Advertising Law @ manatt

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In This Issue

Manatt Partners Among California's Top IP Lawyers

Manatt partners Susan Hollander, Jill Pietrini and Robert Becker were named to the *Daily Journal's* 2010 list of California's Leading Intellectual Property Lawyers, published in the San Francisco and Los Angeles editions. The list recognizes "lawyers whose work had the most impact on their clients and more importantly on the area of law" during the past year.

This year marks Hollander's third time being named to the prestigious list of California's Top IP Litigators – every year since its debut in 2008. The publication calls out her work as lead trademark counsel for The Scott Company, which includes responsibility for protecting more than 10,000 trademark registrations around the world. She is also lead trademark counsel for 24 Hour Fitness and Francis Ford Coppola Industries.

Jill Pietrini, named among the Top Portfolio Managers, Prosecutors and License Specialists, was recognized as a "hot property among her clients" by the *Daily Journal*. Pietrini's work for Summit Entertainment, producers of the popular "Twilight" motion picture franchise, was mentioned, as were the many victories she secured for Mattel, Inc.

Robert Becker, honored with Hollander as one of the state's Top IP Litigators, was recognized for his high profile work on behalf of client Visto Corp., the maker of push e-mail products for mobile phones, on their patent infringement lawsuits against Research in Motion, parent company to Blackberry. The Visto/RIM lawsuits and related counter-suit settled last year for $265.5 million. This is Becker's second appearance on the Top IP Litigators list.

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UPCOMING EVENTS

April 14-15, 2010

American Conference Institute

Walgreens Settles with FTC Over Cold and Flu Supplement

Walgreens has agreed to pay the Federal Trade Commission almost $6 million and change its advertising after the FTC claimed the company deceptively advertised "Wal-Born," its store-brand cold and flu dietary supplement.

The FTC alleged that Walgreens improperly marketed Wal-Born by claiming it could prevent colds, fight germs, and boost the immune system. According to the complaint, Walgreens made such claims in advertisements in nationwide newspaper circulars, on its packaging, as well as on its Web site. The complaint also alleges that sales of the supplement from December 2004 through June 2009 exceeded $31.7 million.

The ads encouraged users to take the product "at the first sign of a cold symptom or in crowded places," and touted the supplement as "Great tasting! Antioxidants! Amino acids! Electrolytes! 1000mg of Vitamin C! Seven herbal extracts! Take to boost your immune system before entering crowded germ filled environments, like airports, offices and schools."

Under the terms of the settlement, Walgreens cannot claim that Wal-Born can boost the immune system or prevent or treat colds or the flu unless it has scientific proof.

The company will pay the FTC a total of $5.97 million.

In a separate settlement, the two principal officers of Improvita Health Products, Inc., the manufacturer of Wal-Born and other similar supplements, settled with the FTC for $565,000. The officers also agreed to ensure that their employees comply with the terms of the settlement.

Why it matters: The settlement is the latest action by the FTC taken against companies that advertise and market cold and flu remedies. In 2008, the FTC reached a settlement with the makers of Airborne totaling $23.3 million over claims that the company falsely advertised its herbal supplement. And last year, the FTC settled similar claims against Rite Aid and CVS over the stores' in-house brands of supplements.

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Health Care Reform Includes Changes to Menu Labeling

Food retailers beware – the health care reform bill signed into law by President Barack Obama last month includes new labeling requirements and caloric disclosures for restaurants.

Advertising, eMarketing & Promotions for the Pharmaceutical Industry
Speaker: Linda Goldstein
Philadelphia, PA
The Union League
for more information

April 21-23, 2010
ABA Antitrust Law Spring Conference
Topic: "Mock Trial 2010: A Jury Review of Exclusionary Conduct"
Speaker: Tom Morrison
Washington, DC
for more information

May 19, 2010
Beverly Hills Bar Association Entertainment Law Committee
Topic: "Brand Integration"
Speaker: Jordan Yospe
Beverly Hills, CA
for more information

June 10-12, 2010
Natural MarketPlace 2010
Topic: "The Claim Game- Vegas Edition"
Speaker: Ivan Wasserman
Las Vegas, NV
Las Vegas Convention Center
for more information

June 15-16, 2010
American Conference Institute Litigating and Resolving Advertising Disputes

Section 4205 of the Patient Protection and Affordable Care Act amends the Food, Drug, and Cosmetic Act to add new labeling requirements for chain restaurants with 20 or more locations doing business under the same name and offering substantially the same menu items. Food retailers with fewer than 20 locations are exempt but can choose to opt in to the requirements.

The law applies to menus and menu boards, including drive-through menu boards and self-service food, such as vending machines or salad bars.

Under the law, food retailers must declare the number of calories each standard menu item provides as it is typically prepared, and must present the required calorie information in terms of suggested caloric intake in the context of an overall diet.

Further, the calorie information must be adjacent to the name of the standard menu item as it is usually prepared and placed on the actual menu or menu board, including a drive-through menu board. It must also be in written form, available on the premises upon consumer request, and include nutrition information currently required on packaged food labels, such as the number of calories, total fat, saturated fat, sugars, cholesterol, fiber, and protein, on a per-serving basis.

Certain items are excluded, such as daily specials, condiments, and temporary menu items, such as test market items or seasonal items.

For vending machines, if an article of food that is sold does not allow a consumer to examine the nutrition label prior to purchase, the operator of the machine must provide a sign in close proximity to each food item or its selection button that includes a statement disclosing the number of calories in the item.

Why it matters: The new law will provide some clarification for restaurant owners, as it expressly preempts state and local rules unless they are more stringent than the Act (for example, New York City requires restaurants with 15 or more outlets to post nutritional information, less than the 20 locales required under the new federal law). However, some aspects of the law remain vague. The definition of "or similar retail food establishment" is unclear, and could apply to food distributors or large chains – such as gas stations with a self-service deli or grocery stores with a salad bar – with 20 or more locations. Another wrinkle: The law requires that the food establishments have a "reasonable basis" for their nutrient information, but does not include a standard by which to calculate. Clarification falls to the FDA, which is required under the law to propose specific regulations within one year. The process could take longer, and it is unknown when the new requirements will actually take effect.

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Topic: "The Realities of Bringing and Defending a Lanham Act case in Federal Court Part 2: Litigating and Proving the Case"
Speaker: Tom Morrison
New York, NY
The Helmsley Park Lane Hotel
for more information

June 15-16, 2010
American Conference Institute
Litigating and Resolving Advertising Disputes
Topic: "Pushing the Envelope: Case Studies Examining Advertising that has been the Focus of Recent Adversarial Proceedings"
Speaker: Linda Goldstein
New York, NY
The Helmsley Park Lane Hotel
for more information

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Our Practice

Whether you're a multi-national corporation, an ad agency, a broadcast or cable company, an e-commerce

Federal Reserve Issues New Rules on Gift Card Fees, Restrictions

The Federal Reserve issued new rules on gift card fees and restrictions set to take effect on August 22, 2010.

The rule amends Regulation E, and implements the gift card provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009.

Gift certificates, store gift cards, and general-use prepaid cards are all covered under the rule, although reloadable prepaid cards that are not marketed as a gift card, and prepaid cards received through a loyalty, award, or promotional program, are not included.

The rule has two major changes: It imposes restrictions on dormancy, inactivity, or service fees, as well as restrictions on expiration dates.

Under the rule, expiration dates must be at least five years after the date a gift card or certificate was issued or the date funds were last loaded. In addition, the rule prohibits any fees for replacing an expired card or certificate or for refunding the remaining balance if the underlying funds remain valid.

Dormancy, inactivity, and service fees can only be assessed under the following circumstances: if at least one year of inactivity on the card or certificate has passed; if no more than one such fee is charged per month; and if the consumer was given clear and conspicuous disclosures about the fees. The restrictions apply to fees such as monthly maintenance or service fees, balance inquiry fees, and transaction-based fees, such as point-of-sale fees, ATM fees, and reload fees.

Why it matters: The Federal Reserve's new rule only adds to the panoply of laws covering gift cards. It does not preempt existing state laws on gift cards that are more protective of consumers, so issuers remain subject to both the federal rule as well as differing state laws across the country. Issuers should be aware that many states go above and beyond the federal rule, and any cards that are marketed nationally must comply with the patchwork of laws across the country.

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FTC Seeks Input on Updating COPPA

The Federal Trade Commission announced that it is seeking public comment on the Children's Online Privacy Protection Act of 2000 (COPPA) in light of the agency's plans to update the Act because of technological advances.

COPPA, which took effect in 2000, prohibits Web sites from collecting or disseminating personal data about children under 13 without their

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But due to "changes to the online environment . . . including children's increasing use of mobile technology to access the Internet," the FTC said it is now considering updating the regulations.

Specifically, the FTC is seeking public comment on how the law should apply to new platforms, such as mobile, interactive TV, and interactive gaming, as well as the use of automated systems that filter out any personally identifiable information before posting in order to review children's online submissions.

The agency is also seeking comment on whether new technology exists to obtain verifiable parental consent that could be added to the regulations or whether the current methods should be removed.

In addition, the FTC is considering expanding the definition of "personal information" to include persistent IP addresses, mobile geolocation data, or information collected in connection with behavioral advertising.

A public roundtable will be held June 2, 2010, and the 90-day comment period will end June 30, 2010.

Why it matters: The expansion of the definition of "personal information" could place additional burdens on advertisers that utilize commercial sites geared toward children. The FTC has expressed interest in enhancing the transparency of behavioral advertising, and companies should be aware of the potential for new regulations under COPPA.

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