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**January 8, 2009**

# ADVERTISING LAW @MANATT

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

## IN THIS ISSUE



## FTC Wants Tighter Rules for Celebrity Endorsements

As discussed in our December 9, 2008, *AdvertisingLaw@manatt* newsletter, the FTC has proposed new advertising guidelines for the use of endorsements. The proposal regarding celebrity endorsements is generating some concern.

The Federal Trade Commission is proposing to tighten guidelines for celebrity endorsements and consumer testimonials in advertising, requiring marketers to specify the typical result from use of a product. Right now, under the current 28-year-old rules, it is sufficient to offer broad disclaimers, such as "results not typical."

"The advertiser would be required to say what is expected, what is the ordinary result," said Mary Engle, the FTC's associate director for advertising practices. "If the average loss is ten pounds, they should say that."

Banning the use of general disclaimers would have a major impact on the $149 billion advertising industry that uses paid testimonials. The use of endorsements is widespread, and virtually ubiquitous in certain product categories, such as weight loss.

Companies worry that a change in the guidelines could open the door to charges of misleading or deceptive advertising. Though currently considered advisory, the FTC has used the guidelines to back deceptive advertising charges in dozens of

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### UPCOMING EVENTS

**January 26-27, 2009**
**ACI: 22nd Advertising Law**

**Topic:**
"Creating Workable and Adaptable Claim Substantiation Procedures"

**Speaker:** Linda Goldstein

New York Marriott East Side Hotel
New York, NY
for more information

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**January 30, 2009**
**FDLI Conference**

**Topic:**

enforcement actions over the past decade. A guideline that requires advertisers to provide "typical" results creates the problem of ascertaining and proving what is typical, which could be difficult and expensive to measure in the case of certain products.

Early last year, the FTC launched a routine review of the guidelines, culminating in its proposed changes issued on November 28. Comments are due by January 30, 2009.

The agency has already gone after numerous companies for using endorsements that did not support claims. For instance, in 2006, the FTC won a case against the makers of the "Q-Ray Ionized Bracelet," requiring up to $87 million to be refunded to consumers. The company argued unsuccessfully that testimonials supported its pain relief claims. In 2007, the agency settled a case for $12.8 million against the marketers of the dietary weight loss supplement Xenadrine EXF. Ads for the supplement used endorsers who said that they lost weight without dieting or exercise, when in fact they dieted and exercised rigorously and were paid $1,000 to $20,000, the complaint alleged.

Two FTC studies concluded that a sizable percentage of consumers polled believed the promises in ads even when prominent general disclaimers were included. But when consumers were given specific data on actual expected results, fewer believed the experiences depicted were generally representative.

The American Association of Advertising Agencies and the American Advertising Federation, two industry trade groups that support keeping the guidelines as is, said the FTC studies were too narrow and could not be applied to all product categories and age groups.

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## High Court Green-Lights "Light" Cigarette Cases

The Supreme Court has opened the door to a new wave of tobacco litigation, finding that smokers could sue cigarette makers for allegedly deceiving them about the dangers of "light" cigarettes.

The ruling will allow pending class action lawsuits to go forward in several states and paves the way to lawsuits in other states. The decision also opens the door to lawsuits over

"What You Need to Know Now about Emerging Dietary Supplements Issues & Trends – Review of Recent Federal Trade Commission Enforcement Actions"

**Speaker:** Ivan J. Wasserman

L'Enfant Plaza Hotel
Washington, DC
for more information

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**February 10-11, 2009**
**Promotion Marketing Association: Basics Seminar**

**Topic:**
"Basics of Promotion and Integrated Marketing"

**Speaker:** Michael Barkow

USA Weekend Magazine
535 Madison Avenue
New York, NY
for more information

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**March 5-6, 2009**
**PLI's Information Technology Law Institute 2009**

**Topic:**
"Mobile Advertising and Web 2.0"

**Speaker:** Linda Goldstein

PLI New York Center
New York, NY
for more information

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**March 11-13, 2009**
**The IAPP Privacy Summit 2009**

**Topic:**

advertising claims for low-tar and low-nicotine brands.

Of the more than 45 million U.S. smokers, close to 85% buy cigarettes that are sold as having lower tar and nicotine. Smokers started switching to these cigarettes in the 1970s, thinking they were safer.

Test machines showed light cigarettes to yield less smoke, tar, and nicotine than regular brands. But when puffed by actual smokers, the cigarettes yield about the same amount of these substances, because smokers tend to cover air holes in the filter with their lips and take larger and deeper puffs to inhale more nicotine.

The Federal Trade Commission told the Court that the tobacco industry had known for at least 30 years that light cigarettes were not safer. It also said the use of labels, such as "light," "ultra light," or "low tar" did little but fool smokers into thinking they faced less of a health risk.

The 5-4 ruling in *Altria Group v. Good* reversed course from an earlier decision shielding cigarette makers from being sued for failing to warn about the dangers of smoking. Since 1969, federal law has required warning labels on cigarette packs, and in 1992, the High Court found that the warning label barred such claims.

Finding that cigarette makers could be sued for deceptive advertising under state consumer protection laws, Justice John Paul Stevens wrote that marketers had a "duty not to deceive" the public through their advertising or marketing.

Justices Anthony M. Kennedy, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer joined the majority opinion.

The Court's decision came as a surprise to some observers because several recent rulings by the Justices have given a broad reading to the concept of preemption, in which federal laws block claims based on state laws covering the same ground. For example, in February of last year, the Court found that FDA approval of certain medical devices barred suits claiming the devices were defective. In a pending case argued in November called *Wyeth v. Levine*, the Court is weighing whether federally approved warning labels on prescription drugs block lawsuits by patients who are injured or killed.

The "light" cigarette case decided last month was launched by several smokers in Maine alleging that the Altria Group had deliberately deceived them in marketing Marlboro Lights and

"Sunday in the Park With FACTA: Navigating the Post-FACTA FCRA Regulatory Landscape"

**Speaker:** Helen Foster

Washington Marriott Wardman Park
Washington, DC
for more information

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**April 2-3, 2009**
**PLI's Information Technology Law Institute 2009: Web 2.0 and the Future of Mobile Computing: Privacy, Blogs, Data Breaches, Advertising, and Portable Information Systems**

**Topic:**
"Mobile Advertising and Web 2.0"

**Speaker:** Linda Goldstein

PLI California Center
San Francisco, CA
for more information

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## OUR PRACTICE

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Practice Group Members

Cambridge Lights. After the Court of Appeals for the First Circuit refused to dismiss the case, the company appealed to the Supreme Court.

Chief Justice John G. Roberts Jr. and Justices Antonin Scalia, Clarence Thomas, and Samuel A. Alito Jr. dissented.

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## FTC Shutters Scareware Scams

The Federal Trade Commission has shut down sellers of so-called scareware—fake security software that issues false alerts about viruses and porn to scare users into buying their bogus products.

The FTC has won a temporary restraining order against two outfits, Innovative Marketing, Inc. and ByteHosting Internet Services, LLC, prohibiting them from making false claims about their products. The agency is seeking a permanent ban.

According to FTC court filings, the defendants tricked Web sites into advertising their products. Any user who clicked on an ad was taken to the Web site operated by the defendants, which then ran a bogus "scan" looking for security problems. The "scan" inevitably uncovered a wide range of security problems—viruses, spyware, and even illegal pornography—and advised the unwitting visitors to buy their security software to remedy the problems.

The fake security products the firms were peddling were WinFixer, WinAntivirus, DriveCleaner, ErrorSafe, and XP Antivirus.

The agency has also requested that operators of Web sites hosting the ads block customers from clicking through to the defendants' sites.

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## Drug Makers Will Stop Certain DTC Ads

Prescription drug manufacturers have revised their voluntary guidelines for direct-to-consumer advertising to make the ads more informative. The revised guidelines will become effective this March.

Under the new standards issued by the Pharmaceutical Research and Manufacturers of America, the main industry

trade group, companies will stop promoting prescription drugs for uses that have not been approved by the Food and Drug Administration. They will also stop using actors as doctors without disclosing that fact, and using celebrity endorsers who do not actually use the drug they are promoting.

The $5 billion-a-year DTC advertising industry developed after the FDA relaxed its policies in 1997. Criticism intensified in the wake of the crisis over Merck's painkiller, Vioxx, which the company took off the market over allegations that the drug caused heart problems.

But critics say the changes fall short of those urged by a panel on drug safety for the Institute of Medicine, part of the National Academy of Sciences. The panel recommended a two-year moratorium on DTC ads for new drugs. The new standards, by contrast, do not require marketers to wait a certain period of time before advertising new drugs. Critics also want TV spots to include an FDA phone number for patients wishing to report side effects. Under the voluntary standards, only print ads would be required to include the number.

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