Advertising Law

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Duracell Battery Class Action Lawsuit

A federal class action lawsuit has been filed against Duracell and its parent corporation, Procter & Gamble (P&G), alleging violations of the California Consumer Legal Remedies Act and Unfair Competition Law.

In *James Collins v. Duracell, Inc. and The Procter & Gamble Company*, Duracell and P&G are accused of engaging in deceptive conduct and false advertising by claiming that Duracell Ultra Advance and Ultra Power premium batteries last longer than Duracell's competing, less expensive batteries.

According to the complaint, as a result of these allegedly false claims, consumers purchased the premium-price batteries believing they would last longer than Duracell's other batteries, and paid "significantly higher prices with no meaningful additional benefits."

In the complaint, plaintiffs also dispute Duracell's claim that the Duracell Ultra Advanced battery is "ideal for high drain devices," as they give consumers "up to 30% more power in toys than Ultra Digital batteries." Instead, the results of Plaintiff's counsel's independent investigation showed that Duracell Ultra Advanced batteries fail to last materially longer than Duracell's other alkaline batteries." As such, plaintiffs argue "there is no meaningful difference in battery life between Duracell Ultra Advanced and Duracell's other alkaline batteries."

Beginning earlier this year, Duracell and P&G began to phase out their Ultra Advanced batteries, replacing them with batteries branded as "Ultra Power." However, as plaintiffs point out in the complaint, both the Ultra Advanced and Ultra Power branded batteries use the same model number, MX1500. Further, while the product packaging for the Ultra Power batteries claims they are Duracell and P&G's "Longest Lasting" and "most powerful" alkaline batteries, for use "When it Matters Most," plaintiffs allege "there is no discernible difference between the two batteries, absent the change in branding and marketing." According to

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Practice Area Links

Practice Overview
Members

Upcoming Events

May 4, 2012
New York City Bar Association's Sweepstakes, Promotions, & Marketing Laws: Comprehension & Compliance Seminar
Topic: "Mobile Marketing—Certainties & Uncertainties"
Speaker: Marc Roth
New York, NY
For more information

May 5–9, 2012
INTA's 134th Annual Meeting
Topic: "Social Media—An Ever Changing, Challenging and Competitive World: How to Provide Legal and Business Advice to Clients"
Speaker: Linda Goldstein
Washington, DC
For more information

May 7-8, 2012
ERA Government Affairs Fly-In 2012
Speaker: Linda Goldstein
Washington, DC
For more information

May 17, 2012
Response Expo 2012
Topic: "Counterfeits, Knockoffs and Digital Reputation Management"
Speaker: Linda Goldstein
San Diego, CA
For more information

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

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

the complaint, as was the case with Duracell's Ultra Advanced batteries, the new Ultra Power batteries also "fail to last materially longer than Duracell's other alkaline batteries."

The Duracell Ultra Advanced & Duracell Ultra Power Battery Life class action lawsuit was filed in the United States District Court for the Northern District of California on behalf of plaintiffs and a class of persons defined as "All persons who purchased Duracell Ultra Advanced or Ultra Power batteries in the State of California during the period beginning four years prior to the date of filing the complaint through the present." The complaint seeks, among other things, declaratory and injunctive relief, restitution or disgorgement, prejudgment interest, post-judgment interest, and attorneys' fees and costs.

To read the Duracell Ultra Advanced and Ultra Power Battery Class Action complaint, click here.

Why it matters: Companies need to be careful when it comes to marketing similar products with varying price points. Unless there is a material difference between products that justifies an increase in price, companies are better off not introducing similar, competing goods. Doing so only invites inquiries by class counsel and regulators over the ethics of comparison claims, thereby increasing the risk of being hit with a lawsuit.

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Class Action Settlement Seeks To "Stop" GameStop's Allegedly Deceptive Marketing Practices

On April 9, 2012, a federal judge in the United States District Court for the Northern District of California issued a preliminary order approving a settlement in a class action suit against GameStop.

Under the proposed settlement, GameStop has agreed to post warnings about the differences between used games and new games that include free downloadable content (DLC).

The consumer warnings, which must be posted in GameStop's California stores as well as on the company's Web site for a two-year period, will disclose that there may be a fee associated with DLC. A final approval hearing is scheduled for September 17, 2012.

The proposed settlement stems from a 2010 class action lawsuit filed against GameStop in the Northern District of California. In the complaint, class members alleged that GameStop misled consumers by advertising on product packaging that free DLC came with the purchase of various used games. Plaintiffs contended that the DLC associated with used games often required a fee – sometimes as high as $15 per game. According to the complaint, GameStop advertised free DLC in order to inflate the prices of its used games, which were often priced at only $5 less than that of new games.

In announcing the settlement, class counsel claims the lawsuit will help bring down the cost of used games. Counsel said "The in-store and online warnings are an important benefit under the settlement…because if GameStop discloses the truth to consumers, it is unlikely that they

will be able to continue selling used copies of certain games for only $5 less than the price of a new copy. In fact, we already know that not long after the lawsuit was filed, GameStop lowered prices for used copies of many of the game titles identified in the lawsuit."

The proposed settlement also provides restitution to GameStop consumers. According to the terms of the settlement, consumers with verification (from their own records or GameStop's sales records) that they purchased a qualifying game will be eligible for a $10 check and a $5 coupon. On the other hand, consumers without verification who submit a claim form under penalty of perjury will be eligible for a $5 check and a $10 coupon. "We are pleased that as a result of this lawsuit, we were able to obtain complete restitution for consumers, with actual money paid out to people who were harmed by GameStop's conduct," stated one of the lawyers representing class members.

While the proposed settlement will only apply to California consumers, class counsel is actively "investigating similar GameStop practices in other states" and has encouraged consumers to contact counsel if they have experienced similar allegedly deceptive practices in other jurisdictions.

For copies of Plaintiff's Notice of Motion and Motion for Preliminary Approval of Settlement and the Court's Order Granting Preliminary Approval, click here.

Why it matters: The GameStop class action lawsuit is a reminder to advertisers to carefully ensure that their product packaging does not contain any deceptive statements or claims. As is evident by the fact that class counsel is encouraging consumers in other jurisdictions to bring forth similar deceptive advertising claims against GameStop, counsel is always on the lookout for potential class actions to file against businesses. To mitigate the risk of liability exposure in class action litigation, companies should make sure that product packaging and advertisements do not contain misleading statements about products. Such practices may also help to reduce the number of consumer complaints to federal and state regulators, thereby minimizing the risk of an enforcement proceeding by the government.

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Commercial Email with Falsified or Misrepresented Header Information Violates Anti-Spam Law

The California Court of Appeal recently upheld a trial court's findings that commercial emails violate the state's anti-spam law when they are sent under a sender domain name that either fails to identify the actual sender, or isn't readily traceable to the sender by use of a publicly available online database.

According to the appellate court, in *Balsam v. Trancos*, permitting commercial email marketers "to conceal themselves behind untraceable domain names" greatly increases the likelihood of "Internet fraud and abuse," which are the "very evils for which the Legislature found it necessary to regulate such emails" with the anti-spam law.

The Trial Court

Plaintiff Balsam originally sued Trancos, an email marketer, under California Business and Professions Code Section (B&P Code §)

17529.5(a)(2) after he received eight commercial email advertisements on behalf of an unidentifiable marketer. The emails were sent through various domain names privately registered to a proxy service, which made it very difficult for plaintiff to determine who was responsible for sending them. Further, the advertisements did not purport to be from anyone in particular, as the "from" email addresses included accounts such as "franchisegater@modalworship.com," and "dating@mythicaldumbwaiter.com." The subject lines of the emails also varied – some recipients were invited to take surveys in exchange for payment, while others received dating-related services and offers.

According to the complaint, the defendant sent the commercial emails in violation of California B&P Code § 17529 et seq., which makes it unlawful for any person or entity to send a commercial email advertisement from California or to a California email address when the email advertisement contains or is accompanied by "falsified, misrepresented, or forged header information." Plaintiff argued that because the sending domains and "from" names on the eight emails he received did not adequately identify the defendant as the sender, their "header information" was illegal.

The trial court largely agreed, finding that the sending domains and "from" names in seven of the eight emails at issue violated B&P Code § 17529.5(a)(2) by inadequately identifying the sender. According to the trial court, nowhere in the header, body and/or opt-out of the seven emails was there evidence that they came from the defendant – a company that operates a number of Internet advertising businesses. As such, defendant's falsity or misrepresentation was based on the fact "that the 'sender' names (or domain names used) do not represent any real company, and cannot be readily traced back to the true owner/sender."

In contrast, the trial court found that one of the eight emails at issue did not violate the statute as the sender was readily apparent in the header information.

Appellate Ruling

Upon review, the California Court of Appeal affirmed each aspect of the trial court's decision. According to the court, "header information in a commercial e-mail is falsified or misrepresented for purposes of section 17529.5(a)(2) when it uses a sender domain name that neither identifies the actual sender on its face nor is readily traceable to the sender using a publicly available online database such as WHOIS." Further, where a commercial marketer, such as defendant Trancos, "intentionally uses privately registered domain names in its headers that neither disclose the true sender's identity on their face nor permit the recipient to readily identify the sender…such header information is deceptive and does constitute a falsification or misrepresentation of the sender's identity" in violation of the law. The appellate court found that the from lines, which "misrepresented the sender's identity," were unlawful.

To read the California Court of Appeal's ruling in *Balsam v. Trancos,* click here.

To read the FTC's CAN-SPAM Act, Compliance Guide for Business, click here.

Why it matters: The California Court of Appeal's ruling in *Balsam v. Trancos* will ultimately have a significant impact on the way companies, both in and out of California, use commercial email advertisements to market products and services. Gone are the days when marketers and their hired affiliates freely use generic "from" lines or untraceable domain names to send ads to consumers. Instead, email marketers must now comply with California's anti-spam law by including either (1) a domain name that is registered to the sender and can be easily determined by performing a WHOIS lookup, or (2) the name of the sender or marketer on whose behalf the email was sent in the emails header (i.e., the sender names, domain names, and email addresses that appear on the "from" lines).

Because provisions of B&P Code § 17529.5(a)(2) closely mimic those of the CAN-SPAM Act, it can be argued that the court's ruling in *Balsam v. Trancos* reaches across California borders to all 50 states. The CAN-SPAM Act is a federal law that sets the rules for commercial email, establishes requirements for commercial messages, gives recipients the right to have the marketer stop emailing them, and spells out tough penalties for violations. Among other things, it prohibits the use of false or misleading header information in all commercial messages, which the law defines as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service." This includes email that promotes content on commercial websites.

Given the similarities between California and federal law, marketers throughout the country should revise their email protocols so as to ensure that the header information in their commercial emails is both accurate and traceable through use of a publicly available online database, such as WHOIS.

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NAD Recommends ConAgra and Colgate Cease Making Certain Claims About Lasagna and Toothpaste Products

The National Advertising Division of the Council of Better Business Bureaus (NAD) recently reviewed certain comparison claims made by both ConAgra Foods, Inc. (ConAgra), and Colgate-Palmolive Company (Colgate).

In both cases, the companies were advised to cease using the claims in advertising and marketing as there was insufficient evidence to support the claims.

Nestle USA, Inc., the maker of Stouffer's frozen lasagna products, challenged the comparison claims made by ConAgra regarding Marie Callender's "Three Meat and Four Cheese Lasagna." At issue were ConAgra's claims that "Marie Callender's multi-serve lasagna…is preferred nearly two to one over Stouffer's" and is "PREFERRED over the leading Meat Lasagna." ConAgra based these comparison claims on a taste test between Marie Callender's 31-ounce frozen Three Meat and Four Cheese Lasagna and Stouffer's 19-ounce Meat and Sauce lasagna – two very different products. While NAD recognized that advertisers are permitted to make "apples to oranges" comparisons to "highlight

features or attributes of their products," it was quick to point out that in order to do so advertisers must "clearly indicate the exact product to which its advertised comparison refers." NAD further noted that advertisers must also be sure that their advertisements do not "communicate the message that a competitor does not make a more similar product than the one being compared to the advertiser's own product." In this case, NAD concluded that in "terms of size and method of preparation . . . the Stouffer's 38-ounce lasagna or Marie Callender's 19-ounce Three Meat and Cheese product were more similar" to each other than the products compared in the advertising.

Although ConAgra disclosed that the Stouffer's product used in the comparison was 19-ounce lasagna with meat and sauce, NAD concluded that the disclosure, which was made in small type, was "insufficient to qualify what could be interpreted by consumers as a line claim" (i.e., the statements about the product are true for all items within that product's line). For these reasons, NAD concluded that ConAgra's taste test did not support its claims that Marie Callender's lasagna was "preferred" over other leading products and "nearly two to one over Stouffer's" and recommended that ConAgra and Marie Callender's cease making such claims.

In addition to evaluating Nestle's challenge against ConAgra, NAD was also recently charged with determining the appropriateness of comparison claims made by Colgate-Palmolive about its Sensitive Pro-Relief Toothpaste. In that case, GlaxoSmithKline (GSK) challenged Colgate's broadcast and print advertisements which stated that its toothpaste worked faster than GSK's product, Sensodyne.

Specifically at issue were Colgate's claim that its toothpaste (1) "Gets to the nerve faster for long-lasting relief"; (2) is "a clinically proven formula that works fast, within 2 weeks, to provide relief to the nerve and builds a protective shield to help prevent painful sensitivity flare-ups when used as directed"; (3) "Provides faster acting and long-lasting relief with regular use"; (4) goes "Faster to the nerve for Lasting Relief"; (5) provides "FASTER & LONG-LASTING Hypersensitivity relief"; (6) works "Faster vs. Sensodyne toothpaste. Within 2 weeks. Based on clinical studies. Lasting relief with continued use"; (7) is "Part of a new treatment solution for dentin hypersensitivity"; and (8) "Rushes to the nerve for faster relief" thereby delivering "potassium nitrate to the nerve more quickly for faster relief."

While NAD recognized that Colgate's evidence supported its "stand-alone claims that the [toothpaste] is effective," it concluded that Colgate had insufficient evidence to support its claims that the toothpaste worked "faster" than Sensodyne in relieving pain. As such, NAD recommended that Colgate modify or stop using any of its "faster" claims and discontinue the phrase "clinically proven better" than other leading toothpaste products.

In addition, NAD recommended that Colgate modify or stop using certain qualified claims about its products in advertisements it sends to oral care professionals. It suggested that Colgate discontinue its claims that the product provides over 30% more relief at 2 weeks and 29% more relief at 8 weeks, or, in the alternative, "modify these claims by clearly disclosing that the results were only seen in one of two test

methods." Similarly, NAD recommended that Colgate modify or stop using various comparison graphs the company uses in advertisements.

Both Colgate and GSK have appealed certain portions of NAD's decision.

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

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

Why it matters: NAD's decisions emphasize the need for advertisers to have sufficient evidentiary support when making product comparison claims in their advertisements. NAD stressed the need for advertisers to clearly identify the precise product that their comparison refers to as well as be sure that the advertisements do not mislead consumers by suggesting a competitor does not have a more similar product to the one being compared in the advertisement. In addition, advertisers cannot exaggerate the effectiveness of their products – like advertising that a product provides "fast" pain relief – without proper evidence to back up the claim. Likewise, proper support is required to make "clinically proven" claims. Advertisers who ensure they have sufficient evidence to support their product comparison claims greatly reduce the risk of successful challenges by competitors._

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FTC Orders Alcoholic Beverage Manufacturers to Provide Advertising Data for Agency's Study

The Federal Trade Commission (FTC) recently announced that it sent compulsory process orders to 14 beer, wine, and distilled spirits manufacturers, requiring them to provide data for the agency's fourth major study on the effectiveness of voluntary industry guidelines in reducing advertising and marketing to underage audiences.

Specifically, the FTC has asked various major alcoholic beverage advertisers – including Anheuser-Busch Companies, Inc., Bacardi USA, Inc., and Heineken USA, Inc. – to provide the Commission with information about their Internet, digital marketing and data collection practices, advertising expenditures and placements, and general business practices.

The alcohol beverage industry imposes its own regulatory guidelines on advertising and marketing by alcohol manufacturers to underage audiences. For example, the Beer Institute's product placement guidelines recommend that "Brewers discourage underage drinking and do not intend for their products to be purchased or consumed illegally by people below the legal drinking age. Consistent with that philosophy, Brewers will not approve product placement which portrays purchase or consumption of their products by persons who are under the legal drinking age." The Wine Institute's Code of Advertising Standards contains similar provisions to prevent product placement in advertisements appealing to underage consumers. Likewise, the Code of Responsible Practices of the Distilled Spirits Council of the United States prohibits product placement directed toward underage consumers.

Recommendations from the FTC's prior 1999, 2003, and 2008 studies have led industry trade groups, including the Beer Institute, the Wine

Institute, and the Distilled Spirits Council of the United States, to implement "an improved voluntary advertising placement standard; media buying guidelines for placing ads on radio, in print, on television, and on the Internet; a requirement that suppliers conduct periodic internal audits of past placements; and systems for external review of complaints about compliance."

To read the FTC's press release about the recent study, click here.

Why it matters: What sets the latest FTC study apart from previous studies on the effectiveness of voluntary industry guidelines is that this is the first time the agency has requested information on Internet and digital marketing and data collection practices. In so doing, the FTC appears interested in determining what, if any, impact digital marketing is having on the self-regulatory efforts of the adult-beverage industry.

On a broader front, the compulsory process orders signify the FTC's regulatory and enforcement authority as the nation's chief consumer protection agency. The Commission is sending a clear signal to all industries and their trade groups that self-regulation is prudent and necessary to protect consumers and foster a collaborative relationship with federal and state regulators. This is especially true in the age of digital marketing.

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Noted and Quoted... *Advertising Age* Turns to Chris Cole for Analysis on Consumer Fraud Class Action Trends

On April 23, 2012, *Advertising Age* published commentary by Chris Cole, an advertising litigation partner with Manatt, Phelps & Phillips, concerning the meteoric rise of consumer fraud class action suits and what this means for advertisers and marketers at consumer goods companies. According to Cole, "the trend reveals more about the legal economy than our nation's advertising industry" as plaintiff's lawyers have set their sights on consumer fraud class action suits as profitable targets.

To read the full article, click here.

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