Advertising Law @ manatt

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In This Issue

Special Focus
New Colorado Sales Tax Law Poses Significant Threat to Internet, Catalog Retailers

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On February 24, 2010, the governor of Colorado signed into law H.B. 10-1193, which requires retailers not having a physical presence in Colorado (such as Internet and catalog sellers) and that do not otherwise collect Colorado state sales taxes on sales to Colorado residents (which is likely to be most out-of-state retailers) to notify Colorado customers that the customers owe the Colorado tax on their purchases. The law applies to retailers with more than $100,000 in annual sales.

Although the Supreme Court's 1992 decision in *Quill v. North Dakota* means that retailers with no physical presence in a state are not required to collect state sales tax on sales to residents in such state, in most states the residents still owe the state tax – typically through a "use tax" that is parallel to the sales tax. Apart from the case of registration of motor vehicles purchased out-of-state, where states can collect use tax at the time of registration, use taxes tend to be widely ignored or even unknown.

States ever hungrier for tax revenue have been setting their sights on

UPCOMING EVENTS

April 9, 2010

Palo Alto Area Bar Association

online and catalog sales to their residents, with such purchases generally being sales-tax-free. Such attempts must deal with the constitutional limitations of *Quill*. *Quill* essentially held that the commerce clause of the U.S. Constitution prohibits a state from imposing a sales tax on a retailer with no "nexus" with the state, and that "nexus" exists only where the retailer has some kind of physical presence in the state. For many years physical presence was viewed as requiring a store, warehouse, office, distribution center or other facility of the retailer itself. Recently New York, North Carolina and Rhode Island have enacted taxes that treat "affiliates" of retailers (such as utilized by Amazon.com, Overstock.com and other Internet retailers) as providing the requisite physical presence. The validity of the New York statute is currently the subject of litigation. Other states, including California, Connecticut, Hawaii, Illinois, Iowa, Maryland, Minnesota, New Mexico, Tennessee, Vermont, Virginia and Wisconsin, have considered and – for the time being – rejected such "Amazon" taxes.

While originally drafted in a fashion similar to the New York law, the enacted version of Colorado's law takes a different approach in that it is formally structured as primarily a notice and reporting regime rather than a direct tax collection regime. Out-of-state retailers need not collect sales taxes on sales to Coloradans, but must (i) include a notice on each invoice to Colorado customers informing them that their purchase is subject to Colorado sales tax (unless otherwise exempt under Colorado law), and (ii) send a report to customers in January of each year detailing all of their purchases in the preceding year and the amount of sales tax owed. The notice must state that the retailer is not obligated to (and does not) collect Colorado sales taxes, the purchase is not exempt merely because it is made over the Internet (or by other remote means), the State of Colorado requires that sales or use tax be paid on the purchase (unless otherwise exempt under Colorado law) and that the retailer is obligated to provide a year-end summary to its Colorado customers to assist them with filing their tax returns. In addition, out-of-state retailers must also provide the purchaser's information annually to the Colorado Department of Revenue. Failure to comply with the customer notice requirement will result in a fine of $5 per violation. Failure to comply with the Colorado Department of Revenue notice requirement will result in a fine of $10 per violation, with an additional penalty of $10 per customer omitted from the notice. Regulations recently issued under H.B. 10-1193 provide that due to the short period of time between enactment and the March 1, 2010 effective date, if a retailer begins to provide notices by May 1, 2010, it will not be subject to penalties for prior failures.

Wholly apart from the compliance burdens raised by H.B. 10-1193, there are unsettling privacy considerations. The notice that out-of-state retailers must provide to the Colorado Department of Revenue includes specific information about their customers' purchases. The State will

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Speaker: Clay Friedman
Palo Alto, CA
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American Conference Institute
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

now know that particular individuals have purchased items that many consumers would view as highly sensitive.

Why it matters: Colorado has implemented an unusual approach to the battle over collecting sales taxes from out-of-state retailers. While it does not yet appear that anyone has brought a legal challenge to H.B. 10-1193, but a challenge seems almost certain. As states continually seek new sources of revenue, it seems likely that Colorado will not be the last to make an aggressive attempt to tax remote purchases.

back to top

Linda Goldstein and Tom Morrison Join Faculty of Upcoming Advertising Litigation Conference

Linda Goldstein, chair of Manatt's Advertising Division, and Tom Morrison, partner in the firm's False Advertising Practice Group, will serve among the faculty of the American Conference Institute's "Litigating and Resolving" Advertising Disputes Conference on June 15 and 16 in NYC.

The event is a comprehensive 2-day program and will cover: challenges faced by in-house counsel, how to determine the appropriate forum for competitive challenges, preparing effective strategy, proving the case, utilizing the NAD, securing preliminary relief, the interplay between regulatory activity and private litigation, taking the case to the TV networks, and effective settlement strategies. Also notable is a unique session titled "View From the Bench: Judicial Perspectives on Advertising Litigation." Hon. Timothy Batten, USDC, Northern Dist of GA; Hon. Faith Hochberg, USDC, Dist of NJ; and Hon. Warren Eginton, USDC, Dist of CT are panelists.

For more information, and to take advantage of Manatt's $300 discount off the registration fee, click here.

back to top

15 Years Later, FDA Rules on Tobacco to Take Effect in June

The Food and Drug Administration issued its final rules on marketing cigarettes and smokeless tobacco to children, which take effect June 22. The rules were first proposed in 1995, but the U.S. Supreme Court struck them down in 2000 in Lorillard Tobacco Co. v. Reilly, when it found a ban on outdoor tobacco advertisements within 1,000 feet of any school or playground unconstitutional. But as part of the Family Smoking Prevention and Tobacco Control Act signed by President Barack Obama last June, the FDA is required to reissue the rules.

Topic: "The Claim Game- Vegas Edition"
Speaker: Ivan Wasserman
Las Vegas, NV
Las Vegas Convention Center
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June 15-16, 2010
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Litigating and Resolving Advertising Disputes
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
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June 15-16, 2010
American Conference Institute
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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
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Newsletter Editors
Jeffrey S. Edelstein
Partner

The Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents ban the sale of all tobacco products to anyone under the age of 18. In addition, tobacco companies are banned from sponsoring sporting and entertainment events, and prohibited from offering free samples and giveaways of non-tobacco items (a Marlboro t-shirt, for example). The rules also require that vending machine sales be in adult-only facilities and outlaw the sale of packages with fewer than 20 cigarettes.

Advertising is also restricted under the rules. Audio ads for tobacco products are prohibited from using music or sound effects; only words can be used. And with the exception of periodicals with 85 percent or more adult readership, print advertisements must be black text on a white background. The rule also provides for federal enforcement for violations.

The FDA is still considering one element of the prior rules, however: outdoor advertising.

The agency released a notice of proposed rulemaking, seeking comment on whether or not it should regulate the outdoor advertising of cigarettes and smokeless tobacco. Electronic or written comments are due by May 18, 2010.

Why it matters: The FDA has indicated that it expects a legal challenge to the rules. Several tobacco companies, including R.J. Reynolds and Lorillard – the second and third biggest tobacco manufacturers in the United States – already filed suit regarding the Act after it went into effect last summer. Although regulation of cigarette advertising and marketing has been in place for decades, the companies argue that they already operate under the strictest regime in the country and the new law goes too far. A number of ad groups – such as the Association of National Advertisers, the American Association of Advertising Agencies, and the American Advertising Federation – filed an amicus brief on behalf of the tobacco companies, expressing concern that the new law could establish a precedent of restrictions on the marketing and advertising of other products (like alcoholic beverages or prescription drugs).

back to top

Lawmakers to Consider Two Bills with Advertising Impact

Federal legislators will soon be considering two different bills that would impact online advertising: a privacy bill that could restrict certain marketing practices and a financial reform bill that contains language giving the Federal Trade Commission greater rulemaking authority. Congressman Rick Boucher (D – Va.), chair of the House Energy and Commerce Subcommittee

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on Technology and the Internet, plans to introduce a consumer privacy bill in the coming months.

"Where I want to go with this is generally opt out," Rep. Boucher told reporters. "If I were [a publisher or advertiser], I would want Internet users to have a sense that their experience is more secure, that they know what information is collected about them, and they be given much more control. They will be more trusting of electronic commerce. . . .it's good for business."

The second proposed law, the Wall Street Reform and Consumer Protection Act of 2009, would remove existing limits on the FTC's rulemaking capability and expand its enforcement powers. The Senate version of the bill does not contain these provisions, however.

With its new authority, the FTC would be able to issue financial penalties to violators and would also be able to hold companies liable for aiding and abetting violations of the law.

In response to the potential for increased authority, FTC Chairman Jon Leibowitz said that the industry "needs to do a better job of ensuring that consumers know what they are agreeing to with online advertising. The new rulemaking authority is really about hard-core fraud. It doesn't make sense to initiate rule making where business practices and consumer attitudes are still evolving like behavioral targeting. . . .We prefer self-regulation."

Why it matters: The recent passage of the health care bill means that federal lawmakers will now turn back to other issues, such as privacy and financial reform. Companies that advertise online should be aware that new legislation is a possibility. Twenty-nine advertising industry trade groups, such as the Interactive Advertising Bureau, the Direct Marketing Association, and the Association of National Advertisers, recently sent a letter to a Senate committee, expressing concern about giving the FTC greater authority.

back to top

Companies Violated TCPA by Sending Free, Unsolicited Text Messages

A pair of U.S. District Courts recently held that SMS messages sent to a consumer without the consumer's consent could violate the Telephone Consumer Protection Act – even though the consumers were not charged for the messages.

Both cases were filed as putative class actions by consumers who received "spam" text messages.

In the first case, Sadat Abbas alleged that Selling Source, a company that provides Web site design, hosting, Internet marketing, and e-commerce services, violated the TCPA by sending him "numerous"

messages.

In the second case, Victor Lozano claimed that Twentieth Century Fox sent him a text message advertising the animated film *Robots* when it was released on DVD, as well as other "spam" text ads.

Both defendants moved to dismiss, arguing that the TCPA was not intended to include SMS or text messages, and that the suits failed because the Act requires that consumers pay for the spam messages they receive. Both courts disagreed.

"Congress was just as concerned with consumers' privacy rights and the nuisances of telemarketing," as it was with shifting the cost of consumers having to pay for unwanted calls, Judge Joan B. Gottschall wrote in Abbas. "Automated calls invade privacy and pose nuisances regardless of whether the called party is charged for the call." While the TCPA does not define the term "call," both courts determined that it applied with equal weight to SMS and text messages. Although such messages did not exist in 1991 when Congress enacted the TCPA, that "does not preclude the application of the latter to the former," Judge Gottschall wrote.

Judge Amy J. St. Eve agreed in Lozano. "[W]hile text messaging was not a capability in 1991, the plain meaning of the term 'call' at that time includes communications by phone, and does not prohibit application of the statute to text messaging. . . . [T]he legislative history of the TCPA reflects that Congress anticipated future technologies when it enacted the statute."

Why it matters: The decisions make clear the importance of getting express consent from consumers prior to sending SMS messages, even if the messages are free. Marketers who send unsolicited text messages without permission could face litigation.

back to top

First Lady Addresses Grocery Manufacturers Association

First Lady Michelle Obama recently spoke to the Grocery Manufacturers Association and urged them to join the voluntary labeling campaign that the Food and Drug Administration plans to launch this fall. The First Lady spoke to the GMA at its annual Science Forum and promoted her campaign against childhood obesity, called Let's Move! Her campaign has four major goals: giving parents the support they need to make better food choices, providing healthier food in schools, helping kids become more physically active, and making healthy, affordable food available in every part of the United States.

The First Lady encouraged the members of the GMA to "share in the

responsibility." "[W]e need you not just to tweak around the edges, but to entirely rethink the products that you're offering, the information that you provide about these products, and how you market those products to our children," she said.

Mrs. Obama referenced a recent FDA survey which indicated that the majority of Americans rely upon food labels to help them decide what foods to buy. "But we know those labels aren't always as helpful as they could be," she said. "Parents shouldn't need a magnifying glass and a calculator to make healthy choices for their kids."

To that end, the First Lady encouraged the GMA to use "clear, consistent, front-of-the-package labels that give people the information they've been asking for, in a format that they understand." She also encouraged the audience to join with the FDA, which will begin pursuing voluntary agreements from various companies in the fall regarding labeling. The First Lady also encouraged GMA members to revamp or ramp up efforts to reformulate products, particularly those aimed at kids, to decrease the amount of fat, salt, and sugar, and increase nutrients.

She also urged companies to limit advertisements for certain products that are targeted at children. "Our kids didn't learn about the latest sweets and snack foods on their own," she said, telling a story about daughter Sasha recently parroting a commercial for Honey Nut Cheerios. "[W]hatever we believe about personal responsibility and self-determination, I think we can all agree that it doesn't apply to kids. . . .I'm asking you to actively promote healthy foods and healthy habits to our kids," the First Lady said.

In a statement, Richard G. Wolford, Chairman, President and Chief Executive Officer of Del Monte Foods Company and Chairman of the GMA Board of Directors, said the industry is committed to working with the FDA and USDA "to ensure that the industry makes the best use of the front of the product label to provide clear and useful science and fact-based nutrition information to parents and other consumers."

Why it matters: While the First Lady acknowledged in her remarks that childhood obesity can't be solved "by passing a bunch of laws in Washington," her multi faceted campaign focuses on labeling and advertising issues. Childhood obesity will remain in the news: In addition to Mrs. Obama's request for clearer labels and less marketing to children, the FDA will be conducting a campaign this fall to solicit companies to voluntarily change their labels.

back to top

Vermont Considers Law Banning Hospital Advertising

The Vermont legislature is considering a ban on hospital advertising and marketing as part of an effort to control state health costs. State Representative Steve Maier introduced H. 627, An Act Relating to Health Care Cost Containment, in an attempt to cut down on spending by state hospitals.

One piece of the bill includes a prohibition on the inclusion of advertising and marketing expenses in hospital budgets. Rep. Maier cited estimates that Vermont hospitals spend roughly $10 million each year on advertising and marketing. "I think it's appropriate to question whether our not-for-profit system needs to compete," he said. "It's not producing health care."

While the bill includes an exception that allows hospitals to advertise job openings, opponents have expressed concern that the ban creates serious constitutional issues, violating First Amendment protections for commercial speech.

The proposed law defines marketing and advertising as "promotion or any activity that is intended to be used or is used to influence individuals seeking health care services to use a specific hospital to attain those services." It is unclear if hospitals could still budget for informational releases – such as promoting educational programs, services such as Alcoholics Anonymous, or announcing that a new surgeon has been hired – or whether they too would be banned.

Why it matters: An almost complete ban on advertising and marketing would face a steep uphill battle if challenged in court. Under the constitutional analysis, the government would need a compelling reason for the law, which Rep. Maier has stated as controlling the cost of health care. But opponents could argue that advertising spurs competition, which can actually reduce costs.

back to top

Manatt to Host the PMA's Entertainment Law Summit in Los Angeles

On April 29, Manatt will host an afternoon program on behalf of the Promotion Marketing Association designed for executive-level marketers and attorneys. Each session will outline essential best practices, and the afternoon will conclude with a networking cocktail reception. Topics include:

1. "Social Media: Will Buzz Make You or Break You?"
Featuring: *Linda Goldstein, Esq. Partner, Manatt, Phelps & Phillips and Chas Salmore, CEO, MWKS*

2. Music Download: Talent, Labels and Numerous Rights Holders

Featuring: *Evan Greene, Chief Marketing Officer, and Bobby Rosenbloum, Esq, General Counsel, from The Recording Academy. And Scott Perry, Founder, New Music TipSheet and MKTGideas*

3. Branded Entertainment: Managing the Issues
Featuring: *Jordan Yospe, Esq. Partner, Manatt, Phelps & Phillips, Tammy Brandt, Esq. Managing Counsel, Toyota Motor Sales and Eric Baum, SVP, Business & Legal Affairs, Sony Pictures Entertainment*

Seating is limited, so be sure to register ASAP and take advantage of Manatt's friend-of-the-firm discount of $100 off the member and non-member rate. Enter promotion code: MAN-100 when you register here.

back to top