



September 23, 2009



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Manatt Adds Advertising Partner Terri Seligman in New York

Terri J. Seligman has joined the firm as a partner in Manatt's Advertising, Marketing and Media Division. Terri comes to Manatt from Loeb & Loeb, LLP and is based in the firm's New York City office.

Terri focuses her practice on claims support and emerging media – two areas of particular strength for Manatt's industry-leading advertising group. Her work encompasses all legal issues relating to online marketing and social media as well as traditional advertising and marketing vehicles such as rebates, rewards and gift cards. She counsels corporations across a wide range of industries, including financial services, consumer products, entertainment, telecommunications and pharmaceuticals. In addition, Terri counsels clients in advertising disputes and regulatory matters, and has represented companies in numerous disputes before the Council of Better Business Bureau's National Advertising Division.

The addition of Terri Seligman closely follows the August 2009 addition of Anthony DiResta in Manatt's Washington, DC office. Tony is a prominent



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UPCOMING EVENTS

consumer protection lawyer and General Counsel to the Word of Mouth Marketing Association.

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FCC Launches Probe of Wireless Industry

The Federal Communications Commission (FCC) has launched an inquiry into the wireless marketplace that could result in new or revised wireless regulations. Through its Wireless Innovation and Investment Notice of Inquiry, the FCC is asking for public comment on spectrum availability and use, wireless networks, devices, applications, and business practices. The agency is also seeking input on how consumers have used wireless services and technology to address problems in healthcare, energy, education, and public safety.

“It’s no secret to most folks in this room that I have been more than a tad critical of the extensive consolidation that has occurred in wireless,” FCC Commissioner Michael Copps said at a press conference announcing the probe. “While I again applaud the technology and service strides the wireless industry has made, I remain unconvinced that the road we traveled was ideal.”

The inquiry is aimed at generating a framework for analyzing wireless innovation and investment, including the relevant metrics and data sources that should be considered.

The FCC framework will be combined with the record developed in response to the Mobile Competition Report Notice of Inquiry adopted late last month to inform FCC consideration of future wireless regulatory issues.

In response to the FCC inquiry, CTIA - The Wireless Association issued a statement from President/CEO Steve Largent highlighting advances in the sector.

“Whether it be the almost 100,000 applications that are now available to consumers since the opening of the first applications store 14 months ago, or the launch in the United States of the newest smartphones, or the ability of more consumers in the U.S. than anywhere else on the planet to access the highest-speed wireless networks, or the lowest price per minute of the 26 countries tracked by Merrill Lynch, or the highest minutes of use of those same 26 countries, or the fact that we have the least-concentrated wireless market on the planet, or the evolution in the way services are sold – we are excited to tell the industry’s story,” Largent said.

Why it matters: The FCC’s sweeping inquiry into the wireless industry suggests that the agency is moving from the relatively hands-off approach of the Bush administration to closer scrutiny of wireless policies and practices

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Natural Products Expo East

Topic: "The Claim is Right: Are You Smarter Than a Regulator?"

Speaker: [Ivan Wasserman](#)

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September 28, 2009

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Topic: "Food Claims Enforcement and Litigation on the Rise: How to Reduce Your Risk"

Speaker: [Chris Cole](#) and [Ivan](#)

[Wasserman](#)

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by the Obama administration. We anticipate that the probe will eventually result in new or revised regulations governing this sector.

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Court Throws Out Sanctions Against Kevin Trudeau

Infomercial king Kevin Trudeau, known for pitching “cures” for everything from cancer to obesity as well as his outspoken criticism of the Federal Trade Commission, has won an appeal of a \$37.6 million court fine and ban over promotions for his book, *The Weight Loss Cure “They” Don’t Want You to Know About*.

The Court of Appeals for the Seventh Circuit vacated and remanded the fine and ban, writing that it was “troubled” by both.

For years, Trudeau has hawked “cures” for nearly everything, primarily through late night infomercials. For nearly as many years as Trudeau has been in business, the FTC has pursued him and the two adversaries have carried on an ongoing battle through the courts and the media.

“[Trudeau] has appeared in dozens of [infomercials], usually in the form of a staged, scripted interview where Trudeau raves about the astounding benefits of the miracle product he’s pitching,” the court wrote. “But Trudeau’s tactics have long drawn the ire of the Federal Trade Commission. By promoting his cures, Trudeau claims he is merely exposing corporate and government conspiracies to keep Americans fat and unhealthy. But the FTC accuses Trudeau of being nothing more than a huckster who preys on unwitting consumers – a 21st-century snake-oil salesman.”

Trudeau’s latest fight with the FTC involves the weight-loss program in his book, *Weight Loss Cure*, which the agency claims he misrepresents as “easy,” “simple,” and able to complete at home, when it is actually expensive, restrictive, and cumbersome.

At the time Trudeau started hawking *Weight Loss Cure*, he was subject to a court ban from appearing in infomercials for anything but books, as long as he didn’t “misrepresent the content of the book.” The FTC said Trudeau’s “Weight Loss Cure” infomercial violated this court order. The district court agreed and held Trudeau in contempt. It fined him \$37.6 million and banned him from all infomercials – including for books – for a three-year period.

On appeal, the Seventh Circuit upheld the finding of contempt, writing that Trudeau “clearly misrepresented the book,” but it overruled the fine and ban.

Because the sanctions were civil, they can either be compensatory or coercive, the court explained. The sanctions against Trudeau did not meet

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Topic: "Digital Music
Innovation: What's Next?"
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October 27, 2009
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Institute's 3rd Annual Forum
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either standard. The lower court failed to explain how the fine compensated the FTC for its losses. Moreover, coercive sanctions must provide the defendant with the chance to “purge,” or avoid punishment by complying with the order. The court-ordered ban against Trudeau did not satisfy the coercion requirement, because it did not include an opportunity to purge.

“The trouble with the infomercial ban is that it lasts for three years no matter what Trudeau does,” the court wrote. It reversed and remanded the ruling, instructing the district court to explain how it arrived at \$37.6 million and to rework its coercive sanction to include a purge option.

Why it matters: Trudeau’s victory may be only momentary, assuming the district court is able to explain how the fine compensated the FTC for its losses, and adds a purge option to the ban. Such sanctions are usually requested by the agency and adopted by the court. It’s an embarrassing – but possibly temporary – setback for the agency in its ongoing battle with Trudeau.

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Court OKs Paris Hilton’s “Hot” Suit Against Hallmark

When Hallmark Cards used Paris Hilton’s picture and catchphrase “That’s hot” on a greeting card, Hilton, who allegedly had not authorized the use of either, sued for trademark infringement, as well as for violations of her right of publicity and privacy.

Now, a panel of the Court of Appeals for the Ninth Circuit has rejected Hallmark’s argument that Hilton’s right of privacy and publicity claims should be dismissed because its depiction of Hilton was protected speech as a matter of law. Hallmark had appealed from a decision by a district court that had rejected Hilton’s claim of trademark infringement but let her other claims stand.

The offending card riffed on a scene from Hilton’s reality TV show *The Simple Life* on a birthday card captioned “Paris’s First Day as a Waitress.” It depicted Hilton’s face superimposed on a cartoon of a waitress serving food to a customer. The Hilton character tells the customer, “Don’t touch that, it’s hot.” The customer asks, “What’s hot?” Hilton responds, “That’s hot.” The inside of the card reads, “Have a smokin’ hot birthday.”

The appeals court rejected Hallmark’s argument that the card was protected by the First Amendment as sufficiently “transformative” because the setting was different and the phrase “that’s hot” referred to the temperature of a plate of food. While noting differences from the TV show, including that the cartoon body was of a generic female and not Hilton, the court wrote, “the basic setting is the same: we see Paris Hilton, born to privilege, working as a

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Marketing Association Summit

Topic: "FTC Developments"

Speaker: [Anthony DiResta](#)

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Newsletter Editors

[Jeffrey S. Edelstein](#)

Partner

jedelstein@manatt.com

212.790.4533

[Linda A. Goldstein](#)

Partner

lgoldstein@manatt.com

212.790.4544

Our Practice

Whether you’re a multi-national corporation, an ad agency, a broadcast or cable company, an e-commerce business, or a

waitress.” The court concluded that Hilton “has at least some probability of prevailing on the merits before a trier of fact.”

Hallmark said it is currently evaluating its options, including a possible appeal to the full Ninth Circuit.

Why it matters: To avoid infringing on a person’s right of publicity, the use of that person’s image, catchword, etc., must be sufficiently transformative. Transformativeness is a very fact-specific inquiry in which the court examines whether something new has been added to the original work or depiction. If a new work makes some kind of comment on the appearance or personality of a celebrity, that might add enough, but if the portrayal does no more than exaggerate or distort the essence of a celebrity, that might not be enough. California, which is the seat of the entertainment industry, also has very protective right of publicity laws.

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Debt Collection Scams Top List of Consumer Complaints

The National Association of Attorneys General (NAAG) released its National Top 10 List of Consumer Complaints to state attorneys general offices in 2008. The top three: debt collection, auto sales, and home repair/construction remained the same from 2007.

Every state has a consumer protection statute prohibiting deceptive acts and practices, including online scams. Along with the Federal Trade Commission, state attorneys general actively enforce anti fraud laws against businesses that commit fraud in such areas as debt collection, auto sales and repair, telemarketing, and misleading advertising.

The National Top 10 Consumer Complaints List for 2008 is:

- 1 Debt Collection
- 2 Auto Sales
- 3&4 Home Repair/Construction
- Credit Cards (tie)
- 5&6 Internet Goods and Services
- Predatory Lending/Mortgages (tie)
- 7 Telemarketing/Do-Not-Call
- 8&9 Auto Repair
- Auto Warranties (tie)
- 10 Telecom/Slamming/Cramming (tie)

Consumer complaints ranged from unauthorized charges and inaccurate late fees on credit or debit cards to phony debt reduction services and foreclosure

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scams, when companies claim to be able to save a home if the consumer pays money up front.

“With the recession and increased foreclosure rates, consumers need to be on high alert. Too many people are being swindled out of their hard-earned money by scam artists,” said Hawaii Attorney General Mark Bennett, who co-chairs the NAAG Consumer Protection Committee with Montana Attorney General Steve Bullock.

Attorney General Bullock said, “Attorneys general throughout our nation vigorously enforce the laws designed to protect consumers. When consumers have been deceived or treated unfairly by a business, they should contact the attorney general’s office in their state. By filing a complaint with our offices, our staff can work with both consumers and businesses to try to rectify the problem.”

The 2008 National Consumer Complaints List is generated from survey responses completed by the offices of the Attorney General and tallied by the NAAG Consumer Protection Project.

Why it matters: In a sign of the recessionary times, scams involving credit cards and predatory lending cracked the top 10 list of consumer fraud complaints in 2008. Businesses that collect and keep data on credit cards need to be especially vigilant these days about securing that data because major security breaches can be very costly, since they almost invariably result in government investigations and private class action lawsuits.

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Privacy Advocates Urge Restrictions on Behavioral Ads

A coalition of consumer privacy advocates have released proposed guidelines for lawmakers who are contemplating regulations on behavioral advertising.

Ten groups led by the Center for Digital Democracy and the Electronic Frontier Foundation have released the guidelines ahead of Congress’s return in September. The groups are calling for greater transparency and more control to online users over how their personal and financial information is used.

The focus of the proposed guidelines is the growing field of behavioral advertising techniques, in which a user’s online activity is tracked in order to serve the user with targeted ads.

Supporters of behavioral advertising argue that such ads are more relevant to the users who receive them, but privacy advocates worry about the security

and anonymity of the data being collected, stored, and used.

Hearings on the issue were held earlier this summer, with a number of representatives from online companies testifying before Congress in defense of their practices and policies.

The guidelines being promoted by privacy advocates call for a number of measures that are far stricter than those proposed by the industry. Advocates want the Federal Trade Commission to provide a precise definition of sensitive personal data, and propose that certain factors, such as finances, ethnicity, and race, should be off-limits. They also propose a 24-hour limit on the collection and use of data on Web surfers. Additionally, they would like companies to be required to inform users upon request of the scope and details of the amassed data on the users.

Why it matters: The guidelines proposed by the group of consumer advocates will undoubtedly be met with resistance from the industry, which values behavioral advertising because it allows the industry to serve more targeted ads, which in turn generate more clicks and more sales. Privacy advocates, in turn, are concerned that the growing use of behavioral tracking threatens the privacy of the users who are tracked.

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