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Podcast: Manatt Partner Ivan Wasserman On GAO Report About Tainted Supplements

***Functional Ingredients*' managing editor Hank Schultz spoke with Wasserman at the Natural Marketplace show in Las Vegas.**

To listen to the podcast, click here.

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Hummel Advises on Litigation Communication Strategies in InsideCounsel

Public comments by counsel or clients during high-profile litigation is the topic of Chad Hummel's most recent column for *InsideCounsel* magazine.

In "Litigation Communication Strategies," Hummel, chair of Manatt's national Litigation Division, offers guidelines that can protect companies and corporate counsel from the potentially dire consequences of public comments during litigation. "In the new media age, the perception that high-profile cases are litigated in the press or another public forum, such as in social media, is increasingly the reality," Hummel says in his *InsideCounsel* column, the fourth of seven installments of the biweekly

UPCOMING EVENTS

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ACI Conference

Topic: "Sweepstakes, Contests,

series.

Read the article here.

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Private Deceptive Advertising Suits Over "Natural" and "Organic" Labels Get Stuck in the Mud

Author: Kimo Peluso

Recently, two federal courts on opposite coasts, in unrelated cases, found that the truthfulness of certain "natural" and "organic" labels would be better resolved before federal agencies than in a courtroom. In May, a California federal court pushed the pause button on a soap purveyor's Lanham Act suit.

The company's suit challenged several of its competitors with falsely labeling their personal care products as "organic." In addition to the lawsuit, captioned *All One God Faith, Inc. v. Hain Celestial Group, Inc.*, the plaintiff had filed an administrative complaint with the USDA against many of the same defendants, based on USDA rules on "organic" labeling. The federal court judge, concerned about the possibility of a judicial ruling at odds with regulatory standards, told the plaintiff to hit the showers. At least for now. The court stayed the lawsuit pending resolution of the pending USDA proceedings.

Similarly, in June, a New Jersey federal court stayed a consumer class action brought under the New Jersey Consumer Fraud Act, challenging the "100% Natural" label on Arizona Iced Tea products. In that case, *Coyle v. Hornell Brewing Co.*, the plaintiff class griped that the "natural" label was a scam because the defendant's products contained high fructose corn syrup. Again citing the risk that any judgment could conflict with federal regulatory rules, the Court put the lawsuit on ice. It issued a six-month stay and formally referred to the FDA the question of whether the sugary sweet ingredient truthfully comes from mother nature. Thus, the consumer class action in *Coyle*, like the competitor suit *All God One Faith* were effectively stalled, pending administrative rulings.

Why it matters: "Natural," "organic" and similar claims are seen increasingly on a variety of products, from health supplements to hand soaps. As these claims spread, so too do private lawsuits challenging them. These recent cases illustrate the potential procedural and substantive defenses available in such cases, as a result of parallel efforts by regulators to define these same terms. Courts increasingly appear willing to stay or dismiss such lawsuits in favor of seeking guidance or resolution from the relevant agencies.

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and Promotions"

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Moving Company Sues Web Site Over Message Boards

A New York moving company filed suit against MovingScam.com, claiming that the site endorsed MovingScam.com's affiliates and disparaged the plaintiff on the site's message boards.

Budget Van Lines filed suit in federal court against MovingScam.com and its owner, claiming that the defendants "have made numerous posts discouraging customers from using outside moving-service companies, like [Budget], and encouraging them to use moving-service companies affiliated with the MovingScam.com Web site." The suit alleges false advertising, trademark infringement, and commercial disparagement.

MovingScam's Web site has a "blacklist" of moving companies that "scam" consumers, which includes Budget, the complaint says. It also contains a banner ad for either the defendants or an endorsed company on every page of the blacklist, according to the complaint. The defendants insert ads for their own products and those of its advertisers on the site's message boards, the complaint alleges, in between comments that disparage other moving companies.

Budget's suit claims that the site earns a portion of sales revenue when users click through ads on its site to endorsed companies. MovingScam.com "falsely leads consumers to believe that the site is a consumer-protection Web site providing information to help consumers choose moving companies and vendors for moving supplies when, in fact, the Web site is an e-commerce Web site with the primary purpose of generating revenue," according to the complaint.

To read the complaint in *Budget Van Lines v. Walker*, click here.

Why it matters: The defendants have faced similar claims in the past: Several years ago, Nationwide Relocation Services filed suit in Florida federal court. That case settled in 2008. This suit serves as a warning to companies that make comparative claims about competitors to be careful not to disparage or falsely mislead consumers as to the nature of those claims.

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NAD: Claims of "Like Free" Same As "Free"

In a pair of decisions, the National Advertising Division determined that OfficeMax and Staples should discontinue the use of claims like "It's like getting one FREE" to describe products that could be obtained through participation in the companies' loyalty programs. The NAD ruled that the word "free" has "cachet with consumers and should be reserved for offers that are truly without cost."

Office Depot challenged claims made by its competitors Staples and OfficeMax about their loyalty programs. In print and Internet advertising, OfficeMax claimed, "It's like getting one FREE" for its MaxPerks Bonus Rewards program, where consumers enroll and earn points with each purchase at OfficeMax that can be used to purchase other office products. The word "free" appeared in a bright color, in capital letters, and in a font three times larger than the surrounding print.

Although OfficeMax argued that consumers did not believe they were getting free products or cash back because the company used the phrase "like free" and not "free," the NAD disagreed. "What the advertiser is offering is not free merchandise but rather the opportunity to join a loyalty program and earn points that can be used towards purchasing merchandise in the future. Receiving merchandise as a benefit of being a member of a loyalty program is very different from receiving free merchandise or cash back," the NAD said.

The phrase "like free" was similar to the word "free" and "connotes the same meaning," the NAD added, recommending that OfficeMax discontinue use of the claim.

The Staples RewardProgram made a similar claim in its ads, that: "It's like getting supplies for FREE," and the NAD reached the same conclusion. "NAD recognizes that aggressive price competition benefits consumers, but such benefits are only realized when savings claims are accurate and enable consumers to assess the value of a bargain or a sale. Accordingly, it is incumbent on advertisers to ensure that the savings promised are real," the NAD said. The NAD did agree with Staples that its claim "Buy ANY of these office supplies, get 100% back in Staples Rewards" was substantiated and accurate.

To read the OfficeMax decision, click here.

To read the Staples decision, click here.

Why it matters: Companies that offer loyalty programs should take note of the decision and make sure their reward claims are accurate and can be substantiated. The NAD determined that Staples had a right to tout its RewardProgram, which allows consumers to redeem their

points at a later date. But both Staples and OfficeMax were told to discontinue their claims using the word "free" as a promotional device to attract customers. Both companies said they plan to appeal to the National Advertising Review Board.

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FTC Offers Tips on Endorsement Guides

The Federal Trade Commission released an informational document about its Endorsement Guides, addressing issues like how and when to make disclosures and the need for advertisers to establish training and monitoring programs for members of their social media marketing networks.

The revised Guides went into effect December 1, 2009, and impacted the use of testimonials and endorsements in all media, as well as specifically targeting blogging, viral marketing, and other social media platforms.

Based on questions sent into the agency, the FTC Bureau of Consumer Protection's Division of Consumer and Business Education posted a "Frequently Asked Questions" document to help guide advertisers and bloggers.

The agency encouraged bloggers to be as open as possible. "What matters is effective communication, not legalese," the FTC emphasized. A blogger should disclose the fact that he or she received a $1-off coupon for a product that is reviewed and disclose a free product even if he or she returns it after reviewing it.

The FAQs specifically address social media like Facebook and Twitter. Even if a Facebook page identifies the company a blogger works for, he or she should include an additional disclosure when talking about the company's products. And a famous athlete with thousands of followers on Twitter may need to disclose that he is paid to endorse a certain product with each tweet "if a significant number of his readers don't know that." Because determining how many followers are actually aware of the sponsorship relationship could be difficult, the FTC recommends the additional disclosure. When making the disclosure, the agency said no specific language is necessary, although it emphasized that a single disclosure on a home page is not sufficient – bloggers should disclose with each post or video that references a product. Requiring a consumer to follow a link to disclosure information (on an "About Us" page, for example) is not sufficient, the agency said.

Disclosure on Twitter, where messages are limited to 140 characters, can be effectuated by using hashtags like "#paidad" or even "#paid" or "#ad."

For companies that utilize social media for marketing, the FTC said reasonable programs to train and monitor members of the network

should be in place. The scope of the program will vary depending on the risk of consumer harm, the agency said, with a network selling health products requiring greater supervision than one selling a fashion product, for example.

Advertisers should explain to network members what can and what can't be said about the product, establish a reasonable monitoring program to check what members are saying about the product, and follow up if questionable practices are found, the FTC advised.

Addressing testimonials, the FTC said that if consumers want to speak to their specific results, the advertiser must have adequate proof to back up the claim that the results shown in the ad are typical, or clearly and conspicuously disclose the generally expected performance in the circumstances shown in the ad. Statements like "results not typical" or "individual results may vary" are not sufficient under the revised Guides.

To read "The FTC's Revised Endorsement Guides: What People Are Asking," click here.

Why it matters: The FTC said it has not been getting complaints about deceptive blogs, nor is the agency currently monitoring blogs or planning to do so. Instead, the focus remains on "advertisers, not endorsers – just as it's always been." The FAQs are useful for businesses trying to navigate the revised Guides, and companies should pay close attention to the agency's suggestions, as they indicate the type of activity the FTC may consider deceptive.

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Court Dismisses Viacom Suit Against YouTube

A federal court judge dismissed a lawsuit brought by Viacom against YouTube alleging that the site was violating copyright laws because it contained tens of thousands of copyrighted clips uploaded by users.

"General knowledge that infringement is 'ubiquitous' does not impose a duty on the service provider to monitor or search its service for infringements," the court said. Viacom filed suit against YouTube claiming that the site was committing direct, vicarious, and intentional copyright infringement because it had "actual knowledge" of infringing activity and failed to stop it.

YouTube argued that the suit should be dismissed because it was protected by the safe harbor provisions of the Digital Millennium Copyright Act.

Viacom disagreed, contending that because YouTube knowingly hosted unlawful materials it was not protected by the DMCA.

But U.S. District Court Judge Louis L. Stanton disagreed. Although the court said that a jury could find that YouTube "not only [was] generally aware of, but welcomed, copyright-infringing material being placed on [the] Web site," the company also "swiftly removed" items when it received notice that it was infringing a copyright. "Mere knowledge of prevalence of such activity in general is not enough. . . . To let knowledge of a generalized practice of infringement in the industry, or of a proclivity of users to post infringing materials, impose responsibility on service providers to discover which of their users' postings' infringe a copyright would contravene the structure and operation of the DMCA," the court said.

The suit showed that the DMCA notification system "works efficiently," Judge Stanton noted, with YouTube removing almost 100,000 infringing videos one business day after receiving a takedown notice from Viacom. "[I]t is uncontroverted that when YouTube was given the notices, it removed the material. It is thus protected 'from liability for all monetary relief for direct, vicarious and contributory infringement,'" subject to the DMCA, Judge Stanton wrote.

To read the decision in *Viacom v. YouTube*, click here.

Why it matters: The decision is a decisive victory for YouTube in a case where Viacom was seeking $1 billion in damages. Viacom said it planned to appeal the decision, calling it "fundamentally flawed." But for now, copyright holders are on notice that they have the burden to send a takedown notice for infringing content to be removed. Only if the infringing content is not removed would a copyright owner have the basis to file suit under the DMCA. However, companies that host user-generated content should ensure that they are compliant with the DMCA in order to avail themselves of the safe harbor by designating an agent or setting up a program where copyright holders can notify them of possible infringement and then addressing the complaint.

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Twitter Settles With FTC On Data Security Charges

In the agency's first case against a social networking service, Twitter has settled with the Federal Trade Commission over charges that it failed to protect users' personal information.

The complaint alleged that the company had serious lapses in its data security and failed to use reasonable and appropriate security measures to prevent unauthorized access to nonpublic user information and honor the privacy choices exercised by users, despite its claims to the contrary. Specifically, Twitter failed to establish or enforce policies on its administrative passwords – like prohibiting the use of common dictionary words, for example – or enforcing periodic changes of

administrative passwords by setting them to expire after a certain period of time.

Because of these failures, unauthorized access occurred on two occasions where an intruder was able to derive an employee's administrative password. The intruder then reset user passwords and sent unauthorized tweets, including one purportedly from then President-elect Barack Obama offering his followers the chance to win $500 in free gasoline.

Under the terms of the settlement, Twitter is barred for 20 years from misleading consumers about its security and privacy and will also establish and maintain a comprehensive information security program that will be assessed by a third party every other year for 10 years.

To read the complaint in *In the Matter of Twitter*, click here.

To read the settlement agreement, click here.

Why it matters: The settlement reinforces the FTC's focus on privacy and data security, particularly in new media. "When a company promises consumers that their personal information is secure, it must live up to that promise," David Vladeck, Director of the FTC's Bureau of Consumer Protection, said in a statement. "Consumers who use social networking sites may choose to share some information with others, but they still have a right to expect that their personal information will be kept private and secure." Companies that control users' personal information should take reasonable and appropriate steps to ensure that administrators are using secure passwords and honoring their own privacy policies.

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