Advertising Law

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In This Issue

PMA To Be Represented by Manatt Partner Linda Goldstein on FTC Panel

On May 30, Manatt's Linda Goldstein, Chair of the Advertising, Marketing & Media Division, will represent the Promotion Marketing Association at the Federal Trade Commission's one-day public workshop to consider the need for new guidance for online advertisers about making disclosures. New guidance is likely to address technological advancements and marketing developments that have emerged since the FTC first issued its online advertising disclosure guidelines known as Dot Com Disclosures 12 years ago.

The workshop will be from 8:30-5 p.m., at the FTC Conference Center, 601 New Jersey Ave., NW, Washington, D.C. It is free and open to the public. The event will be available via webcast, and preregistration is not required.

The workshop will cover revising the Dot Com Disclosures so they better illustrate how businesses can provide clear and conspicuous disclosures in the current online and mobile advertising environment. Any revisions will be consistent with the goals of the original guidelines and will continue to emphasize that consumer protection laws apply equally to online and mobile marketers, and to other media. The FTC began seeking input for revising the Dot Com Disclosures guidelines last year.

Click here for the preliminary agenda for the workshop.

back to top

Manatt Partner Jeff Edelstein to Lead CLE Privacy Law Webinar Session

On June 12, 2012, Manatt partner Jeff Edelstein will lead a webinar discussion titled "Privacy Update: Formulating Privacy

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Practice Area Links

Practice Overview
Members

Upcoming Events

June 12, 2012
Celesq CLE Advertising Law Webinar
Topic: "Privacy Update: Formulating Privacy Policies and Practices for Compliance with the FTC's Final Report and Guidelines"
Speaker: Jeff Edelstein
For more information

June 12, 2012
ABA Section of Litigation's 2nd Annual Food & Supplements Workshop
Topic: "So How Did Walnuts Become Drugs? Compliance Issues for Companies that Sell Supplements & Functional Foods"
Speaker: Ivan Wasserman
Downers Grove, IL
For more information

June 19, 2012
***The National Law Journal's* 2012 Complex Litigation Breakfast Series**
Topic: "Developments & Considerations in False Advertising Claims"
Speaker: Chris Cole
New York, NY
For more information

June 19-20, 2012
ACI's 3rd Annual Conference on Litigating and Resolving Advertising Disputes
Topic/Speaker: "Buckle Up: We're Headed to Trial," Chris Cole
Topic/Speaker: "Defining Advertising Injury: Protecting Coverage Rights When the Company is Sued for False or Misleading Advertising," Steve Raptis
Topic/Speaker: "Developing a Strategy to Combat the Uptick in Litigation Challenging the Marketing and Labeling of Food Products," Linda Goldstein
New York, NY
For more information

July 24–27, 2012
15th Annual Nutrition Business Journal Summit
Topic: "NBJ State of the Industry"
Speaker: Ivan Wasserman
Dana Point, CA
For more information

Awards

Policies and Practices for Compliance with the FTC's Final Report and Guidelines." Jeff's presentation will provide an overview of privacy, recent developments and enforcement activity, offer highlights of the FTC's privacy framework and guidelines, shed light on the areas that are ripe for enforcement and discuss practical strategies for applying the FTC's privacy framework.

For more information or to register for this event, click here.

back to top

Thanks to the FTC, Defendants Won't "Get Rich Quick" on Infomercial Scams

A federal court in California granted the Federal Trade Commission's motion for summary judgment against defendants who ran three separate get-rich-quick schemes that collectively defrauded almost one million consumers.

The court found that defendants' easy-money infomercials deceived consumers in violation of the FTC Act because almost all consumers who purchased defendants' products actually lost money. The court ordered the parties to submit recommendations for the proper scope of injunctive and monetary relief. The FTC will ask the court for $450 million.

The FTC filed its action in the U.S. District Court for the Central District of California against several defendants behind three "wealth-creation" products: (1) John Beck's Free & Clear Real Estate System, (2) John Alexander's Real Estate Riches in 14 Days, and (3) Jeff Paul's Shortcuts to Internet Millions. Defendants advertised these products through infomercials containing testimonials and on the Internet. Per the complaint, their marketing campaign "advertised a 'system' that costs $39.95, plus shipping and handling, and consists of a front-end kit of educational materials—including written materials, DVDs, and/or CDs—and a purportedly free month-long membership in a value-added 'club.'"

For example, under the John Beck system, consumers allegedly learn "how to buy real estate at government tax foreclosure sales by paying the delinquent back taxes owed on the property." This program boasted that consumers could make substantial amounts of money buying properties "free and clear" for "pennies on the dollar" at these tax sales. The program also promoted a free 30-day membership in John Beck's Property Vault, which was nothing more than an undisclosed continuity plan that charged consumers monthly fees.

Defendants' infomercial for "John Alexander's Real Estate Riches in 14 days" also misrepresented how consumers could get rich quick by purchasing real estate. According to the complaint, the defendant falsely claimed that consumers could learn how to use the "inverse ownership system," where consumers facilitate real estate transactions and get "the cash out at closing" without using any of their own money or credit. Consumers could purportedly learn how to complete these transactions in only 14 days. This program also duped consumers into a continuity plan by offering a free 30-day membership in "John's Club," a hotline advisory service.

Defendants also aired infomercials for “Jeff Paul’s Shortcuts to Internet Millions” that claimed to promote “proven, turnkey Internet businesses,” under a system “so simple that consumers do not need any prior experience with Internet business to make it work.” Like the others, this program came with a free 30-day membership to “Big League,” also known as Jeff Paul’s “Internet Millionaires Club,” which enrolled unknowing consumers in a paid continuity plan.

The FTC alleged that defendants’ products are deceptive because consumers, in practice, make no money, and that defendants could not substantiate any of their claims that these programs did or could make money. The FTC alleged violations of the FTC Act and the Telemarketing Sales Rule (TSR), which, based on the FTC’s evidence, the defendants violated as a matter of law, according to the court.

Specifically, the court found that the “FTC has established that Defendants falsely represented that consumers could ‘purchase’ homes and other real estate for ‘pennies on the dollar’; buy homes at tax sales in consumers’ own area, regardless of where they live; make money ‘easily’ and with ‘little financial investment required’; and make money ‘free and clear of all mortgages.’” In reality, consumers do not own property after successfully bidding at a tax sale and typically only have the right to collect delinquent taxes. Moreover, “dozens of consumer witnesses . . . testified that it is difficult or impossible to find government tax sales in their area, and it is difficult or impossible to earn substantial money by purchasing homes or land” using the money-making system. Not surprisingly, defendants did not have sufficient evidence to substantiate their claims about the John Beck system.

The court held that the John Alexander and Jeff Paul systems were also violations of the FTC Act as a matter of law. Defendants could not substantiate that consumers could easily make money under these systems, and their kit materials further highlighted the deceptive nature of their claims. The kit materials for the John Alexander system were difficult to understand and confusing, while the materials for the Jeff Paul system failed to provide adequate information for consumers to create sufficient Web sites or their own Internet businesses.

In addition, the defendants’ telemarketers were found to have falsely represented that consumers could make money quickly and easily, gave unsubstantiated express earnings claims to consumers, and guaranteed that consumers would make money. The telemarketers were required to oversell defendants’ “coaching services” despite the fact that the defendants could not substantiate any of these claims.

Finally, the court concluded that defendants violated the TSR by failing to obtain express informed consent from consumers to enroll them in continuity plans, and by enrolling consumers in the plans “and obtaining [their] payment information without first disclosing all” material terms, that consumers would be charged unless they took affirmative steps to avoid the charge, the date of the charge, and the specific steps they may take to avoid the charge.

Based on its findings, the court granted the FTC’s motion for summary judgment on April 20, 2012. While the court found injunctive relief appropriate, it asked the parties to submit supplemental briefing on the proper scope of such relief. Similarly, the court concluded that monetary relief was proper, but asked the parties to submit further briefing on the amount of such relief. All supplemental briefing is to be filed by May 21, 2012. The FTC stated in its May 1, 2012, press release that it will seek $450 million in monetary relief from defendants.

To review the court's order granting the FTC summary judgment, click here.

To review the FTC's May 1, 2012, press release, click here.

Why it matters: Marketers that promote unworkable products invite costly scrutiny from regulators. Marketers must have evidence to substantiate their claims, especially when made in infomercials with testimonials. Get-rich-quick products invite even closer scrutiny, as these products, more than most, tend to lure consumers into making worthless purchases.

back to top

Nutella Maker Settles Class Actions Asserting False Advertising Claims

Laura Rude-Barbato, mother of three children, and Athena Hohenberg, mother of a 4-year-old, filed a class action false advertising lawsuit in a California federal court against Ferrero U.S.A., Inc., the maker of Nutella. Plaintiffs alleged that Ferrero falsely advertises Nutella as nutritional when in reality it is no healthier than a candy bar.

Plaintiffs Marnie Glover and Jayme Kaczmarek filed similar class action lawsuits – later consolidated – in federal court in New Jersey. Ferrero recently agreed to settle both lawsuits under separate agreements, subject to final court approval in July.

Plaintiffs in the California action alleged that for many years "Ferrero has been running television and print ads, primarily in Europe, suggesting Nutella is nutritious, an appropriate breakfast food, and that it promotes children's healthy growth and development." Plaintiffs also alleged that "Ferrero has invaded the United States with the same misleading advertising strategies, played out on the labels of Nutella, in television commercials and print ads, on the Web and elsewhere, designed to and effective in persuading American consumers that Nutella is an appropriate breakfast food, and a healthy alternative to things like jelly and syrup."

According to plaintiffs, Ferrero's allegedly deceptive advertising campaign is misleading "because Nutella, far from being nutritious and part of a 'balanced breakfast,' in fact contains about 70% saturated fat and highly processed sugar by weight. . .[is]. . .made with partially hydrogenated vegetable oil. . .and therefore contained toxic artificial trans fat. . .substances [that] contribute significantly to a number of serious diseases, and cause thousands of otherwise preventable deaths each year." Plaintiffs in the New Jersey action alleged similar claims against the company.

The challenged commercials show a mother feeding Nutella to her child while claiming it is a healthy, balanced breakfast. Similarly, Nutella's labeling portrayed the spread as a healthy breakfast by showing fresh fruit, whole wheat bread, and orange juice.

California plaintiffs filed their class action lawsuit asserting claims for false advertising, unfair competition, violation of California's Consumer Legal Remedies Act, breach of express warranty, and breach of implied warranty of merchantability. Plaintiffs sought "an order compelling Ferrero to (1) cease marketing its products using the misleading tactics [alleged in the lawsuit], (2) conduct a corrective advertising campaign, (3) restore the amounts by which Ferrero was unjustly enriched, and (4) destroy all misleading and deceptive materials and products." Plaintiffs also demanded that Ferrero admit that Nutella was not any healthier than a candy bar. The New Jersey plaintiffs alleged violations of New Jersey's Consumer Fraud Act, as well as claims for breach of express and implied warranties.

On January 10, 2012, the parties in the New Jersey action filed a class action settlement agreement resolving their dispute. Similarly, on January 19, 2012, the parties in the California action also filed a class action settlement agreement with the federal court in California. Despite submitting to the terms of these settlements, which Ferrero says it did only to avoid costly litigation, the company denies any wrongdoing or liability, and continues to stand by its products and advertising campaigns. Ferrero agreed under the settlements to pay over $3 million to consumers and up to another $3.9 million in fees and costs. Ferrero also agreed to (1) include Nutrition Keys on the front panel of Nutella "indicating quantity/content of Calories, Saturated Fat, Sodium and Sugar in Nutella based on the serving size"; (2) modify the back panel of Nutella's label "by removing the phrase 'An example of a tasty yet balanced breakfast' and replace it with 'Turn a balanced breakfast into a tasty one'"; (3) replace and not air the television commercial at issue; and (4) modify Nutella's Web site by removing certain information, and replacing the phrases "Nutella and Nutrition," "About Nutella," and "Breakfast Builder" with new language.

The federal court in California issued an order preliminarily approving the settlement on January 23, 2012, and scheduled a fairness hearing for July 9, 2012, for final approval of the settlement. On February 3, 2012, the court in New Jersey also issued an order preliminarily approving the settlement in that action, scheduling its final fairness hearing for July 9.

To read copies of the court documents in both actions, click here.

Why it matters: Food retailers must carefully and accurately label and advertise the nutritional value of their food products to avoid class action litigation. Retailers must have substantiation for their health claims and be sure not to oversell the nutritional value of their products. Otherwise, savvy class counsel with sympathetic clients trolling for an easy payday may bring costly lawsuits for allegedly deceptive advertisements or product labeling that could have easily been avoided.

back to top

Vita Coco Coconut Water Settles Class Action Lawsuit

All Market, Inc., the maker of Vita Coco coconut water, has reached an agreement to settle a nationwide class action lawsuit for $10 million.

The settlement class consists of consumers who purchased Vita Coco products between August 10, 2007, and the date the court approves the proposed settlement. Plaintiffs alleged in the complaint that All Market misrepresented the health benefits and nutritional content of Vita Coco products by marketing them as "super-hydrating," "nutrient-packed" and "mega-electrolyte."

Plaintiffs filed the false advertising class action lawsuit against All Market, Inc., doing business as Vita Coco, last year in the United States District Court for the Southern District of New York. According to plaintiff's complaint, Vita Coco coconut water's label falsely claims it contains "15 times the electrolytes found in sports drinks" and "is about hydration." In addition to not containing as many electrolytes, plaintiffs allege the product is no more hydrating than a less expensive sports drink. Plaintiffs also claim that some of the Vita Coco products contain significantly less sodium and magnesium than advertised. According to the complaint, this allegation can be substantiated by a confidential witness who will testify that defendant knew for years that it misrepresented sodium and magnesium levels. In response to these allegations, Vita Coco denies any wrongdoing and claims it is agreeing to settle the class action lawsuit only to end costly and protracted litigation.

According to papers filed by the plaintiffs in support of the agreed-upon settlement, "The Stipulation provides for substantial economic relief to the putative class, including cash payments and product vouchers. Further, the Stipulation provides for non-monetary relief in the form of a program which will change the labels and advertising of Vita Coco Products to more clearly describe the variable nature of coconut water, as well as a quality control program which will ensure regular and independent testing. Vita Coco has additionally agreed to distribute to charitable organizations that promote healthy living a total of $3 million worth of Vita Coco products. The total value of the Stipulation is in excess of $10 million."

The court issued a preliminary order approving the settlement on April 12, 2012. In the order, it certified the following class: "All persons or entities in the United States who made retail purchases of Vita Coco Products during the Settlement Class Period." The court specifically excluded various parties from the settlement, including "Vita Coco's employees, officers, directors, agents, and representatives;. . .those who purchased Vita Coco Products for the purpose of re-sale. . .[and] all persons who have been properly excluded from the Settlement Class." The court also scheduled the final approval hearing for August 22, 2012.

To read the plaintiffs' complaint, click here.

To read the court's order preliminarily approving the settlement, click here.

Why it matters: Plaintiffs' lawsuit illustrates the appetite of class counsel to pursue companies making health claims about their products.

To avoid costly litigation, companies must have evidence to substantiate their health claims. If they cannot support their claims, retailers should carefully tailor their marketing campaigns to ensure they do not veer into class action litigation or a federal or state regulatory enforcement proceeding. Carefully creating these campaigns to avoid any misleading messages is essential to stay above the fray of litigation and enforcement.

back to top

Mom Sues Facebook Over Unauthorized Credit Purchases

In March 2012 a mother filed a class action lawsuit in San Jose, California, against Facebook, alleging that the social networking site makes it too easy for minors, including her teenage son, to incur credit card charges without parental knowledge or permission, and she is seeking refunds to be made to minors who misrepresented their right to acquire the company's online currency.

On April 17 the case was removed to the U.S. District Court for the Northern District of California, where a similar case, *Meguerian et al. v. Apple Inc.,* is pending. That case was brought against Apple Inc. for allegedly selling in-app credits and goods to minors without parental knowledge or consent.

In addition to seeking an injunction against Facebook, the complaint requests attorneys' fees and a declaratory judgment that the contract plaintiff's son entered into is voidable. In addition, the lead plaintiff is requesting class action status and seeking around $5 million in damages on behalf of potentially thousands of similarly situated minors and parents/guardians who were allegedly victimized by Facebook's claimed violations of California's consumer protection laws.

The case stems from a transaction that occurred when plaintiff Glynnis Bohannon's teenage son purchased $20 worth of Facebook "Credits" on his account. According to the complaint, "When users make purchases within Facebook apps and on the Facebook site, Facebook requires that all such payments flow through the Facebook credits system." Account holders may purchase their Facebook Credits "by various methods including credit card, debit card, paypal, and mobile phone." Credits may then be used "to purchase virtual goods within games hosted by the site."

In October 2011 Bohannon says she authorized her son to use her credit card to purchase $20 in Credits. After the transaction, Facebook allegedly failed to disclose it had stored plaintiff's credit card information on her son's account for future purchases. Claiming he did not know this, Bohannon's son incurred hundreds of dollars of debt by making virtual purchases with what he believed was merely "in-game currency."

Plaintiff alleges that Facebook is responsible for the debt she incurred over the initial $20 she authorized because it never disclosed that the site stores a parent's credit card number for further use, and failed to impose adequate safeguards to prevent minors from making unauthorized purchases. Specifically, plaintiff alleges that Facebook (1) violated California's Consumer Legal Remedies Act by actively marketing and promoting its in-app purchases and virtual goods without disclosing certain material facts; (2) violated California's Unfair Competition Law by actively advertising, marketing, and promoting in-app games and other content with the statement that "all sales are final" when Facebook knew that such purchases would be made by minors; and (3) was unjustly enriched by wrongfully collecting and retaining money for virtual goods and in-app purchases paid for by minor children.

Central to the case is whether Facebook can shield itself from liability when minors violate the site's terms and conditions. To create an account on Facebook, users – which include minors 13 and over – must indicate that they agree to "Facebook's Statements of Rights and Responsibilities," which incorporates by reference Facebook's "Payment Terms." According to one provision under Payment Terms, "If you are under the age of 18, you may make payments only with the involvement of a parent or guardian. You should review these payment terms with a parent or guardian to make sure that you both understand them." Plaintiff argues that requiring children under the age of 18 to obtain a parent's permission before they buy the credits is insufficient to prevent the transaction – especially when the minor at issue was unaware that he was spending real money, via her mother's credit card, to purchase Facebook Credits.

Plaintiff seeks a declaratory judgment that she and the other class members can void the contract created when her son purchased goods in an app with Facebook Credits. Plaintiff alleges that minors can void their contracts at their option under California and federal law, and therefore claims that her son's contracts with Facebook can – and should – be voided by the courts. In response, Facebook spokesperson Andrew Noyes told PaidContent.com, "We believe this complaint is without merit and we will fight it vigorously."

To read the complaint against Facebook, click here.

To read Facebook's Notice of Removal, click here.

To read PaidContent's article about this case, click here.

To read Facebook's payment terms, click here.

To read the FTC's "Mobile Apps for Kids: Current Privacy Disclosures Are Disappointing,"click here.

Why it matters: This case is just one of many similar suits filed recently against companies like Facebook involving kids who spend their parents' money allegedly without their knowledge or consent. Recently a court ruled that a similar lawsuit over "bait apps" may proceed against Apple. The Facebook case has now been removed to the same court where the Apple case is pending.

In a recent report the Federal Trade Commission renewed its commitment to investigate the policies of companies such as Apple and Google that market and deliver games and mobile apps to minors. In its "Mobile Apps for Kids: Current Privacy Disclosures are Disappointing," the Commission stated that "parents need consistent, easily accessible, and recognizable disclosures regarding in-app purchase capabilities so that they can make informed decisions about whether to allow their children to use apps with such capabilities."

back to top

From the Tennis Court to Federal Court: Penn Files False Advertising Lawsuit Against Dunlop

On April 30 Penn Racquet Sports Inc. and parent company Head USA Inc. filed a false advertising lawsuit against rival ball manufacturer Dunlop International Ltd. and Dunlop Sports Group Americas Inc.

The complaint, which was filed in a U.S. District Court in Connecticut, alleges that Dunlop deceived the public by claiming to make the "World's No. 1 Ball" and having a 70 percent share of the global tennis ball market.

Penn argues Dunlop cannot substantiate its claim of superiority and that, in fact, Dunlop's balls are not "No. 1" and the company does not have the largest worldwide share. Penn further contends that Dunlop previously agreed to stop using "No. 1" in its advertising but hasn't done so. In support of its claims, Penn makes the following statements in its complaint: "Head Penn has enjoyed over fifty (50) percent market share for the tennis-ball market in the United States for the past 15 years and currently enjoys a sixty (60) percent share of the U.S. tennis-ball market, according to data compiled by the Tennis Industry Association (TIA) – a recognized tennis-industry organization."

In addition to an award of an undetermined amount of damages, plaintiff Head is seeking a declaratory judgment that defendant Dunlop's actions constitute false advertising as a matter of law. The complaint also requests that Dunlop be permanently enjoined from claiming to have the "World's No. 1 Ball" and/or a 70 percent global market share, and destroy "all products, signage, advertisements, promotional materials, stationery, forms, and/or any other materials and things that contain or bear the false and misleading statements."

To read Head's complaint, click here.

Why it matters: The allegations against Dunlop bring to view questions about the legality of puffery in advertising. The Federal Trade Commission has described puffery as "a term frequently used to denote exaggerations reasonably to be expected of a seller to the degree of quality of his product, the truth or falsity of which cannot be precisely determined." Advertising claims such as "best" or "bargain" or "perfect" are often considered so vague and/or exaggerated that consumers do not pay attention to them, depending on the context. In contrast, the FTC says "statement[s] of objective actuality, the truth or falsity of which can be ascertained with factual precision" are not puffery. A company that claims to offer "the world's lowest price," for example, may be subject to a false advertising lawsuit because its accuracy can be proven. Advertisers must remember to be careful when making claims about their or their competitor's products. Such distinctions are encouraged as a means to separate one product from another, but only if they are able to be substantiated.

back to top