Advertising Law @ manatt

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In This Issue

Breaking News
FTC "Boosts" the Claim Substantiation Standard in Two Settlements

On July 14, 2010, the Federal Trade Commission announced two settlements concerning health and weight loss claims for food and dietary supplement products. Both settlements are very noteworthy in part because of the provisions in the orders that define the type of substantiation that the advertisers are required to possess in order to make certain claims.

One settlement involved Nestle Healthcare Nutrition, Inc., concerning claims that its BOOST Kids Essentials probiotic drink products protected kids from colds and flu by strengthening the immune system, and reduced diarrhea and decreased absences from school. The other settlement involved Iovate Health Sciences USA, Inc., concerning claims for a variety of dietary supplement products for weight loss (e.g., Accelis) and for treating and preventing colds, flu and allergies (e.g., Cold MD and Allergy MD). While the Nestle settlement did not include any monetary payment, Iovate is paying $5.5 million.

Prior to these two settlements, the FTC typically required advertisers to possess "competent and reliable scientific evidence" for claims covered by an order, which was defined very generally to mean "tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using

UPCOMING EVENTS

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procedures generally accepted in the professions to yield accurate and reliable results."

Rather than using this general language, the Nestle and Iovate orders require the advertisers to possess at least two adequate and well-controlled human clinical studies prior to making the types of claims that triggered the FTC's enforcement action. The orders specify that the two studies must be randomized, double-blind, and placebo-controlled (although the Nestle order provides that this may not be required if it cannot be ethically or effectively implemented), and they must be conducted by different researchers. The orders also specify that if a study is not on the identical product, there must be reliable scientific evidence that any differences will not impact the effectiveness of the marketed product.

In addition, per the orders, the companies cannot make claims about treating or preventing colds, flu or allergies unless the claim is permitted for the product by the Food and Drug Administration (FDA). This is very unusual in that the FTC Act requires that claims be truthful and not misleading – not that they meet FDA requirements. In its press release on the Iovate order, the FTC explained its reasoning for this provision: "Although FDA approval of health-related claims generally is not required for compliance with the FTC Act, in this case, the FTC determined that requiring FDA pre-approval before the defendants make disease claims for dietary supplements and drugs will provide clearer guidance that will facilitate the defendants' compliance with the FTC order and make the order easier to enforce."

Why it matters: These settlements are significant for several reasons. First, they show that the FTC is continuing to focus on products that claim to treat or prevent colds and flu, promise weight loss, or target kids. Second, the Nestle order is the first involving a probiotic product. Perhaps most importantly, they show that when settling cases involving health and safety claims in the future, the FTC may be very specific in the type of evidence it requires advertisers to possess before they can make similar claims again. Whether the specific substantiation required in these orders becomes FTC's de facto substantiation standard remains to be seen.

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Linda Goldstein to Offer Expertise at Upcoming Affiliate Summit East

Linda Goldstein, chair of Manatt's Advertising, Marketing & Media Division, will address questions from top merchants, networks and marketing affiliates on the most pressing regulatory issues in the advertising and marketing space during the "Ask the Experts" session at Affiliate Summit East.

Topic: Topic: "How to Avoid Becoming a Regulatory Target"
Speaker: Linda Goldstein
New York, NY
for more information

September 24, 2010
ACI Conference
Topic: "Sweepstakes, Contests, and Promotions"
Speaker: Linda Goldstein
New York, NY
for more information

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The event, to be held on August 15-17, 2010 in New York City, will address a host of the latest industry issues affecting affiliate marketers, including the following sessions: Seven Deadly Sins of Affiliate Marketing; Using Social Media for SEO; Podcasting 101; and Facebook Advertising From Soup to Nuts. Joining Ms. Goldstein in the "Ask the Experts" session are Alex Mifsud, CEO of EntroPay; Keith Posehn, President of Zorz LLC; and Rebecca Madigan, Executive Director of the Performance Marketing Association. For more information, click here.

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World Cup: Ambush Marketing Fails to Score, U.S. Soccer Protects Its Rights

In between nail-biting matches and vuvuzela noise, the World Cup also saw some legal advertising news.

Two Dutch women were criminally charged by the South African government after they took part in an ambush marketing campaign orchestrated by the beer company Bavaria. More than 30 women participated in the beer maker's publicity stunt by wearing orange minidresses paid for and provided by Bavaria to a match between the Netherlands and Denmark. But two of the women were charged with violating a law criminalizing ambush marketing, which host country South Africa had passed in anticipation of the World Cup. However, when the two women appeared in Johannesburg court, they were told by a prosecutor that all charges had been dropped. A spokesperson for the court said a settlement had been reached, but declined to give details.

Here in the United States, the U.S. Soccer Federation sought a preliminary injunction against The Sports Authority stores after the sporting goods retailer ran an ad featuring a U.S. Soccer Team player wearing the National Team uniform.

U.S. Soccer, the governing body of soccer in the United States, argued that it has an exclusive contract with Dick's Sporting Goods, which is the only apparel retailer with permission to display the U.S. Soccer marks.

The ad, which aired on television during World Cup matches, also appeared on Facebook and YouTube. It featured U.S. national team forward Taylor Twellman wearing official U.S. Soccer gear with the crest and logo, and included "slow motion close-ups" of the U.S. Soccer marks, the complaint said.

"Undoubtedly, consumers will mistakenly believe that TSA's use of the U.S. Soccer mark and U.S. Soccer national team uniform featuring that mark to [be] affiliated, connected with or sponsored by U.S. Soccer, which it most definitely is not," the complaint argued.

U.S. Soccer said TSA continued to air the ads despite receiving a cease-and-desist letter, including during the match between the United States and England, which drew more than 17 million viewers worldwide. And despite the letter, TSA planned to air the ad again during the match between the United States and Slovenia.

U.S. District Court Judge William H. Hibbler granted a temporary restraining order and preliminary injunction against TSA Stores, Inc. He also required the defendant to post a $25,000 bond.

To read the complaint in *U.S. Soccer Federation v. TSA Stores, Inc.*, click here.

To read the order granting the preliminary injunction, click here.

Why it matters: Bavaria's attempt at ambush marketing definitely got the company some publicity, but it was focused more on the criminal charges leveled at the women taking part rather than on its products. Companies should be aware that anti-ambush marketing legislation, which typically outlaws the misuse of registered marks and unfair competition, is becoming increasingly common, especially in conjunction with significant sporting events like the World Cup. And the U.S. Soccer case reiterates that mark holders will fight to protect their exclusive rights.

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House Deletes Expansion of FTC Authority

After intense lobbying, members of the House financial regulatory reform committee removed the expansion of Federal Trade Commission authority that was part of the House financial reform bill.

The Wall Street Reform and Consumer Protection Act of 2009 (H.R. 4173) would have expanded the FTC's rulemaking authority, enhanced its ability to issue fines, and allowed the agency to prosecute parties for aiding and abetting.

The Senate version of the financial reform bill did not contain the language, and legislators were negotiating which version of the bill would be given to the President to sign.

Advertising industry trade groups, including the Association of National Advertisers, the Interactive Advertising Bureau, the American Association of Advertising Agencies, and the American Advertising Federation had joined together to fight the House version of the bill containing the proposed changes.

They argued that the FTC's current powers were reasonable and appropriate and that the increased powers under the bill would give the

Commission unprecedented and sweeping powers.

The removal of the provision reportedly came around 4 a.m. after intense negotiation.

Why it matters: The FTC's current rulemaking procedure is limited by the so-called "Magnuson-Moss" rules, which require extensive periods of notice and comment or a direct mandate from Congress to enact rules. Had the proposed language remained in the legislation, the process would have become much more informal. And with Chairman Leibowitz noting areas ripe for rulemaking, such as negative options and free offers in online sales, the advertising industry can consider this to be a significant victory.

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Consumer Group Files FTC Complaint Against Spokeo

The Center for Democracy & Technology filed a complaint with the Federal Trade Commission against Spokeo, an online data aggregator and broker, alleging that the company is violating the Fair Credit Reporting Act.

The FCRA allows consumers to see and challenge the information that goes into their credit reports, or learn who has accessed reports about them. The CDT argued that because Spokeo offers financial reports about consumers, the company should be required to follow the FCRA's requirements.

"Despite offering credit ratings and promoting the use of its services for employment decisions, Spokeo does not offer consumers any of the protections encoded in the Fair Credit Reporting Act as required by law," the complaint alleged. "Consumers have no access to the data underlying Spokeo's conclusions, are not informed of adverse determinations based on that data, and have no opportunity to learn who has accessed their profiles."

Spokeo gathers information from a variety of sites and databases, like LinkedIn and MySpace, as well as other public records. Some of the information it compiles – such as an individual's address, phone number, estimated age, and household composition – is offered free. But the site also sells additional information, including estimates about an individual's income, credit ratings, and investments.

The site includes terms of service that instruct visitors not to use Spokeo information to assess credit eligibility, suitability for employment of individuals, or any other purpose covered by the FCRA.

"Although Spokeo offers detailed – although erratic – insight into millions of American consumers, the site has few controls in place to protect those consumers' rights," the complaint argues.

The CDT further alleged that the site has "significant inaccuracies" in its profiles and asked the FTC to prohibit the company from making deceptive claims about its paid service. The complaint noted that it performed searches of CDT employees on Spokeo and found errors "in every single profile."

"In general, the data provided in these consumer profiles is unreliable," the complaint said.

The CDT requested that the FTC order Spokeo to cease offering consumer reports until the company follows the requirements of the FCRA, and pay restitution to consumers who paid for the consumer reporting service as well as penalties under the FCRA.

In a statement, Spokeo said it is not a credit reporting agency and does not issue consumer reports.

"Indices that are sometimes mistaken for actual credit information are in reality marketing profiles derived from a variety of sources, not unlike those advertisers have been relying upon for decades," the company said. "Hence, the type of information we offer is not governed by the Fair Credit Reporting Act."

To read the CDT's complaint, click here.

Why it matters: The FCRA provides consumers with the right to access consumer report data, the right to petition the consumer reporting agency to correct incorrect data, a time limitation on how long negative information may remain on a consumer's record, and a limitation on who can access a consumer's report – none of which Spokeo provides. If the FTC were to require Spokeo to comply with the FCRA, it would place significant burdens on the data broker.

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DMA Sues, Challenging Colorado E-Commerce Law

The Direct Marketing Association has filed a federal suit challenging the new Colorado law that requires e-commerce sites and other out-of-state retailers to disclose information about state residents' purchases to the authorities.

Colorado House Bill 10-1193, which took effect March 1, requires retailers with more than $100,000 in annual sales that do not have a physical presence in Colorado and that do not otherwise collect Colorado state sales taxes on sales to Colorado residents to notify Colorado customers that they owe a Colorado state tax on their purchases.

Retailers must also send an annual report to customers each January detailing their purchases from the prior year with the amount of

Colorado sales tax they owe. Penalties range from $5 to $10 per violation.

In its complaint, the DMA argues that the law interferes with interstate commerce, relying on a 1992 U.S. Supreme Court decision that held that state governments cannot require retailers to collect state tax unless they have a physical presence in the state, which has been interpreted to mean a brick-and-mortar store.

"There must be a sufficient, minimum connection between an out-of-state retailer and a state, in the form of a physical presence, before the state may impose regulatory obligations on such retailers," the complaint said.

The group further argued that "there is a real risk that sensitive, personal information" of consumers will become public. The complaint noted that the law does not establish data security standards for the department collecting the purchase information, nor does it allocate funds for such a purpose.

The DMA is seeking an injunction against enforcement of the law and a declaration that the law is unconstitutional.

To read Colorado House Bill 10-1193, click here.

To read the complaint in *Direct Marketing Association v. Huber*, click here.

Why it matters: Colorado is not alone in its attempts to increase tax revenue. New York enacted legislation in 2008 requiring online retailers that use in-state affiliates to collect state sales tax; that law was challenged by Amazon and is currently under consideration by a state appellate court. The state of North Carolina is also sparring with Amazon after it asked for all purchase information by state residents since 2003, a request Amazon (joined by the ACLU) is fighting in federal court.

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Legislators Ask Apple to Explain Geographic Location Data Sharing

Representatives Edward Markey (D-Mass.) and Joe Barton (R-Tex.) recently wrote to Apple CEO Steve Jobs, asking him to explain recent changes to the company's privacy policy.

Earlier this year, Apple updated its privacy policy so that users needed to agree that the company and its "partners and licensees" could collect and store user location data.

The legislators expressed concern that users must agree to the terms before they can purchase songs or download apps from Apple's iTunes store.

The text from the new privacy policy addressing location-based services reads:

"To provide location-based services on Apple products, Apple and our partners and licensees may collect, use, and share precise location data, including the real-time geographic location of your Apple computer or device. This location data is collected anonymously in a form that does not personally identify you and is used by Apple and our partners and licensees to provide and improve location-based products and services. For example, we may share geographic location with application providers when you opt in to their location services."

The legislators asked Jobs to answer a series of questions, including why the company started collecting the geographic data and how it intends to use it, how many consumers are subject to the collection of data and how often the data is collected, as well as how long Apple has been collecting the location data, and what specific Apple products are used to collect the data.

In addition, the lawmakers asked what internal procedures Apple has in place to ensure that any location data is stored so that it doesn't personally identify consumers, and who the unspecified "partners and licensees" are that Apple shares the information with.

Representatives Markey and Barton asked for a response by July 12.

To read the letter, click here.

To read Apple's privacy policy, click here.

Why it matters: Geolocation has become an increasingly used vehicle for marketing, as social networking and apps allow those with smartphones to search for physical places. But location-based information creates a number of data security and privacy concerns, addressed in part by the Federal Trade Commission's recommendations in its "Self Regulatory Principles of Online Behavioral Advertising," which recommend that companies receive "affirmative express consent" before using precise geographic location information. The issue is receiving even more scrutiny, as the House Subcommittee on the Constitution, Civil Rights and Civil Liberties held a hearing discussing the use of location-based services by law enforcement authorities. The hearing was the second panel discussing proposed updates to the Electronic Communications Privacy Act of 1986 to account for new technology. And Representative Rick Boucher's (D-Va.) privacy bill, introduced in May, would require that consumers affirmatively opt in before companies can collect, use, or disclose any sensitive data, a term which includes precise geographical location. Any company using geographic location should pay close attention to the various developments, which we will continue to cover.

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