Advertising Law

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In This Issue

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Manatt Partner Chris Cole to Provide Insight on Substantiating Green Marketing Claims at ACI Conference

As the FTC ramps up its enforcement efforts for green marketing violations, it is crucial for companies to take a step back and assess these initiatives.

On May 24, 2011, Chris Cole, a partner in Manatt's Green Marketing practice group, will take the stage at American Conference Institute's Green Marketing Compliance Summit to explore "Avoiding Compliance Errors, Penalties, and Lawsuits: Substantiating Green Marketing Claims in a Precise Yet Cost-Effective Manner." He will provide insight on building a compliant green marketing program, mitigating the risk of competitor suits through claim substantiation transparency and determining when it is beneficial to challenge testing results. Chris will also outline cost-effective methods to disprove claims.

For more information or to register for this event, click here.

back to top

Court: "Explicit and Repeated" Disclosures by Webloyalty Defeat Suit

A California federal court dismissed a plaintiff's suit against Webloyalty that alleged he was misled into joining the company's savings club.

After making a purchase on MovieTickets.com, Patrick Berry received an offer to save $10 off his next purchase if he provided his e-mail address. He filed suit when he began receiving monthly charges of $12 as a member of Webloyalty's membership program, on the grounds that Webloyalty misrepresented that he could receive a coupon and not enroll in a savings club.

Noting that Berry "did not spend substantial time to read the text or other information provided in the pop-up window before he provided his e-mail address and clicked the green button," U.S. District Court Judge Marilyn L. Huff dismissed the suit.

"The court is more than persuaded that the explicit and repeated disclosures that defendants made in their enrollment page suffices to defeat the misrepresentation claims," she wrote.

"After the disclosures were presented to him, Berry took three affirmative steps to accept the terms of the club membership – he entered his e-mail twice and clicked the 'YES' button. Right below the yes button, he could have clicked 'No thanks' to refuse membership," the court said. "Such disclosures are sufficient to place the consumer on notice of the conditions and terms of the club."

In addition to a disclosure immediately above the e-mail entry boxes, the enrollment page had five other disclosures that informed the consumer that by choosing to join the club, he or she will be charged $12 per month after an initial free 30-day trial, the court said. It also included three different statements that if the consumer chose to enroll in the club, the consumer's credit or debit card information would be transferred from MovieTickets.com to Webloyalty and used to charge the monthly membership fee.

To read the court's opinion in *Berry v. Webloyalty.com*, click here.

Why it matters: The court's decision provides companies with a baseline for acceptable notice to consumers, albeit sizable – using five different disclosures and a requirement that consumers take three affirmative steps to accept terms.

Want To Bet? ESPN Pulls Gambling

ESPN pulled all gambling advertising and programming from its schedule after the federal government filed a civil complaint and criminal indictment against the operators of PokerStars, Full Tilt Poker, and Absolute Poker, three major Internet gambling companies.

"We are aware of the indictment only through what has been announced publicly," ESPN told Reuters in a statement. "For the immediate future, we are making efforts to remove related advertising and programming pending further review."

The U.S. Department of Justice seized five Web sites – Pokerstars.com, Fulltiltpoker.com, Absolutepoker.com, Ultimatebet.com, and UB.com – and in separate civil and criminal actions is seeking $3 billion and up to 65 years of prison time for the 11 defendants accused of operating an illegal gambling business, money laundering and bank fraud.

In 2006, Congress passed the Unlawful Internet Gambling Enforcement Act, which bans financial institutions from processing transactions related to online gambling. Many gambling sites relocated outside of the country but continued to advertise here in the United States.

According to the complaint and indictment, the defendants skirted the federal ban by creating fake corporations and Web sites to deceive banks into thinking that the sites were not involved in gambling activity.

To read the civil complaint, click here.

To read the criminal indictment, click here.

Why it matters: The law banning online gambling remains controversial. In addition to a dispute with the World Trade Organization, the House Financial Services Committee recently approved a bill that would overturn the law by legalizing – and regulating –

Internet gambling in the United States. ESPN said the removal of gambling content should be temporary, and the network still plans to air the World Series of Poker in July.

back to top

A Tale of Two Meats

In two different cases companies have been accused of making false statements about their meat products.

A class action suit was filed in a Florida federal court against Kraft Foods and Hormel Foods, in which the plaintiffs allege that the fat-free-percentage claims on deli meat products are deceptive.

Labels on Kraft Foods' Oscar Mayer deli meats and Hormel Foods' Natural Choice-brand products state the products range from 95 to 98 percent fat-free.

However, the suit alleges that in some instances the meats actually contain more than 10 times the amount of fat claimed on the product labels, and the brands use "a clever psychological technique to trick consumers." The brands use the same size and color of font and place the percentage-fat-free claims immediately adjacent to the calories per serving, which suggests to consumers that the two statements modify each other, according to the complaint.

For example, Oscar Mayer Honey Ham purports to be 98 percent fat-free with 50 calories per serving. By combining that information, the suit claims, the defendants are suggesting to consumers that 98 percent of those 50 calories are fat-free, when the product actually contains 20 percent fat by calories.

"Without exception, people who have earned medical degrees, PhDs, JDs, master's degrees, and people with decades of real-world experience, including financiers, developers and executives, all have been deceived by [the defendants'] labels," according to the complaint.

Plaintiff Brad Kuenzig purchased both brands because of their "crafty labels," according to the complaint, which estimates a nationwide class of millions of consumers who purchased the products since April 2006. In addition to damages, the suit seeks an

injunction requiring the defendants to remove their percentage fat-free-claims from their products and engage in a corrective advertising campaign.

In other meat-related news, the plaintiff who alleged that Taco Bell misleads consumers about the makeup of its taco meat has withdrawn her lawsuit. The suit alleged that Taco Bell misrepresented its meat fillings by calling them “seasoned ground beef” or “seasoned beef” when a “substantial” amount of the filling was made up of extenders and other nonmeat substances.

Taco Bell responded to the suit by taking the offensive and launching a national advertising campaign that proclaimed, “Thanks for suing us,” and putting together YouTube videos defending the company’s products.

Now that the plaintiff has withdrawn her suit, both sides are claiming victory.

Beasley Allen, the plaintiff’s law firm, released a statement that it withdrew the suit because Taco Bell made changes to its marketing and product disclosure. “From the inception of this case, we stated that if Taco Bell would make certain changes regarding disclosure and marketing of its ‘seasoned beef’ product, the case could be dismissed,” lawyer Dee Miles said in the statement.

But Taco Bell – noting that no payments were made to the plaintiff and no settlement agreement was reached between the parties – inquired in advertising, *“Would it kill you to say you’re sorry?”*

The ads state that the firm “brought false claims about our product quality and advertising integrity” and that no changes to product, ingredients and advertising were made. The ad ends with an appeal to the law firm: *“You got it wrong, and you’re probably feeling pretty bad right now. But you know what always helps? Saying to everyone, ‘I’m sorry.’ C’mon, you can do it!”*

To read the complaint in *Kuenzig v. Kraft Foods, Inc.,* click here.

To see Taco Bell’s latest ad, click here.

Why it matters: Taco Bell may have borne great costs for the aggressive defense of its products, but the company no longer faces an expensive class action lawsuit and has shown other potential plaintiffs what they would face if they filed suit. So far, Hormel and Kraft are taking a more traditional approach, with Kraft releasing a statement denying the allegations in the suit: “This lawsuit is unfounded. We stand behind the statements on

our labels, which are true and clear," said Sydney Lindner, Kraft's associate director of corporate affairs.

back to top

Fourth Circuit Affirms An Injunction and $13.5 Million Verdict in Infant Formula Case

The Fourth Circuit upheld an injunction against Mead Johnson Nutrition Co. ("Mead"), that prohibits the company from falsely claiming its baby formula products were superior to those of the plaintiff, competitor PBM Products ("PBM").

The court's ruling also upholds a $13.5 million jury verdict against Mead, where jurors found that Mead's actions violated the Lanham Act. PBM, the maker of store-brand baby formula, brought suit in 2008 after Mead sent Florida residents a mailer claiming its Enfamil Lipil was superior to store-brand formulas.

In its appeal, Mead argued, in part, that expert testimony about customer surveys or evidence about prior litigation between the companies should not have been admitted. Mead targeted the parents of two- to three-month-old infants in its 1.5 million mailers, while the surveys included new parents, those expecting a baby in the next six months, and a group of new and expectant mothers – the wrong universe of respondents, Mead argued. Mead also asked the Fourth Circuit to lift an injunction limiting its advertising claims.

The court, however, disagreed with Mead's assertions.

Although the surveys conducted by PBM's experts did "not exactly match the audience that received the advertisement, it is a sufficiently close approximation of the recipient pool to be admissible," the court said.

The court further held that evidence of two prior cases between the "familiar combatants" was not prejudicial to Mead, despite its argument that PBM was trying to paint it as "a serial lawbreaker."

"The evidence of prior litigation between the parties in regards to baby formula is relevant because it speaks to Mead Johnson's intent in making its misleading claims."

Any unfair prejudice was limited by the trial court's exclusion of specific evidence regarding the settlements in the other cases, the court added.

Finally, the court upheld the trial court's injunction barring Mead from making two express claims – "mothers who buy store-brand infant formula to save on baby expenses are cutting back on nutrition compared to [Mead Johnson's] Enfamil" and "only Enfamil has been clinically proven to improve infants' mental and visual development."

"As the litigation history of the parties demonstrates, despite having twice been restrained from disseminating misleading advertising, Mead Johnson continued to do so. PBM cannot fairly compete with Mead Johnson unless and until Mead Johnson stops infecting the marketplace with misleading advertising," the court said.

To read the decision in *PBM Products v. Mead Johnson & Co.*, click here.

Why it matters: The opinion from the federal appellate court was unanimous and resoundingly upheld the trial court's findings and injunction. Although Mead continues to battle over the mailer – which included the infamous "blurry duck" to suggest that babies who used store-brand formula could have poor eyesight and other problems – it continues to lose. Late last year a U.S. District Court certified a class of plaintiffs who purchased Enfamil in a false advertising suit. The company also lost three consecutive challenges brought by competitor Abbott Laboratories, maker of Similac, before the National Advertising Division, which were cited in the Florida class action and ultimately led the NAD to refer the case to the Federal Trade Commission.

back to top