Advertising Law

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"All Natural" Ice Cream Suit Can Proceed, Court Rules

In another case addressing the use of the term "natural," a U.S. District Court in California denied ice cream maker Ben & Jerry's motion to dismiss a suit in which plaintiffs alleged that the phrase "All Natural" on ice cream and frozen yogurt packaging was false and deceptive.

The California-based plaintiffs specifically claimed that the products contained alkalized cocoa, which is processed with man-made potassium carbonate and therefore the "All Natural" labels violated California's unfair and deceptive business practice laws.

Ben & Jerry's argued that the plaintiffs failed to state an actual injury and that their claims should be preempted by Food and Drug Administration labeling regulations or, alternatively, that the court should abstain from deciding the case and refer the issue of what constitutes a "natural" product to the FDA.

But U.S. District Court Judge Phyllis J. Hamilton disagreed.

Relying on a recent California Supreme Court decision, the judge said that the putative class had adequately stated an "injury-in-fact."

"The injury is that they were deceived, and paid money they would not otherwise have paid had they known about the potassium carbonate in the cocoa," the court said. A reasonable consumer could have been deceived into believing that the products contained only natural ingredients, the court said, and whether that applied to the entirety of the class was a question of fact to be decided later.

Because the FDA has yet to regulate the use of the term "natural" on a food label, the court said the plaintiffs' claims were not preempted, and the court declined to abstain from deciding the suit.

To read the court's decision in *Astiana v. Ben & Jerry's*, click here.

Why it matters: "Natural" is a contentious term, and the lack of guidance from the FDA is proving frustrating for manufacturers, who have been facing litigation and action from consumer groups. In addition to the Ben & Jerry's suit, multiple class actions have been filed against Snapple over its use of "All Natural" label claims for drinks that include high fructose corn syrup.

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For One Model, Age Is Not Just a Number – It's a Cause of Action

Reinforcing the adage to never ask a lady her age, a model has filed suit against Estee Lauder over the company's use of her images in store, online and promotional ads for an "anti-aging skin care product."

Caroline Louise Forsling – who has appeared in the *Sports Illustrated* swimsuit issue and walked the runway for designers like Chanel, Gucci, and Valentino – alleged the company used a test shot from a photo shoot she did for a hair care company owned by Estee Lauder. The test shot shows Forsling with "little or no makeup" and her hair pulled back. The images purport to be the "before" and "after" pictures from a "dramatization" of

a clinical study for Estee Lauder's Origins Plantscription anti-aging serum and were used even after she demanded that the company cease and desist.

According to the complaint, Forsling's face appears dark in a picture labeled "before," with visible wrinkles on the forehead and near her eyes and lips, while the "after" image shows her with "light, smoother, younger-looking skin."

The test subjects of the study ranged in age from 45 to 60, and Forsling contends that she did not participate in the study. "Indeed, she would not have been eligible to participate because she is significantly younger than 45," according to the complaint. (The *New York Daily News* reported that according to public records, Forsling is 35.)

Seeking "no less than $2 million," Forsling alleged that Estee Lauder engaged in deceptive and false advertising and violated her right to privacy and publicity under New York law. She also seeks injunctive relief.

To read the complaint in *Forsling v. Estee Lauder*, click here.

Why it matters: Forsling alleges that Estee Lauder used the picture again after she demanded that the company stop using it. According to the complaint, the company issued a casting call in April to modeling agencies, seeking models with "fine wrinkles on their faces," and included the image of Forsling as a "reference." For a model whose livelihood depends upon her appearance, Forsling argues that the image has cost her work.

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$10.4M to the FTC For Work-at-Home, Government Grant Scams

Pursuant to an order issued by a U.S. District Court Judge, the Federal Trade Commission will receive $10.4 million from Real Wealth, Inc., and its owner, who the agency alleged ran "work-at-home" and grant scams. The case was referred to the Commission by the AARP Legal Counsel for the Elderly.

The defendants' booklets explained how to earn money by applying for government grants or working from home.

Lance Murkin, the sole owner of Real Wealth, used sales pitches like “All I do is mail 30 postcards every day and I make an extra $350 a week!” and “Collect up to $9,250 with my simple 3 minute form,” claims which the FTC alleged were false and unsubstantiated.

Thousands of consumers responded to the defendants’ direct-mail campaign, which targeted the elderly and disabled, according to the agency.

But few, if any, consumers made substantial income from the defendants’ products, the FTC said.

At least 100,000 consumers nationwide participated in the defendants’ business activities, and between 2004 and 2009 the defendants derived more than $10.4 million, according to the agency.

The FTC filed an order in the U.S. District Court for the Western District of Missouri, and Chief Judge for the District Fernando J. Gaitan, Jr., granted summary judgment for the agency.

Under the court’s order, the defendants will pay just over $10.4 million, the gross revenues they derived from their business, and are banned from marketing or selling work-at-home and grant-related products in the future.

To read the court’s order in *FTC v. Real Wealth, Inc.*, click here.

Why it matters: The FTC said that the action was part of “Operation Bottom Dollar,” a law enforcement sweep intended to crack down on illegal job and money-making scams. The operation included 7 actions filed by the FTC – including the Real Wealth complaint – as well as 18 actions by state attorneys general, a civil action by the Postal Inspection Service, and 43 criminal actions by the Department of Justice. “Federal and state law enforcement officials will not tolerate those who take advantage of consumers in times of economic misfortune,” David C. Vladeck, Director of the FTC’s Bureau of Consumer Protection, said in a statement about the operation. “If you falsely advertise that you will connect people with jobs or with opportunities for them to make money working from home, we will shut you down. We will give your assets to the people you scammed, and, when it’s appropriate, we’ll refer you to criminal authorities for prosecution.”

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Lawmakers Introduce Geolocation Bill

Sens. Al Franken (D-Minn.) and Richard Blumenthal (D-Ct.) recently introduced the Location Privacy Protection Act, which would require that companies obtain users' consent before collecting or sharing geolocation data.

The Act would "close current loopholes in federal law," according to a press release issued by Sen. Franken, and would mandate that companies also delete users' data upon request. Companies that receive location information from more than 5,000 mobile devices would also be required to "take reasonable steps to protect that information from reasonably foreseeable threats" under the proposed legislation.

Notice must be expressed and received "separate and apart from any final end user license agreement, privacy policy, terms of use page or similar document," according to the bill, and must include information regarding what geolocation information will be collected and the specific nongovernmental entities to which the information may be disclosed.

The Act would apply only to nongovernmental entities and would have no impact on law enforcement activities.

Notably, the Act allows consumers to bring private civil suits with damages of at least $2,500 per violation and to seek punitive damages and attorneys' fees where warranted.

The bill also calls upon the National Institute of Justice to study the use of location technology in relation to dating and domestic violence and stalking, and requests that the U.S. Attorney General develop a training curriculum for the investigation and prosecution of crimes involving the misuse of geolocation data.

Finally, the law would establish criminal penalties for "stalking apps" that "knowingly and intentionally" disclose geolocation with the intent that stalking will occur as a result of the disclosure, as well as the "knowing and intentional aggregation and sale" of location data of children 10 years old and younger.

To read the text of the Act, click here.

Why it matters: Privacy, specifically geographical location information, has been a hot topic in Washington recently. A second bill, the Geolocation Privacy and Surveillance Act, was introduced the same day by Sen. Ron Wyden (D-Ore.) and Rep. Jason Chaffetz (R-Ut.) that would require law enforcement agencies to obtain probable cause warrants to track location-using mobile devices (with limited exceptions for emergency responders, parents of minor children, and investigations under the Patriot Act). In addition to the two new pieces of legislation, Sen. Patrick Leahy's update to the Electronic Communications Privacy Act also addresses geolocation data.

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