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Gillette Settles Razor Ad Suit for $7.5 Million

A federal judge gave preliminary approval to a settlement in a multi-district class action suit against Gillette, accusing the company of misstating the efficacy of its M3 Power Razor in ads. Gillette agreed to pay $7.5 million. The settlement involves multiple lawsuits filed in 2005 in both the United States and Canada that were consolidated in Massachusetts federal court.

Introduced in May 2004 by Gillette, the M3 Power Razor was touted by the company as "revolutionary," according to the plaintiff's complaint. It included a battery-powered feature that caused the razor to oscillate, creating what Gillette described as "micro-pulses," which the company claimed in its advertising raised hair up and away from the skin, resulting in a closer shave. But the complaint alleged that independent testing demonstrated Gillette's claims were baseless and that the company knew its advertising campaign was deceptive.

"Indeed, Gillette's chief scientist advised Gillette's in-house legal counsel and other high-level Gillette employees that the marketing campaign was inaccurate," according to the complaint. The suit alleged violations of state deceptive trade practices statutes, deceptive advertising laws, and consumer fraud statutes, as well as negligent and intentional misrepresentation, breach of warranty,

and unjust enrichment.

Under the terms of the settlement, Gillette denied the plaintiffs' allegations but chose to settle to avoid further expensive and protracted litigation. Gillette will pay $7.5 million into a settlement fund; class members may receive a refund, rebate, or a replacement razor. A final approval hearing is set for March 2011.

To read the complaint in *In re M3 Power Razor*, click here.

To read the settlement agreement, click here.

Why it matters: The class action suit was not the only legal action taken against Gillette over its M3 Power Razor advertising campaign. A German court enjoined the company from making claims about its "micro-pulse" in that country. And before the class action suit was filed, Schick filed a false advertising suit against Gillette in a federal court in Connecticut regarding the same claims. Schick obtained a preliminary injunction against Gillette. Gillette was ordered to stop making the claims in all advertising and to remove the claims from all packaging. Manatt, Phelps & Phillips represented Schick in the litigation.

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Internet Tracking, Direct Marketing in the News

A recent series of articles in the *Wall Street Journal* about direct marketing and the use of tracking technology on the Internet have the industry on the defensive and privacy advocates calling for legislation to be passed next term. The series, called "What They Know," told readers that "Marketers are spying on Internet users – observing and remembering people's clicks, and building and selling detailed dossiers of their activities and interests."

The publication looked at the top 50 Web sites in the United States and found that the sites dropped an average of 64 pieces of tracking technology – like cookies – onto users' computers. The tracking technology allows companies to follow users around the Internet and create a marketing profile based on the sites they visit, allowing for targeted direct marketing of particular goods.

In another article, the *WSJ* profiled data aggregator [x+1], which is used by companies to help target credit card offers to consumers. Yet another story included a 17-year-old, worried that she was 15

UPCOMING EVENTS

August 26, 2010
Thompson Audio Conference
Topic: "Dietary Supplements and Functional Foods: What You Need to Know About 2010 Enforcement"
Speakers: Ivan Wasserman and Christopher Cole
for more information

September 21-23, 2010
2010 ERA D2C Convention
Topic: "Best Practices in Advance-Consent Marketing"
Speaker: Linda Goldstein
Las Vegas, NV
for more information

September 24, 2010
ACI Conference
Topic: "Sweepstakes, Contests, and Promotions"
Speaker: Linda Goldstein
New York, NY
for more information

October 17-20, 2010
SOCAP International Annual Conference
Topic: "The FTC's Efforts to Regulate Social Media Marketing and Privacy: The Impact on Customer Care Professionals"
Speaker: Tony DiResta

pounds overweight who often does online research about weight loss. Every time she goes online, she sees weight-loss ads, which make her "start thinking about" her weight, making her self-conscious.

The articles spawned a controversy across the country, from a California paper proposing the state adopt its own privacy law in the absence of federal regulation to counterpoint opinion pieces in *USA Today* about the pros and cons of federal privacy legislation. While the paper's editorial board wrote in favor of a law – "Better to erect some legal guardrails before the road toward decreasing privacy becomes too slippery" – president and CEO of the Interactive Advertising Bureau Randall Rothenberg provided the counterpoint. "Federal regulation of the Internet is one more Big Government idea that's inimical to consumer choice, the First Amendment, communications diversity and economic growth," he wrote.

In an op-ed piece in the *WSJ*, Jim Harper, director of information policy studies at the Cato Institute, responded to the series by noting that if "Web users supply less information to the Web, the Web will supply less information to them."

"Some legislators, privacy advocates and technologists want very badly to protect consumers, but much 'consumer protection' actually invites consumers to abandon personal responsibility. The caveat emptor rule requires people to stay on their toes, learn about the products they use, and hold businesses' feet to the fire. People rise or fall to meet expectations, and consumer advocates who assume incompetence on the part of the public may have a hand in producing it, making consumers worse off," he wrote.

To read the *WSJ* series, click here.

Why it matters: For companies that advertise online, the controversy is inconvenient, given the recent focus on privacy. With two bills currently being debated in Washington (Rep. Bobby Rush, D-Ill., introduced his Best Practices Act to the House in July, while Rep. Rick Boucher, D-Va., has only circulated a draft), the articles are providing support for privacy advocates. Jeff Chester, executive director of the Center for Digital Democracy, said that privacy advocates "will be holding up the front page of the *Wall Street Journal* when they lobby the Hill over the next few weeks."

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San Francisco, CA
for more information

November 18-19, 2010
32nd Annual Promotion Marketing Law Conference
Topic/Speaker: "To Tweet or Not to Tweet: How to Stay Current as Technology Changes the Game," Linda Goldstein
Topic/Speaker: "Negative Option/Advance Consent/Affiliate Upsells," Marc Roth
Topic/Speaker: "Children's Marketing," Christopher Cole
Chicago, IL
for more information

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Our Practice

Whether you're a multi-national corporation, an ad agency, a broadcast or cable company, an e-commerce business, or a retailer with Internet-driven promotional strategies, you want a law firm that understands ... more

Practice Group Overview
Practice Group Members

Advertising for Financial Marketers Could Face New Agency

Financial marketers – like banks and credit card providers – may soon have their advertising regulated under the recently created Bureau of Consumer Financial Protection.

Created as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the agency has been tasked with rulemaking on a number of issues under the financial reform law, such as how much information must be included in advertisements and defining what constitutes an "abusive" advertising practice.

The Act set forth new requirements that ads for financial marketing be written in "plain language" with an "easily readable type font" and must clearly describe the costs, benefits, and risks of a particular financial product or service.

Dan Jaffe, executive vice president for government relations for the Association of National Advertisers, told *Ad Age* that because Congress invested so much time and energy passing the financial reform legislation, legislators will be keeping an eye on the new agency.

"Regulators are going to feel pressured to get something out of the gate – which means more regulation," Jaffe said. He also said questions remain about the possible definition of "abusive," which can result in civil monetary penalties under the Act.

Advertisers and marketers have expressed concern about the potential requirements to include greater information in ads, which could make them extremely expensive or unattractive.

To read the Dodd-Frank Wall Street Reform and Consumer Protection Act, click here.

Why it matters: The financial reform law and its accompanying ad requirements do seem to indicate that greater disclosures will be required by financial marketers. But the scope of rules under the Act is unclear, especially since they will be coming from a new federal agency.

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North Carolina Amends Law on Games of Chance

North Carolina recently amended its state law on the regulation of games of chance on electronic devices. "An Act to Ban the Use of Electronic Machines and Devices for Sweepstakes Purposes," or House Bill 80, is limited to games of chance conducted or promoted on electronic devices "owned" by the sponsor, promoter, or affiliated parties that utilize "entertaining displays."

An "entertaining display" is defined as "visual information, capable of being seen by a sweepstakes entrant, that takes the form of actual game play, or simulated game play," including examples like video poker games, bingo games, craps, and pot-of-gold. The law does not affect sweepstakes or promotions aimed at a consumer's PC, laptop, or mobile device (although an earlier version of the bill did include these devices). An earlier version of the bill also included broader language that could have banned certain forms of sweepstakes conducted for marketing purposes, including instant win sweepstakes.

Governor Bev Perdue recently signed the law, which takes effect Dec. 1, 2010.

To read the new law, click here.

Why it matters: The law as amended is an attempt to allow sweepstakes and close an existing loophole that allowed electronic devices like video poker games in retail locations. Companies that conduct games of chance in North Carolina should avoid using electronic devices owned by the sponsor or other party affiliated with the promotion beginning December 1 where the device is used to enter and notify prize winners.

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NAD: Discontinue "Soap Scum" References

The National Advertising Division recently recommended that Unilever, maker of Dove brand soap products, discontinue claims made for its Dove Beauty Bar in a challenge made by Colgate-Palmolive, the maker of Irish Spring bar soap.

The ad campaign included a television commercial, print advertisements, and a Web site demonstration and game. In the television advertisement, a row of women smeared soapy lather onto a mirror, which is then rinsed by a showerhead. While the mirror with Dove lather remains clear, the one with soap has a visible soap residue that the voiceover refers to as "soap scum." The print advertisement depicted a similar scene, with a woman obscured by a soapy film, while the Web site demonstration included a Dove scientist discussing the science of soap scum.

The NAD agreed with Colgate that the soap demonstration did not demonstrate the more likely and typical washing method of consumers (continuous lather and rinsing) when showering, and questioned whether Unilever overstated its test results.

Because it was unclear whether the amount of calcium soap left behind on the skin was consumer meaningful, the NAD concluded that the demonstrations and claim "The truth is clear. Soap leaves soap scum, Dove doesn't" falsely disparaged competitive bar soaps.

"NAD could not ignore the fact that the term 'soap scum' is highly inflammatory and while NAD appreciated that this is the technical name of the substance as used by the FDA and even soap manufacturers, NAD concluded that this is not the word that consumers would typically use to describe soap residue (perceptible or not) that is left behind on skin," the decision said.

The NAD also found a "substantial disconnect" between the studies used to support the premise of "soap deposition" on skin and the mirror studies, and that the "artistic representation" of soap residue on mirrors "highly exaggerated the differences" between two products and was therefore falsely disparaging.

NAD recommended that Unilever discontinue use of references to the soap left behind by competing products as "soap scum," and the use of a demonstration in the online video and television ad.

The NAD also suggested that the online "Soap Toss" game, where players attempt to throw as many bars of soap as possible into a garbage can during a one-minute period, should be discontinued. "NAD determined that it is one thing for an advertiser to urge consumers to *choose* its product over another or to *switch* products premised upon a particular attribute, however it is quite another thing to urge consumers to 'throw away' a competitive product

within the overall context of a Web site claiming that 'The Truth is Clear…Soap leaves Soap Scum…Dove Doesn't' and the accompanying over-stated demonstrations and testimonials wherein consumers note the 'icky' notion of soap scum," the decision said.

To read the NAD's press release about the decision, click here.

Why it matters: The NAD said the decision was an attempt to balance an advertiser's right to promote the benefits of a product against a competitor's right not to have its product falsely disparaged. "Advertisers must be careful not to overstate the extent of any demonstrated superiority when using a comparative demonstration to show differences in a product performance," the NAD said.

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