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Jordan's Suit Not a Slam Dunk

He may be a basketball legend, but Michael Jordan's prowess on the court did not translate into a slam dunk in the courtroom.

In 2009, Jordan was inducted into the Basketball Hall of Fame. *Sports Illustrated* published a special commemorative magazine edition and asked various businesses to design a page for the issue.

Paying nothing, grocery chain Supervalu, parent to Chicago-based Jewel Food Stores, designed a page featuring the image of a pair of Air Jordans spotlighted on a hardwood basketball court. Accompanying text read:

"A Shoe In! After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan's elevation in the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was 'just around the corner' for so many years."

Additional text included Jewel's logo and slogan, "Good things are just around the corner."

Jordan sued, alleging that Jewel had violated his publicity rights.

But U.S. District Court Judge Gary Feinerman said the page was noncommercial speech and entitled to full First Amendment protection.

"It is difficult to see how Jewel's page could be viewed, even with the benefit of multiple layers of green eyeshades, as proposing a commercial transaction. The text recounts some of Jordan's accomplishments and congratulates him on his career and induction into the Hall of Fame. The shoes, the number 23, and the hardwood floor evoke Jordan and the sport and team for which he enjoyed his principal success… At the most basic level, the page does not propose any kind of commercial transaction, as readers would be at a loss to explain what they have been invited to buy."

The use of Jewel's logo and slogan does not propose a commercial transaction on its own, Judge Feinerman wrote. No specific products or services were mentioned and the logo was the most effective way to identify Jewel as the speaker. Even the use of the "just around the corner" slogan personalizes the message, the judge said, reinforcing the idea that Jordan is the company's fellow Chicagoan.

Finally, the court rejected Jordan's argument that Jewel had an

Newsletter Editors

Linda A. Goldstein
Partner
Email
212.790.4544

Jeffrey S. Edelstein
Partner
Email
212.790.4533

Marc Roth
Partner
Email
212.790.4542

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Upcoming Events

March 19–20, 2012
ACI's Legal & Regulatory Summit on Food & Beverage Marketing & Advertising
Topic: *"From Weight Loss to Healthy Eating*—How to Prevent Health Claim Nightmares: Practical Guidance for Structuring Claims that Will Withstand Government Scrutiny and Private Litigation*"*
Speaker: Linda Goldstein
Washington, DC
For more information

March 28–30, 2012
60th ABA Section of Antitrust Law Spring Meeting
Topic / Speaker: "Pot to Frying Pan—Settlement Agreements as Antitrust Violations," Chris Cole
Topic / Speaker: "The FTC's Use of Federal Court for Consumer Remedies," Ed Glynn
Washington, DC
For more information

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

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

economic motivation to place the page in the magazine. "*Of course* that is why Jewel placed the page. To say that a for-profit corporation like Jewel has an 'economic motivation' for taking any particular action is to state a truism," the court said. But that economic motivation alone did not render the page commercial speech, the judge held.

The case will continue, however, as the parties were ordered to brief the issue of whether the noncommercial status of Jewel's page conclusively defeats Jordan's claims.

Jordan's attorney told the *Chicago Tribune* that he will appeal the opinion.

To read the court's opinion in *Jordan v. Jewel Food Stores*, click here.

Why it matters: In addition to drawing a line between commercial and noncommercial speech, the decision also discussed consumer perception. The court noted that Jordan had filed a second suit against Dominick's Finer Foods, a Chicago grocery store competitor of Jewel's, which also created a page in the magazine. "The fact that Jewel and Dominick's… both placed pages in the commemorative issue is significant because anybody inclined to be swayed by Jordan's appearance in an advertisement knows that he does not play on two or more sides of the same fence, commercially speaking. Jordan is Hanes, not Jockey or Fruit of the Loom; Nike, not Adidas or Reebok… A reader who purchased the commemorative issue and saw the Jewel and Dominick's pages would know, instinctively, that the Jewel page was not an advertisement," Judge Feinerman wrote. He also noted that neither side produced consumer surveys that could have borne upon his judgment "by indicating whether people actually consider the challenged speech to have a proposed transaction."

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Mobile App Makers Reach Agreement with California AG

In what the California Attorney General described as an agreement that will affect "millions of mobile app users in California and throughout the world," the operators of six mobile applications platforms said they will improve privacy protections for consumers.

Amazon, Apple, Google, Hewlett-Packard, Microsoft and Research in Motion began talks last August, AG Kamala D. Harris said at a press conference. Together, the companies represent over 95 percent of the market of mobile applications for smartphones, tablets and other mobile devices. Of the roughly one million apps currently for sale, Harris said only five percent have a privacy policy.

There are four principles of compliance to the agreement, Harris said.

First, the platforms all agreed to recognize that the California Online Privacy Protection Act applies to mobile apps. Pursuant to the law, they will now conspicuously post privacy policies regarding how personal data is collected, used and shared. Second, in applications for new or

updated apps, the companies will provide a data field for a hyperlink to the app's privacy policy or a data field for the text of the app's privacy policy itself, making space available for the developers to comply with the law. That will allow consumers to read the policy prior to purchase, download, and installation, Harris said.

Third, the companies agreed to establish a format for consumers to report apps that do not comply with their privacy policies. And fourth, they will implement a process for responding to the reported noncompliance.

The agreement gives "more information to the consumer about how their personal and private information is used and will also give them tools to protect themselves, by giving them tools to take control and make decisions about what information and to whom they want to share," Harris said.

While Harris acknowledged that the collection of consumer information by mobile apps is perfectly legal, developers and platforms must inform consumers prior to collection—typically when the app is downloaded—about what information is being collected and with whom it is being shared.

She also made clear that app developers should be prepared to face enforcement and prosecution under unfair competition and false advertising laws. Harris said her office will not hesitate to prosecute companies found in violation of the law, although she declined to put an official start date on enforcement of the agreement.

To read the agreement, click here.

Why it matters: "Most consumers don't understand the expanse, breadth, depth and application" of the use of their personal information, Harris said. "A population without knowledge of the potential uses is potentially vulnerable." Harris also took a hard line in terms of enforcement, warning companies that California is "certainly prepared to encourage good behaviors with every carrot available but we will also punish bad behaviors and failure to comply with the agreement." The parties to the agreement will meet with Harris in six months to evaluate progress, she said, but she declined to set an official start date on enforcement. She did note, however, that penalties under the available laws include up to $5,000 per violation.

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"Free" Offers Result in $359 Million FTC Settlement

Allegedly "free" offers of weight-loss pills, teeth whiteners and health supplements will cost an individual defendant and his companies $359 million in a settlement with the Federal Trade Commission.

Jesse Willms and his companies used "free" product offers to lure consumers and then relied upon a negative option marketing scheme to charge them for other products and services they did not agree to purchase, according to the agency.

According to the complaint, a typical claim read, "Your risk-free trial is almost ready to ship. Simply use this 100% secure order form to tell us

how to bill the small cost to ship you your trial. Oh and don't worry, today you are only being charged for the small shipping charge, and nothing more." However, consumers' credit card information was then used for a monthly recurring fee of $79.95 and additional fees for various "bonus" offers, the FTC said.

Affiliate marketers used banner ads, pop-ups, sponsored search terms, and unsolicited e mails that led consumers to the defendants' sites and were paid for each consumer whose credit or debit card was charged, the agency alleged.

The settlement order permanently banned the defendants from the use of negative option marketing and imposed a $359 million judgment that will be suspended upon the surrender of various assets by Willms. The defendants are also prohibited from misrepresenting the terms of offers using claims such as "free," "risk-free," or "trial offer," as well as using false or deceptive endorsements and testimonials.

All terms and conditions of an offer—including refund terms—must be disclosed by the defendants prior to requesting a consumer's payment information. In addition, the settlement requires the monitoring of affiliates and affiliate networks involved in any of the defendants' marketing, and the defendants are prohibited from making misleading or unsubstantiated health-related, weight-loss, or disease prevention claims.

An additional five individual defendants also entered into settlements with the FTC; the agency alleged that they aided Willms in providing banks with false or misleading information to obtain merchant accounts that were used to charge consumers' cards.

To read the stipulated final order in *FTC v. Willms*, click here.

Why it matters: Online marketers should ensure that all material terms related to billing are clearly disclosed to consumers, especially in light of the FTC's "ongoing efforts to stamp out online marketing fraud." "The fact that almost four million consumers fell prey to the lure of these 'free trial' offers is a stark reminder that 'free' offers can come at a huge price," David Vladeck, Director of the FTC's Bureau of Consumer Protection, said in a press release about the settlement. "The FTC has stopped about $1 billion in online marketing fraud during the past two years by shutting down operations like this. But consumers still need to beware, because scam artists are constantly coming up with new ways to deceive people online."

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White House Issues "Bill of Rights" for Consumer Privacy

Taking a major step toward federal regulation of privacy in the United States, the Obama administration released a report that includes a "Consumer Privacy Bill of Rights" in an attempt to increase consumer control over personal information online and offer guidance to businesses for the process.

"Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy" consists of the Bill of Rights as well as other elements, such

as enforcement, increased interoperability in privacy laws between countries, and a stakeholder-driven process to establish policies.

The Bill of Rights consists of seven core rights:

- Individual control: Consumers have a right to exercise control over what personal data companies collect from them and how they use it.
- Transparency: Consumers have a right to easily understandable and accessible information about privacy and security practices.
- Respect for context: Consumers have a right to expect that companies will collect, use, and disclose personal data in ways that are consistent with the context in which consumers provide the data.
- Security: Consumers have a right to secure and responsible handling of personal data.
- Access and accuracy: Consumers have a right to access and correct personal data in usable formats, in a manner that is appropriate to the sensitivity of the data and the risk of adverse consequences to consumers if the data is inaccurate.
- Focused collection: Consumers have a right to reasonable limits on the personal data that companies collect and retain.
- Accountability: Consumers have a right to have personal data handled by companies with appropriate measures in place to ensure they adhere to the Consumer Privacy Bill of Rights.

President Obama concluded the guidelines by calling on Congress to adopt the Bill of Rights and provide both state attorneys general and the Federal Trade Commission with enforcement powers. An industry code of conduct would be enforceable under Section 5 of the FTC Act.

The report also calls for greater cooperation and interoperability between the United States and the privacy frameworks found in other countries.

Further, President Obama requested that the Commerce Department begin working with stakeholders—including companies, privacy and consumer advocates, technical experts, international partners, and academics—to develop and implement privacy policies based on the guidelines.

In conjunction with the report, the Digital Advertising Alliance announced that member groups have agreed to create a uniform opt-out functionality in browser headings so that consumers can choose not to be tracked online. Companies such as AOL, Google, Microsoft and Yahoo all committed to support Do Not Track technology in their browsers.

“The DAA will immediately begin work to add browser-based header signals to the set of tools by which consumers can express their preference,” DAA general counsel Stuart Ingis told *MediaPost*. Companies that adhere to the group’s self-regulatory standards will be required to honor the browser-based headers, he said, subject to FTC enforcement.

To read the report, click here.

Why it matters: The guidelines issued by the Obama administration are likely to lead to omnibus federal privacy legislation for the first time

in the United States. All companies should follow the actions of Congress and the Commerce Department as the process continues, especially as some have predicted the establishment of such consumer rights will lead to increased privacy-related litigation by consumers.

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