassionate and objective certainty of comprehensive protection," the NAD said. "Here, the message of completeness is reinforced in the commercials, print and website iterations where the actors on the beach, including children, are under a cloudless, bright, sunny sky."

The use of the disclaimer "amount of protection varies across the spectrum" actually contradicts the "strong, quantified performance message conveyed by the challenged claim," the NAD said, adding to potential consumer confusion.

A claim that may be literally true can still convey a message that is false or misleading, the decision emphasized, and given the importance of sun exposure as a consumer health concern, "it is incumbent upon advertisers to be specific with their claims and not overstate the health benefits of their products."

Merck should discontinue the claim at issue, the NAD said. But it noted that the advertiser could still claim its Coppertone SPF 15+ sunscreens offer protection across the entire UVA UVB spectrum "as long as the new claim does not imply complete protection at every point in the spectrum."

To read the NAD's press release about the case, click here.

Why it matters: "A claim that is literally true may, in the context in which it is presented, still convey a message that is false or misleading," the NAD cautioned.

back to top

Do Not Pass Go: Another Suit Filed over McDonald's Monopoly Game

A class action suit was filed in Illinois federal court alleging that McDonald's and two of its advertising agencies failed to provide legally required consumer disclosures in connection with its long-running Monopoly game promotion.

Plaintiff Michael Siegel claims that the game stamps collected as part of the game constitute written promotional prize offers under the state's Prizes and Gifts Act and that the defendants failed to make the required disclosures.

Required disclosures include the name or names of the sponsor and the sponsor's address; the retail value of each prize; a disclosure that no purchase is necessary to enter the promotion and that a purchase will not improve a consumer's chances of winning; a statement of the consumer's odds of receiving each prize; whether shipping or handling fees or any other charges are required to obtain a prize, or whether prizes are subject to other restrictions; and a disclosure of any limitations on eligibility.

Instead, each game stamp identified whether the consumer won an instant prize – like free food, cash vacations, electronic games, and vehicles – or needed to collect more stamps. The game stamps also referred consumers to the official rules in a separate document, which contained the required disclosures.

That reference was insufficient to satisfy the Act, according to the complaint.

Siegel contends he purchased a food item in October 2011 in Illinois and received a "Pacific Avenue" game stamp, which entitled him to win a Nissan LEAF.

By failing to include all relevant information on the game stamps, the defendants violated the state Act and owe a class of Illinois consumers the greater of $500 or twice the amount of their pecuniary loss, reasonable attorneys' fees, and court costs, according to the complaint.

To read the complaint in *Siegel v. McDonald's Corp.,* click here.

Why it matters: The suit will turn on whether the game pieces constitute written promotional prize offers under Illinois's Prizes and Gifts Act. If the plaintiffs are correct, then the lack of required disclosures would be a violation of the Act. If the game stamps' reference to the official rules satisfies the statute, however, the promotion passes muster.

back to top

Prohibition on ZIP Code Request Applies Retroactively

In a decision that may not bode well for retailers, a California appellate court has reversed the dismissal of a class action suit against Brookstone Co. in which plaintiffs allege that the company illegally collected consumers' ZIP codes.

The plaintiffs filed suit prior to the decision in *Pineda v. Williams-Sonoma*, which held that the collection of ZIP codes as part of credit card transactions violates the Song-Beverly Act.

In 2009 a trial court agreed with Brookstone that a zip code did not constitute "personal identification information" under the Act and dismissed the suit.

But after *Pineda* was issued by the California Supreme Court – and the Court said its holding should be retroactively applied – the plaintiff sought to reverse dismissal of her case.

Brookstone disagreed and sought to apply *Pineda* prospectively only.

In an unpublished decision, the court sided with the plaintiff. "*Pineda* expressly concluded: 'The *only reasonable* interpretation of [the Act] is that personal identification information includes a cardholder's zip code,'" the court emphasized.

Even though courts had previously ruled that the Act did not include

ZIP codes, those contrary interpretations were not reasonable, the court said.

"If the California Supreme Court concludes an interpretation of the plain language of a statute is the only reasonable one, a party cannot persuasively assert that interpretation was unexpected or unforeseeable simply because certain attorneys, trial courts, and/or courts of appeal may have previously reached contrary conclusions regarding that statute," the court said.

Brookstone's due process rights would therefore not be violated by a retrospective application of the *Pineda* decision, the court held, and reinstated the case.

To read the court's opinion in *Alvarez v. Brookstone*, click here.

Why it matters: The *Pineda* decision has already resulted in hundreds of similar suits, and despite the court's choice to issue *Alvarez* as an unpublished decision, it will be cited by plaintiffs' attorneys for support in those cases.

back to top