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Manatt's Advertising, Marketing & Media Practice Receives National Ratings for Excellence in *Chambers USA 2010*

Manatt's Advertising, Marketing & Media Division was recognized as one of the nation's leading practices for both advertising transactional work and litigation in the newly published, eighth annual *Chambers USA: America's Leading Lawyers for Business*.

Beyond the superior practice ratings, five of the Division's lawyers were identified as "Leading Lawyers," including Division Chair [Linda Goldstein](#), litigation partner [Thomas C. Morrison](#), Washington, D.C. litigation partner [Christopher A. Cole](#), and New York partners [Jeffrey S. Edelstein](#) and [Terri J. Seligman](#).

Of the firm, *Chambers* remarked that Manatt's "stellar group has both transactional and litigation expertise, and excels in comparative advertising, false advertising disputes and consumer class actions. It also has strength in consumer generated content, social media, sweepstakes, direct marketing and mobile marketing matters."

In total, the 2010 rankings recognized 17 Manatt lawyers and eight of the firm's practices. In addition to Advertising, Marketing & Media, *Chambers* honored Manatt's Healthcare, Entertainment and Real Estate practices.



Recognized for Excellence in the areas of Advertising, Marketing and Media



Named a Top Practice Nationally for Marketing and Advertising



Practice leaders included among the prestigious *Best Lawyers* in the country

UPCOMING EVENTS

June 23, 2010

Webinar

Mark Your Calendars

June 23 Webinar -- Dietary Supplement Claims Compliance

Is the FDA Redefining the Supplement Standard? Manatt partners [Linda Goldstein](#) and [Ivan Wasserman](#) slim down the complexities of the issue in a webinar on Wednesday, June 23. For additional information, click [here](#).

June 30 Networking Event in Los Angeles -- Location-Based Digital Marketing Forum

The Los Angeles Times, Word of Mouth Marketing Association and Manatt join forces to explore the latest trends, social aspects and privacy implications of location-based marketing at one of West L.A.'s hottest restaurants. Manatt Partner and WOMMA General Counsel [Tony DiResta](#) will highlight key legal and legislative developments. Register [here!](#)

September 24 ACI Conference -- Focus on Sweepstakes, Contests, and Promotions

[Linda Goldstein](#), Chair of Manatt's Advertising Division, [Darren Bowie](#), Legal Director, Nokia, Inc. and [Katherine Nordberg](#), Vice President, Legal Affairs, FOX Broadcasting Company, will dial up legal do's and don'ts on structuring mobile sweepstakes at ACI's 4th Annual *Focus on Sweepstakes, Contests, and Promotions* in New York City on September 24, 2010. To register, click [here](#).

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FTC Delays "Red Flags" Rule – Again

For the fifth time, the Federal Trade Commission has delayed enforcement of the "Red Flags" rule, this time until December 31, 2010.

The rule, which was developed under the Fair and Accurate Credit Transactions Act, requires "creditors" and "financial institutions" that have "covered accounts" to develop and implement written identity theft prevention programs to help identify, detect, and respond to patterns, practices, or specific activities – known as "red flags" – that could indicate identity theft. The rule was originally scheduled to take effect on January 1, 2008.

Controversy arose over the scope of covered entities, with critics arguing that the rule would create unnecessary and expensive administrative burdens for companies outside of the financial sector.

In response, the American Bar Association filed suit, arguing that the rule should not apply to lawyers. A U.S. district court agreed, exempting lawyers from the rule, but the FTC has appealed that decision. Last month, the American Medical Association filed a similar

Topic: "Dietary Supplement Claims Compliance: Is the FDA Redefining the Supplement Standard?"

Speakers: [Linda Goldstein](#) and [Ivan Wasserman](#)
[for more information](#)

June 30, 2010

Location-Based Digital Marketing Forum

Topic: "With location-based technology growing exponentially, how do you build or adapt marketing strategies?"

Speaker: [Tony DiResta](#)
Santa Monica, CA
[for more information](#)

September 24, 2010

ACI Conference

Topic: "Sweepstakes, Contests, and Promotions"

Speaker: [Linda Goldstein](#)
New York, NY
[for more information](#)

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suit, arguing that physicians should also be exempt.

At the end of May, the FTC announced that it was delaying enforcement of the rule at the request of members of Congress, who are working on legislation to address the scope of businesses covered under the rule.

H.R. 3763 – which exempted certain professions, including physicians – was passed by the House of Representatives unanimously in October 2009, but no action was taken by the Senate.

To read H.R. 3763, click [here](#).

To read the order in *ABA v. FTC*, click [here](#).

To read the complaint in *AMA v. FTC*, click [here](#).

Why it matters: “Congress needs to fix the unintended consequences of the legislation establishing the Red Flags Rule – and to fix this problem quickly,” FTC Chairman Jon Leibowitz said in a statement. “As an agency we’re charged with enforcing the law, and endless extensions delay enforcement.” In its announcement, the FTC urged Congress “to act quickly to pass legislation that will resolve any questions as to which entities are covered by the Rule and obviate the need for further enforcement dates.” It noted that if Congress passes a bill with an effective date prior to December 31, 2010, the FTC is ready to begin enforcement as of the earlier date.

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Brando and Hogan Sue to Enforce Publicity Rights

Wrestler Hulk Hogan and the estate of Marlon Brando both filed suit recently, claiming that their publicity rights were being violated and likenesses misappropriated.

In the Hogan case, professional wrestler and self-described actor and celebrity Terry Bollea – better known as Hulk Hogan – filed suit in Florida state court against Post Foods, the maker of Cocoa Pebbles cereal.

The cereal brand ran a commercial featuring Flintstones characters like Fred and Barney wrestling with a cartoon character called “Hulk Boulder.”

Hulk Boulder handily defeats Fred and Barney and begins to celebrate by eating a bowl of Cocoa Pebbles, but the wrestler – who sports long blonde hair and a Fu Manchu mustache, which Hogan claims are his “signatures” – is then bested by Bam-Bam. The commercial ends as Hulk Boulder “is shown humiliated and cracked into pieces with broken teeth,” according to the lawsuit.

While detailing Hogan’s rise to fame as a professional wrestler in the

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1980s, the complaint notes that he originally wrestled as part of a tag team known as Terry and Ed Boulder before he made it big.

Hogan, claiming commercial misappropriation and false endorsement, is seeking both punitive and compensatory damages, as well as an injunction against further use of his likeness.

Across the country, the estate of Marlon Brando filed suit in California state court, alleging that premium denim maker Joe's Jeans misappropriated the Brando name and violated its publicity rights. The jeans company marketed a \$539 black leather jacket called "The Brando," which capitalized upon the deceased actor's name and identity, which has "tremendous commercial value," according to the lawsuit.

The complaint alleges that Joe's Jeans also traded on the Brando name in an e-newsletter. The newsletter featured the Brando jacket, with text reading, "Be The Wild One in Joe's modern design to a vintage classic," which the complaint alleges was a reference to Brando's 1953 film, *The Wild One*.

It also included a shoe called the "Stella," which the estate says was a reference to the leading female character in another Brando classic, *A Streetcar Named Desire*, and the subject of Brando's famous quote "Stella. Hey, Stella!" which was recognized by the American Film Institute as one of the most famous movie quotes of all time.

The suit seeks damages as well as an injunction.

To read the complaint in *Bollea v. Post*, click [here](#).

To see the commercial, click [here](#).

To read the complaint in *Brando v. Joe's Jeans*, click [here](#).

Why it matters: Celebrities and deceased celebrities' estates often seek to enforce all aspects of their publicity rights. Hogan claims that the cartoon wrestler trades on his signature long, blonde hair and Fu Manchu mustache, while the Brando estate is arguing that the actor's body of work – including the name of the films he acted in and his memorable lines – were used to attract attention and enhance the marketing of an allegedly infringing product.

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FTC Seeks Comment on Mandating Ad Info

The Federal Trade Commission is seeking comment on a proposal to compel information from major food and beverage manufacturers, distributors, and marketers for data about the companies' spending and marketing activities targeting children and adolescents.

The proposal would also include quick-service restaurant companies.

In July 2008, the FTC issued a report, "Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities, and Self-Regulation," which analyzed 2006 expenditures and marketing activities directed at children. The report also included several recommendations to companies marketing food or beverage products to children.

The FTC intends to use similar data from 2009 compiled from its request in order to analyze changes in food marketing to children over the three-year period to issue a follow-up report, and determine if companies are following its recommendations.

The information requests would be sent to 48 food and beverage manufacturers, distributors, and marketers and quick-service restaurant companies, 40 of which were recipients of the information requests as part of the 2006 study.

Information sought includes the amount spent to communicate marketing messages about food products to youth; the nature of the marketing activities used to market food products to youth; marketing to youth of a specific gender, race, ethnicity, or income level; and any marketing policies, initiatives, or research in effect or undertaken by the companies relating to the marketing of food and beverage products to children and adolescents.

Specific nutritional data will also be requested for each food product that the companies marketed to children or adolescents in 2009.

Comments are due to the FTC by June 24, 2010.

To read the Federal Register notice detailing the proposed order and for information on how to submit comments, click [here](#).

Why it matters: The information requested will allow the agency to "analyze how industry members allocate their promotional activities and expenditures among various media and for different food products. In addition, the FTC will be able to evaluate the impact of self-regulatory efforts on the nutritional profiles of foods marketed to children and adolescents," the notice states. The Commission also plans to request expenditure data for new media, like online display advertising, e-mail marketing, mobile marketing, and digital marketing.

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Wrigley Settles Misleading Ad Suit for \$6M

For \$6 million, the Wrigley gum company has settled a class action lawsuit alleging that it misled consumers by claiming that its Eclipse brand gum and mints were scientifically proven to kill germs that cause bad breath.

In May 2009, Carol Smith filed a deceptive advertising class action suit against Wrigley in Florida federal court.

The suit claimed that Eclipse was one of the top sellers in its product category after Wrigley released a reformulated version in 2008. On both the packaging and in advertisements, the company made claims like "Most other gums just mask bad breath. We kill the germs that cause it" and "Now Eclipse contains a natural ingredient, scientifically proven to help kill the germs that cause bad breath."

The plaintiff claimed that the ads were false and that Wrigley did not have scientific evidence to support the claims, as its studies were performed in-house and contained methodological and design flaws. The complaint was filed just a month after the National Advertising Division issued a decision concluding that the Eclipse ad campaign was deceptive and that its claims should be discontinued or modified.

Without acknowledging wrongdoing, Wrigley agreed to settle the case earlier this month. The company will pay \$6 million into a settlement fund from which consumers may recover up to \$10, with an additional \$1 million payout if the eligible claims exceed the original settlement fund.

Wrigley also agreed to refrain from using "germ kill" messages in its advertising and labeling for Eclipse products for a period of three years. The company will stop including the Magnolia Bark Extract ingredient in the product.

The settlement awaits final judicial approval.

To read the complaint in *Smith v. Wrigley*, click [here](#).

To read the settlement agreement, click [here](#).

Why it matters: Companies should keep in mind that they must be able to substantiate their marketing claims. Establishment claims which refer to testing (e.g., "tests prove"), like Wrigley's, are subject to a higher degree of scrutiny than other claims. In Wrigley's case, the plaintiffs challenged the methodology and design of the studies, one of which was performed in-house and was conducted on Wrigley employees.

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CARU Finds Pop-Tarts Are Marketed to Kids with Misleading Claims

In a recent decision, the Children’s Advertising Review Unit recommended that Kellogg discontinue certain claims made on its Pop-Tarts packaging, which suggested that the toaster pastries are made with a significant amount of real fruit although the products contain less than 6 percent fruit.

CARU reviewed the packaging of Kellogg’s Pop-Tarts products as part of its routine monitoring practices.

The front of the package of Kellogg’s Pop-Tarts strawberry flavor pictured four strawberries, with the pastry’s strawberry filling prominently displayed. It also featured the claim “Made with Real Fruit.”

The back panel of the box consisted of a large card, outlined with a dotted line, which featured a cartoon representation of a Pop-Tart and other characters. On the top of the panel, the box instructed, “Cut & Collect 15 in all” and “With safety scissors, and an adult’s help, cut along dotted line.”

Kellogg argued that CARU should dismiss the case because the product packaging was not directed primarily to children, but instead intended for the primary grocery shopper. CARU disagreed. It found “ample evidence” to conclude that the packaging, using the cards – along with its advertising copy – was directed to children under 12.

“The package is not only attractive to children, but appears to be directed to them. The box is filled with depictions of the signature cartoon Pop-Tarts character. This is notable in the panel with the nutrition information, which contains six of those signature cartoon Pop-Tarts characters. Significantly, one entire package panel constitutes a premium to ‘Cut & Collect 15 in all,’ ” according to the decision.

Further, CARU said that both the express and implied claims made by the packaging were misleading.

The express claim, “Made With Real Fruit,” when combined with the pictures of strawberries on the package “could easily lead a child to believe that the product contains substantial amounts of strawberries,” according to the decision.

And the implied claim – that Pop-Tarts contain substantial amounts of strawberries – was not supported, CARU said. The Nutrition Facts on the package disclose that the amount of the named fruit is 2% or less, and the total amount of fruit is 4% or less or 6% or less.

“These percentages clearly do not represent a substantial amount of fruit,” CARU said.

In response, Kellogg noted that the packaging at issue may still be on the shelf but is no longer the current packaging.

"Kellogg continues to believe that the front panel of the packaging for Kellogg's Pop-Tarts toaster pastries, which contains the 'made with real fruit' claim, is not advertising primarily directed to children. Nonetheless, we respect the self-regulatory process and will take CARU's decision into consideration in future advertising," it said in the advertiser statement.

To read the decision, click [here](#).

Why it matters: The decision serves as an important reminder to advertisers and marketers that even though packaging might be intended to reach an adult audience, certain depictions might be interpreted to be directed to children. In the Pop-Tarts case, the use of a clip-and-collect card on the packaging, cartoon character depictions, and the ad copy – suggesting that an adult is needed to cut the cards out – led to the conclusion that the advertising was directed primarily at children.

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ATTORNEY ADVERTISING pursuant to New York DR 2-101(f)

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