

# Advertising Law

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## Verizon's Geographical Advertising Program Faces Controversy

**Verizon announced a controversial new "advertising by geography" program that has already received negative reviews from lawmakers.**

The company notified customers in September that it planned to target specific advertising to broadband subscribers and wireless customers by their physical addresses.

Customers were given the opportunity to opt out of the program.

"This advertising program uses your physical address to help advertisers deliver ads to websites that you visit while using Verizon Online," the company said in its notice. "This program allows national brands and local businesses to tailor offers, coupons, and incentives to your local area."

Reps. Ed Markey (D-Mass.) and Joe Barton (R-Tex.) expressed their concern about the program in a letter to Verizon inquiring what consumer information will be disclosed to marketers and why the program is opt-out rather than opt-in, which requires a customer's explicit consent.

"Consumer consent and control are critical to ensure adequate privacy protections," said Rep. Markey. "As a longstanding advocate for clear, easy to use opt-in policies for the sharing and disclosure of consumers' personal information, I am concerned that Verizon's new plan will put third parties in control of the sensitive information of its customers – especially their location. Verizon has in effect chosen 'Can You Track Me Now?' as their new marketing tagline."

The lawmakers also queried the company about how Verizon will benefit from the program and how the company will ensure that only aggregate, rather than individually identifiable, customer information will be used or disclosed as part of the data sharing program.

To read the letter to Verizon, click [here](#).

**Why it matters:** Verizon's new program falls right into the middle of the ongoing privacy debate, particularly the implications of targeted mobile advertising. Although Verizon attempted to stave off some controversy by notifying consumers in advance and providing them the opportunity to opt out of the program, it still faces questions from lawmakers about whether the company's actions were sufficient.

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## Practice Area Links

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## Upcoming Events

November 14-16, 2011

### PMA Marketing Law Conference

**Topic:** "What's New in the Game Today - New Twists on Traditional Sweeps, Contests and Promotions," [Linda Goldstein](#); "The Perils of Partners - Affiliate/Advanced Consent Marketing," [Marc Roth](#); "Courting Disaster - Mock Trial of Promotional Mishaps," [Chris Cole](#)

Chicago, IL  
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November 15, 2011

### ABA Private Advertising Litigation and Consumer Protection Teleseminar

**Topic:** "The Television Network Advertising Clearance Process: Soup to Nuts"  
**Speaker:** [Jeff Edelstein](#), [Lauren Teitelbaum](#)

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December 5-6, 2011

### Digital Gaming and Lottery Policy

**Topic:** "Lottery 2.0 - Welcome to the Social Networks"  
**Speaker:** [Linda Goldstein](#)

Washington, D.C.  
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## **FTC: Revisions Coming to Guidelines on Marketing Food to Children**

**At a recent joint hearing before the House Energy and Commerce Subcommittee on Health and Subcommittee on Commerce, Manufacturing and Trade, speakers discussed the Interagency Working Group's proposed guidelines for marketing food products to children.**

The preliminary guidelines, issued in April, drew criticism from the food industry. As drafted, they called for food and beverage companies to modify the content of their products to meet nutrition standards or eliminate the marketing of such products to children under age 18.

Industry groups argued that the guidelines, albeit voluntary, would violate their First Amendment rights and would amount to de facto regulations.

At the hearing, Director of the Federal Trade Commission's Bureau of Consumer Protection, David Vladeck, told lawmakers that the original guidelines will be scaled down.

"The draft recommendations we issued were ambitious," Vladeck said. "As we studied the comments, however, we realized that perhaps we were too ambitious."

He said the IWG is currently considering whether to make "significant revisions" to its initial proposal, "including revising the marketing principles to more narrowly focus them on those techniques that are used most extensively to market to children."

For example, "brand equity characters," like Kellogg's Tony the Tiger, would be allowed, Vladeck said, as would marketing directed to children aged 12 to 17. Community programs, entertainment and sporting events, philanthropic activities and theme parks would also be excluded from the guidelines, as they are "directed to families or the general community," Vladeck testified.

Vladeck also recognized the industry's self-regulatory program and said the IWG's updated proposal will be "substantially similar."

Even with his acknowledgement of changes, opponents reiterated their concerns to lawmakers.

Elaine Kolish, vice president of the Council of Better Business Bureaus and director of the Children's Food and Beverage Advertising Initiative, testified that "self-regulation is working," and because the organization is continuing to formulate changes, voluntary government restrictions "are unnecessary."

For example, the [recent category-specific uniform nutrition criteria](#) established for the self-regulation program will "further improve the foods in child-directed advertising," she said.



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She also called the IWG's initial proposal "not realistic or workable."

And Dan Jaffe, executive vice president of the Association of National Advertisers, called the guidelines "radical, seriously flawed, and [potentially] economically disastrous," requesting that they be formally withdrawn.

To read Kolish's testimony, click [here](#).

To read Vladeck's testimony, click [here](#).

**Why it matters:** The future of the guidelines remains unclear. In addition to Mr. Vladeck's testimony that seemingly withdraws some of the more controversial aspects of the guidelines, the IWG sent a recent letter to the same House Committee, in which it noted plans to make "significant changes to both the marketing and nutrition principles" found in the preliminary guidelines. And some lawmakers have expressed concerns similar to the industry. At the hearing, Committee Chairman Rep. Fred Upton (R-Mich.) said the guidelines "appear to be a first step toward Uncle Sam planning our family meals."

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## **Alba Files Suit to Protect Publicity Rights Against Belly Bandit**

**As if she didn't already have her hands full, new mother Jessica Alba filed a right of publicity suit against The Caden Cos. Inc., maker of a compression wrap known as the Belly Bandit.**

Alba, mother of a three-year-old, recently gave birth to her second daughter.

In a new suit filed in California state court, Alba says the maker of the Belly Bandit has taken advantage of her maternal status by using her name and image to promote its belly wrap, that purports to "help tighten and shrink your belly and hips!"

Alba alleges that the company used her likeness without her permission on the packaging of the product as well as her name and image under the "Celebrity Testimonials" section of its Web site.

The defendant's "brazen" use of Alba's name also included an unauthorized endorsement that the Belly Bandit is "Jessica Alba's #2 Secret for a Fast Post Pregnancy Slimdown!" according to the complaint.

The suit argues that Alba has invested "considerable" time, money, and energy into the development of her fame, and that she exercises "careful consideration" prior to permitting any commercial use of her name or likeness.

Alba seeks more than a million dollars in damages as well as gross revenues received by the defendant from the sale of products that use her image.

To read the complaint in *Alba v. The Caden Cos.*, click [here](#).

**Why it matters:** Alba is just the latest celebrity to file suit to protect her publicity rights, although her allegations regarding the use of her image are fairly straightforward. Celebrities and their estates as diverse as [Hulk Hogan](#) and [Bette Davis](#) have filed suit recently to protect their

rights over the inclusion of their likenesses in a cartoon character and a dress, respectively.

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## **Insole Ads Lack Substantiation, ERSP Says**

**The Electronic Retailing Self-Regulation Program recently determined that Springbak, the maker of insoles for athletes, should modify or discontinue its use of customer testimonials that did not reflect the results that consumers “typically expected.”**

In recommending that the claims be modified or discontinued, the ERSP concluded that the company could support certain claims made in its broadcast and online advertising – for example, that the insoles will help consumers “run faster,” – but that its test results did not support other broad performance and express health and safety claims.

Springbak marketed Springsoles, insoles designed for athletes to improve their speed, vertical leap, jump, endurance and strength, through the use of testimonials, performance claims (i.e., “Guaranteed to help ease your feet and joint pain, improve your stability, and increase your athletic performance”) and establishment claims (i.e., “. . . this amazing and scientifically proven, patented spring sole”).

One study provided adequate support for Springbak’s claim that it could help users “Run Faster,” the ERSP said, because the study was double-blinded and conducted on 31 geographically dispersed athletes over various distance disciplines.

But most of the substantiation studies provided to the ERSP “consisted of summaries and abstracts of studies that were conducted on a small sample of subjects with little to no control parameters or statistical significance,” including an unblinded observation of seven subjects and an undated study of ten subjects.

Turning to establishment claims, the ERSP said that Springbak failed to provide sufficient reliable scientific data to support its advertising. Establishment claims require at least two adequate and well-controlled clinical studies for substantiation, the ERSP said, and the mere existence of a patent for a product does not, on its own, qualify as reliable, competent and consumer-relevant scientific evidence. The decision recommended that Springbak discontinue such claims.

Therefore, the ERSP said there was no reliable, reproducible evidence to support Springbak’s claims that the insoles could help consumers “Gain 5.5% Longer Stride Length” or alleviate health conditions like “feet and joint pain.”

Finally, while the ERSP recognized that Springbak had many glowing testimonials, all of which were genuine and unscripted, none of the claims made by the coaches in the advertising were supported by independent testing evidence.

Relying on the Federal Trade Commission’s revised Guides Concerning the Use of Endorsements and Testimonials in Advertising, the ERSP said that quantified claims in the testimonials – like that track athletes “were

able to do 35% more clap push-ups wearing Springbak” and that athletes “averaged 5.2 more repetitions” wearing the insoles – should be modified or discontinued.

To read the ERSP’s decision, click [here](#).

**Why it matters:** The decision serves as a reminder to advertisers that there is no substitute for reliable and reproducible data to support claims that a product and/or its components will perform in a particular way. Consumer testimonials that include representative and quantified claims must also be supported by independent testing evidence indicating that the stated results may be “typically expected by consumers,” the ERSP noted.

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