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ADVERTISING LAW

NEWSLETTER OF THE ADVERTISING, MARKETING & MEDIA PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

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Court Says Dell Deceived Customers

A New York state court has found computer retailer Dell Inc. liable for false and deceptive advertising of its credit financing and warranties promotions.

In a May 27, 2008, decision, the court ordered Dell to prominently disclose that most customers are not eligible for free financing or "next day" repair service.

The complaint against Dell was filed by New York Attorney General Andrew Cuomo in May 2007. At the time, the attorney general's office said it had received 700 complaints against Dell. Since then, more than 1,000 additional complaints have come in, a spokesperson said.

Dell now faces the possibility of a sizable claim for damages. Cuomo has asked customers to register their complaints at a special Web site so that damages can be calculated.

A Dell spokesperson said the company disagreed with the court's decision and would vigorously defend its stance, although it had not yet determined whether it would appeal. "We are confident that when the proceedings are finally completed the court will determine that only a relatively small number of customers have been affected," the spokesperson

UPCOMING EVENTS

October 21, 2008

ACI: Sports Sponsorship Advertising and IP

Topic:

"When Retired Players Sue: From Coscarart v. Major League Baseball to Parrish v. NFLPA"

Ronald S. Katz

"Morality and an Agreement's Mortality--Taking Appropriate Measures to Avoid the Termination of an Endorsement Deal"

Linda Goldstein

The Carlton Hotel
New York, NY

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October 22, 2008

D.C. Bar CLE Seminar

Topic:

"Copyright Law and Litigation"

Kenneth M. Kaufman

D.C. Bar Conference Center
Washington, D.C.

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November 20-21, 2008

PMA's 30th Annual Promotion Marketing Law Conference

Topic:

"Navigating the Potholes: The Evolving Landscape for

said.

Previously Dell had pointed out that the alleged complaints constituted only a small percentage of its 6 million transactions in New York between 2003 and 2006. Dell also said that it has started monitoring sales representatives to prevent misrepresentations and has put millions of dollars into technical support and customer service, significantly reducing customer waiting times as well.

Dell advertisements touted promotions such as free monitors, additional memory, rebates, instant discounts, and financing with no interest or no payments for a period to “well qualified” or “best qualified” customers, the court found. However, only as few as 7 percent of New York applicants qualified for some promotions, the court wrote.

“Dell certainly has knowledge of the relative numbers of customers who qualify for various promotions. It is therefore determined that Dell has engaged in prominently advertising the financing promotions in order to attract prospective customers with no intention of actually providing the advertised financing to the great majority of such customers. Such conduct is deceptive and constitutes improper ‘bait advertising.’”

Dell Financial Services, a joint venture of Dell and CIT Bank, handled financing. Many consumers applying for credit believed they would get the promotional rate, the court wrote, but “most applicants, if approved for credit, were offered very high interest rate revolving credit accounts ranging from approximately 16 percent up to almost 30 percent interest without the prominently advertised promotional interest deferral.”

The court also made note of documentation alleging long waits for technical support, frequent phone transfers among departments, the need for repeated customer calls to get through to a technical support representative, and “numerous instances” in which Dell refused to provide on-site service before determining which parts needed replacing. Some customers said they waited years for service.

The court also criticized Dell for rejecting timely and fully documented customer requests for rebates and ordered Dell Financial Services to cease reporting late payments from customers who had already returned their computers for a refund.

Sweepstakes, Games & Contests”

Linda Goldstein

Topic:

"Consumer Product Safety: Hear from the Regulators How the New Laws Affect Your Promotion"

Kerrie L. Campbell

Marriott Downtown Magnificent Mile
Chicago, IL

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December 4-5, 2008 Film & Television Law

Topic:

"Product and Music Placement, Branded Entertainment: Issues and Litigation"

Linda Goldstein

Topic:

"The Value of Fame: Understanding the Right of Publicity"

Mark S. Lee

Century Plaza Hyatt Regency
Los Angeles, CA

[For more information](#)

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Yahoo Sues Lottery Scammer

Yahoo Inc. has sued a yet-to-be-identified group of defendants for allegedly misleading consumers into believing that they won a lottery or prize from the search engine.

The complaint filed on May 16, 2008, in federal court in Manhattan, alleges that the defendants sent e-mails claiming that recipients had won prizes from Yahoo ranging up to a million dollars and instructing them to click on a link or forward personal information to a "Yahoo lottery coordinator" to get their prize. Such "phishing" scams are typically aimed at deceiving consumers into revealing confidential financial information.

In another scam, Yahoo alleged that some of the recipients were instructed to contact another party to arrange for the prize payment. That party would then charge them "hundreds of dollars in various processing and mailing charges in order to complete the payment process."

The complaint alleges violations of federal trademark and antispam statutes and various New York state laws. It seeks injunctive relief and unspecified damages.

Although the identity of the defendants is unknown, Yahoo said it believes that information collected through discovery from third-party e-mail service companies will lead to their identification. Still, private companies typically have a tough time collecting any damages they may be awarded, since spammers are notoriously difficult to track down.

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Belgian Press Wants Google To Pay \$77 Million

Belgian newspapers are asking Google for up to €49 million (\$77 million) in damages for publishing and storing their content without permission.

In May 22, 2008, court papers, the newspaper copyright group Copiepresse claimed it suffered damages of between €32.8 million (\$51.7 million) and €49.2 million (\$77.5 million). The group said it was requesting Google's appearance in September before a Brussels court that will decide the claim. In the meantime the group urged the search engine to pay a provisional amount of €4 million (\$6.3 million).

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In February 2007 Copiepresse won a lawsuit in Belgium court that required Google to delete headlines and links to news stories posted on its Google News service and stored in its search engine's cache without permission of the copyright holders. Copiepresse said that Google broke Belgian copyright law by copying and publishing excerpts of news articles and storing full versions of archived stories in its cached pages.

Copiepresse said the damage amounts were calculated by a University Libre de Bruxelles professor, based on articles stored via Google Search since April 13, 2001, and Google News since its introduction in Belgium in 2006.

The group is also pushing Google to publish without comment a copy of the February 2007 decision on google.be and news.google.be for 20 days or pay a daily fine of €1 million (\$1.58 million).

Google maintains that its Google News service is "entirely legal."

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Feds Seek \$450 Million From Berkeley Nutraceuticals

Prosecutors have asked a federal court to force Berkeley Premium Nutraceuticals to forfeit all the money it earned during some of its most profitable years.

In their May 14, 2008, request, prosecutors said that cash, real estate, and other assets they are seeking from the maker of vitamins and herbal supplements could reach \$450 million. They argued that all of Berkeley's assets are the proceeds of money laundering, false advertising, and fraud. Berkeley founder Steve Warshak and several other company executives were convicted of those charges earlier this year.

The case against Berkeley turned on the company's "continuity program," which automatically sent herbal supplements to customers each month even if they signed up for just one delivery. A jury found the program was the basis for an enormous fraud scheme that included money laundering and false claims in ads about the effectiveness of Berkeley's products.

The prosecution claimed on May 14 that most of Berkeley's profits were tainted by the "continuity program."

Berkeley's lawyer countered that the request was

unreasonable and unfair because much of the company's revenues were derived from legal transactions and not the "continuity program."

The court, however, noted that under federal law the government is authorized to seize an entire account or asset even if only a portion of the value is tied to criminal activity, and that the false advertising claims may also taint a major portion of the company's profits.

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NAD Fingers Press Release For Misleading Claim

The National Advertising Division of the Council of Better Business Bureaus has targeted a press release as the only source of a claim that it viewed as misleading.

The NAD, a United States advertising industry watchdog, handles more than 150 advertising disputes each year. Only rarely does it single out press releases for disseminating false or misleading claims.

In the instant case, the NAD urged PrintsMadeEasy, an online graphic design and printing company, to stop making certain claims about its rivals in one press release and clarify claims in another.

The NAD disagreed with PrintsMadeEasy's contentions that the releases did not come under the definition of "national advertising" and that an outside public relations firm wrote and distributed the releases. It described the press release as "nothing short of a paid commercial message by the advertiser."

In past instances the NAD targeted press releases for false claims, but only as part of larger ad efforts, said NAD communications director Linda Bean. In contrast, the PrintsMadeEasy case involved a press release that was the sole vehicle for the advertising.

The NAD says more than 95% of targeted advertisers comply with its recommendations. If an advertiser does not comply, the NAD opens an investigation and, in certain cases, refers the matter to the Federal Trade Commission.

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Video Downloads To Get U.K. Age Ratings

The U.K. is introducing age ratings for downloaded video content and video games.

Under the voluntary program, managed by the British Board of Film Classification (BBFC), age-rating certificates will appear on Web sites, via set-top boxes and portable players.

Several major video distributors have signed on, with other "key industry figures

. . . poised to join the scheme," the BBFC said. Without revealing specifics, BBFC head of policy Peter Johnson said the group anticipates all the "leading content providers and aggregators to sign up to the scheme in the coming weeks and months."

The program, called BBFC.online, will also require online services and video on demand to have "age verification or gate-keeping systems in place for parents to monitor and control underage viewing."

Johnson said his group would monitor compliance through test purchases. BBFC director David Cooke said the group also would continue to work with the game industry's self-regulatory watchdog Pegi to find a way to classify the different types of online gaming.

The program could also cover Internet services like Microsoft's Xbox Live and Nintendo's WiiWare, all of which provide video and games for download.

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