Advertising Law @ manatt

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## In This Issue



# Special Focus
## EPA Decision Highlights Risks to Retailers Under FIFRA

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**A United States Environmental Protection Agency ("EPA") administrative judge levied $409,490 in penalties against California-based retailer 99¢ Only Stores for selling pesticidal products that were either not registered with the EPA as required by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") or not properly labeled pursuant to FIFRA.**

FIFRA regulates the sale, distribution, and use of pesticides. Every FIFRA-regulated pesticide must be registered with the EPA and properly labeled before being sold in the United States. Although the producer and/or importer of pesticides is responsible for compliance with FIFRA requirements, each seller and distributor must also ensure that the pesticide is properly labeled prior to sale.

The case involves the sale of two cleaning products and one pest-control product imported from Mexico. The majority of the violations involved the sale of one of the cleaning products, the label of which included statements in Spanish that it disinfects or sanitizes surfaces. According to the June 24, 2010, Initial Decision, the retailer sought to mitigate the penalties based on arguments that the violations occurred despite the retailer's exercise of due care. For example, the retailer asserted that the label on the products in question differed from the label on the product sample previously inspected by the retailer for the purpose of determining FIFRA compliance. Specifically, although the

label on the sample product did not contain any pesticidal claims, the label on the products received for retail sale (and subsequently sold by the retailer) included the improper pesticidal claims. Furthermore, the purchase order for the contested products included a representation by the distributor that the products in question were "in conformity with all required laws; produced, labeled, and identified in compliance with all applicable federal, state, local laws, rules, and regulations."

However, notwithstanding the retailer's apparent belief that these products were in compliance with applicable laws and did not make any pesticidal claims, the Initial Decision highlighted that the retailer was negligent in failing to confirm that each unit of product sold by the retailer was properly labeled under FIFRA.
To read the EPA's Initial Decision, click here.

**Why it matters:** Although the EPA continues to closely scrutinize FIFRA compliance by manufacturers of pesticidal products, this decision highlights that the EPA is also focusing its attention on retailers of such products. According to an EPA press release, the penalty represents "the largest contested penalty ever ordered by an EPA administrative law judge against a product retailer under [FIFRA]." Moreover, this case also emphasizes the heightened risk of FIFRA fines and stop sale orders by EPA, generally.

back to top

## NAD: Seventh Generation Should Modify, Discontinue Claims

**In a challenge brought by competitor Procter & Gamble, the National Advertising Division recommended that Seventh Generation Inc. modify or discontinue certain safety and "natural" claims about its products.**

In a television advertisement for Seventh Generation, the announcer says, "People everywhere are saying no to hazardous chemicals," while a box containing competing household cleaners is shown. As a man is featured stocking his pantry with Seventh Generation products, the announcer continues: "and yes to a safe and naturally effective way to clean."

P&G argued that the commercial implies that competitive products are dangerous and that Seventh Generation products do not contain "hazardous" chemicals. The NAD agreed, finding there was no evidence that "when used as directed, Seventh Generation products are safer than competing household cleaning products." The decision recommended that Seventh Generation discontinue the comparative safety claims, as well as any express or implied claims that suggest its products do not contain hazardous chemicals.

**UPCOMING EVENTS**

September 21, 2010
**Manatt/ACC False Advertising and Trademark Litigation Event**
**Topic:** "How to Win Jury Trials in Trademark and False Advertising Cases"
**Speakers:** Tom Morrison
New York, NY
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 7, 2010
**WOMMA's Talkable Brands Exchange**
**Topic:** "Legal Rapid Fire Panel with the FTC"
**Speaker:** Tony DiResta
New York, NY
For more information

October 17-20, 2010

Other claims at issue included Internet ads and product packaging that claim Seventh Generation detergents are 100% natural and safer than competitive cleaning products.

Because there is no regulatory definition of what constitutes "natural" for the product category – and no industry consensus – the NAD reviewed the product packaging and the commercial.

While the packaging doesn't convey that the product is 100% natural, the NAD expressed concern that the key ingredients in the listed products are only partially natural.

"While NAD is not in the position to assign a percent to what constitutes 'natural,' NAD was concerned by the fact that the key ingredients in the listed products are only partially natural contradicts the unqualified 'natural' in the product name, which is especially significant given that purchasers of Seventh Generation products specifically seek out natural products."

The NAD suggested that Seventh Generation modify the use of "natural" on certain products to make it clear that the basis for the claim is the fact that the products are plant-derived or plant-based. However, it did note that nothing in the decision "prevents [Seventh Generation] from touting its efforts in minimizing the inclusion of hazardous chemicals and its disclosure of all ingredients in its household cleaning process."

In its advertiser's statement, Seventh Generation said it would take the NAD's recommendations into consideration.

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

**Why it matters:** "When making comparative safety and efficacy claims for household cleaning products, advertisers must exercise caution to avoid overstating potential product benefits or dangers," the NAD cautioned. Companies that do not heed this advice may find themselves the subject of an NAD or regulatory challenge.

back to top

## FDA Warns Companies About Green Tea Claims

**The Food and Drug Administration sent a warning letter to Unilever about certain health claims made about the company's Lipton Decaffeinated Green Tea product.**

The agency said Unilever's Web site – with a link to the site on the product label – contains unauthorized therapeutic and nutrient content claims. On the site, a section titled "Cholesterol Research" says that "Four recent studies in people at risk for coronary disease have shown a significant cholesterol-lowering effect from tea or tea flavonoids. . . .

**SOCAP International Annual 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 Option/Advance Consent/Affiliate

One of these studies, on post-menopausal women, found that total cholesterol was lowered by 8% after drinking 8 cups of green tea daily for 12 weeks."

That language constitutes a therapeutic claim, the agency said. "The therapeutic claims on your website establish that the product is a drug because it is intended for use in the cure, mitigation, treatment, or prevention of disease," the letter said.

In addition, the FDA warned Unilever that by using the term "antioxidant" in the statement, "Lipton Tea is made from tea leaves rich in naturally protective antioxidants," it was making an unauthorized nutrient content claim. To use the term "antioxidant," a company must establish the nutrients that are subject to the claim, and those nutrients must have recognized antioxidant activity, with the level of each nutrient sufficient to qualify for the claim.

Claims such as "tea is a naturally rich source" or "packed with protective flavonoid antioxidants," which were also made on the site, fail to comply with the FDA's requirements because they do not identify the relevant nutrients or their levels, the letter said.

Similar letters were also sent to Dr. Pepper Snapple Group, the maker of Canada Dry Sparkling Green Tea Ginger Ale, as well as Fleminger Inc. and Redco Foods, other makers of green tea products.

To read the FDA's warning letter to Unilever, click here.

**Why it matters:** Advertisers should be careful to avoid making unauthorized therapeutic and nutrient content claims to avoid similar warnings from the FDA.

back to top

## The Buzz on Google's Settlement

**For $8.5 million, Google recently settled a class action lawsuit alleging that its social networking feature, Buzz, violated users' privacy.**

Launched in February as the company's answer to competitive social networking sites, Google Buzz was instantly attacked by critics. As originally presented, Buzz was automatically added to all users of Gmail, Google's e-mail system, and the program then turned users' frequent e-mail contacts into followers.

The users' information and followers were also made public by default, including photos and information shared in other Google products, such as the Picasa photo-sharing site.

In response, a putative class action lawsuit was filed in California federal court, alleging that Buzz violated federal privacy law. The Electronic Privacy Information Center also filed a complaint with the

Upsells," Marc Roth

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

Chicago, IL

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Federal Trade Commission, requesting an investigation.

The suit – which alleged violations of the Electronic Communications Privacy Act, the Stored Communications Act, the Computer Fraud and Abuse Act, and public disclosure of private facts – included all Gmail users in the United States.

Under the terms of the settlement, the company will "undertake wider public education about the privacy aspects of Buzz," and the plaintiffs may make further recommendations to Google about such education. Google also acknowledged that the company has addressed privacy issues, while the plaintiffs agreed that privacy threats no longer exist. Finally, Google agreed to create an $8.5 million settlement fund, which will go toward "existing organizations focused on Internet privacy policy or privacy education" after fees and costs.

Each of the seven named plaintiffs can receive up to $2,500 and the plaintiffs' attorneys could receive up to $2 million. A hearing on the preliminary approval of the settlement is set for September 27.

To read the proposed settlement in *In Re Google Buzz User Privacy Litigation*, click here.

**Why it matters:** The same day that the settlement was announced, Google said it plans to simplify its privacy policies by cutting their length by 22%. "To be clear, we aren't changing any of our privacy practices," wrote a Google lawyer on the company's official blog. "We want to make our policies more transparent and understandable." The Buzz lawsuit was just one of many class actions filed recently over allegations of privacy violations, including against Classmates.com and litigation against Google because it intercepted data while mapping its Street View service. Internet companies should ensure that their privacy policies are up to date or be prepared to face civil litigation or regulatory intervention.

back to top

## FTC Flips the Switch on Light Bulb Manufacturer

**The Federal Trade Commission filed suit against light bulb manufacturer Lights of America and the company's principals alleging that they are misleading consumers by exaggerating the light output and life expectancy of Light-Emitting Diode (LED) bulbs on product packaging and brochures.**

The FTC filed its deceptive advertising complaint in U.S. District Court in Los Angeles, claiming that since 2008, the company overstated the features of its LED bulbs on both product packaging and brochures, and misled consumers about the brightness of its LED bulbs as compared to traditional incandescent bulbs.

LED bulbs, although typically higher-priced, also last longer than incandescent and compact fluorescent bulbs, and they can save consumers on energy costs over a period of time, according to the FTC.

Lights of America's LED bulbs produced "significantly" less light (measured in lumens) than it claimed, however, according to the complaint. The FTC said that the company promoted one of its bulbs as producing 90 lumens of light output when tests showed it produced only 43 lumens.

According to the FTC, Lights of America also deceptively compared the brightness of its LED bulbs with incandescent bulbs. The complaint used the example of an LED lantern bulb that the company said could replace a 40-watt incandescent bulb, which typically produces about 400 lumens, when the Lights of America LED bulb only produced 74 lumens.

Finally, the agency claims that Lights of America's LED bulbs failed to last as long as the company claimed. Independent testing showed that an LED-recessed bulb the company claimed would last 30,000 hours lost 80% of its light output after 1,000 hours.

The complaint seeks both injunctive relief and compensation for consumers.

To read the complaint in *FTC v. Lights of America, Inc.*, click here.

**Why it matters:** The complaint is a reminder to companies making performance claims that their advertising must be supported with the appropriate testing. Like the Seventh Generation matter above, advertising that has a "green" or energy claim is likely to attract greater scrutiny by regulators as companies seek to gain consumer attention.

back to top

## Washington Settles With Window Maker Over Energy Claims

**The Washington Attorney General's office recently settled with Great Lakes Window over allegations that the company made unsubstantiated energy efficiency claims. In addition to paying $50,000 in refunds for qualifying homeowners, Ohio-based Great Lakes agreed not to engage in certain marketing practices.**

The Washington AG filed a complaint against the company, which sells replacement windows to retail window companies nationwide, as well as a local Washington company, Penguin Windows, with which it settled earlier this year. From 2004 to 2009, Great Lakes ran a "40% Energy Savings Pledge" campaign that claimed consumers would save at least 40% in energy costs the first year by purchasing new doors and

windows, or be paid the difference, subject to a number of material terms and conditions.

The complaint alleged that the claim was false, a violation of the state's consumer protection law.

The AG's office said that the energy savings realized varied based on a number of different factors, including the type, size, and location of the replaced windows; the insulation of the home; the condition of the home's heating and cooling systems; and the climate at the home's location. To estimate the energy savings, a whole-home energy audit would need to be performed, the AG's office said.

"As a result, the actual energy savings that homeowners who qualified for the Pledge typically obtained was in fact far less than the 40% savings the Pledge promised," according to the complaint.

Under the terms of the settlement, Great Lakes did not admit to wrongdoing. The AG's office agreed to suspend $25,000 in civil penalties, although the company will pay $10,000 in attorneys' fees and legal costs, as well as $50,000 to consumers. Great Lakes also agreed not to engage in false and deceptive advertising, and to review and respond to written customer complaints about its energy efficiency claims and keep records of those complaints for four years.

To read the complaint in *State v. Great Lakes Window, Inc.*, click here.

To read the settlement agreement, click here.

**Why it matters:** Advertisers must have support for all claims, even those with multiple, complicated factors affecting the outcome – such as a home energy audit.

back to top