



November 10, 2009



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Calendar Notables...

The Word of Mouth Marketing Association (WOMMA) Annual Summit is NOVEMBER 18 -20 in Las Vegas. Look for Manatt partners Tony DiResta and Linda Goldstein at the Brands Council Networking Session, where they will recap FTC developments. Click [here](#) for details. Attention ABA members! The Antitrust Law Section's Private Advertising Litigation Committee is conducting a telephonic brown bag program titled, "Damages in Lanham Act False Advertising Cases: Theory and Practice" on NOVEMBER 24 at 2:30p. Manatt's Chris Cole will moderate. Click [here](#) for more information. On DECEMBER 3 at Google Headquarters, NY, the Promotion Marketing Association presents its 2nd Annual Digital Marketing Summit. Register online [here](#) and be there when Linda Goldstein and Randall Rothenberg, President of the Interactive Advertising Bureau, discuss advertising, social media and outreach to bloggers. This is a do-not-miss session. The challenges of complying with the FTC's new endorsement and testimonial rules are also the subject of the Electronic Retailing Association's "Spotlight Sessions" on DECEMBER 7 in New York, DECEMBER 14 in Long Beach, CA and via webinar on DECEMBER 17. ERA's program faculty includes Linda Goldstein, Rich Cleland of the FTC, and Jonathan Gelfand, Product Partners. Visit [here](#) to learn more.

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UPCOMING EVENTS

New York Law Makes Refund Policies Clearer

A new New York law governing customer refund policies will go into effect on November 25, 2009. The amendments to the statute require retailers to provide greater disclosure and ensure the conspicuous display of store refund policies. The law, which attempts to close several loopholes in the three-decade-old statute, also defines and addresses restocking and other fees that some retailers charge for returns.

The new law:

Requires all merchants to affirmatively post their refund policies. The current exemption to the posting requirement for merchants who provide cash refunds for twenty days from the purchase date has been removed.

Permits customers to return any item for a full refund for up to thirty days from the date of purchase should the retailer fail to post the refund policy, as long as the buyer can verify the date of purchase with a receipt or any other purchase verification tool used by the merchant.

Requires retailers to make available upon request a written copy of the store's refund policy and to disclose such availability on the refund policy signage.

Updates refund policy signage to provide consumers with advance notice if the return of any purchase is subject to any fees and the exact dollar or percentage amount of such fees. This includes disclosing restocking fees, which the bill defines as "any amount charged by a seller for accepting returned merchandise and paying a refund or credit."

Why it matters: These are important changes with an immediate, practical impact on refund practices and policies. All retailers with a New York location should review the new refund policy disclosure rules closely and ensure that they are in compliance when the changes go into effect on November 25.

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Food Makers Shelve Smart Choices Program

Major food manufacturers are backing away from a controversial nutritional labeling program in the wake of a Food and Drug Administration investigation and plan to standardize criteria for food nutrition labels.

The industry-backed "Smart Choices" program was launched in August to identify foods

November 12, 2009

WOMMA TweetUp

Topic: "WOMMA FDA &

Social Media Hearing

Analysis"

Speaker: [Anthony DiResta](#)

The Mall

Washington, D.C.

[for more information](#)

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November 18-20, 2009

4th Annual Word of Mouth

Marketing Association Summit

Topic: "FTC Developments"

Speaker: [Anthony DiResta](#)

Paris Hotel

Las Vegas, NV

[for more information](#)

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November 24, 2009

2:30 - 4:00 pm (EST)

Topic: "Damages in Lanham

Act False Advertising Cases:

Theory and Practice"

Moderator: [Chris Cole](#)

The ABA Section of Antitrust

Law Private Advertising

Litigation Committee and the

Economics Trial Practice

Committee Teleconference

[for more information](#)

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December 3, 2009

Fast Forward 2011: PMA's

Second Annual Digital Summit

Topic: "What the Recent FTC

Guidelines Mean for

that meet certain nutritional standards and then highlight them for consumers with a green label on package fronts. But the program raised eyebrows among nutritionists and consumer health advocates when it was discovered that foods like Froot Loops, Cracker Jacks, and mayonnaise met the nutritional criteria for a “Smart Choices” label.

Last month, Connecticut Attorney General Richard Blumenthal announced that he had sent letters to leading food manufacturers expressing his concern that the Smart Choices program was “overly simplistic, inaccurate and ultimately misleading.” Blumenthal said several other states had expressed interest in joining his effort. He said his investigation would seek to determine if the labeling campaign violates the state’s consumer protection law, which bars misleading or false product claims.

Shortly after, the Food and Drug Administration announced a crackdown on inaccurate nutritional labeling. Although she did not name specific products, an FDA official did note that some products labeled with the “check mark” logo under the Smart Choices program “are almost 50 percent sugar.”

In the wake of the FDA’s announcement, Smart Choices officials said the group would “postpone” active operations and not encourage wider use of the logo while the FDA investigates labeling issues. Although they added that manufacturers that currently use the logo can continue to do so, major food manufacturers such as PepsiCo, Kellogg, and Unilever have been quick to back away from the program.

Smart Choices stood behind its program, saying that the nutritional criteria were based on federal dietary guidelines and that its efforts were a step in the right direction. Board member Richard Kahn said the group supported the FDA’s effort. “The impetus for the Smart Choices program was that there were and are too many systems,” he said. “We applaud the concept of having one system nationwide.”

The FDA said it was working to define the criteria manufacturers must meet to make certain nutrition claims on product fronts. The agency plans to work with manufacturers, nutritionists, and others to design a standardized system to help consumers select healthy foods.

Why it matters: Typically, self-regulatory efforts are aimed at staving off government oversight. However, the Smart Choices program had precisely the opposite effect from what was intended and resulted in a new FDA initiative to develop uniform front-of-package nutritional labels.

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Complaint Says Target’s Silk Soymilk Isn’t Organic

An organic food advocacy group is charging Target Corporation with misleadingly promoting Silk soymilk as being organic.

Advertising and Marketing"

Speakers: [Linda Goldstein](#),

Manatt Phelps & Phillips and

Randall Rothenberg,

President, Interactive

Advertising Bureau

Google Headquarters

New York, NY

[for more information](#)

...

December 7, 2009

ERA Spotlight Session

Topic: "Endorsements and

Testimonials"

Speakers: [Linda Goldstein](#) of

Manatt Phelps & Phillips, Rich

Cleland of the FTC and Julie

Coons of the Electronic

Retailing Association as

moderator

Digital Sandbox Networking

Event Center

New York, NY

[for more information](#)

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December 14, 2009

ERA Spotlight Session

Topic: "Endorsements and

Testimonials"

Speakers: [Linda Goldstein](#) of

Manatt Phelps & Phillips, Rich

Cleland of the FTC, Jonathan

Gelfand of Product Partners,

LLC and Julie Coons of the

Electronic Retailing

Association as moderator

Hilton Long Beach &

The Cornucopia Institute filed a complaint with the Department of Agriculture, accusing the giant retailer of false advertising in national newspaper ads that depict the Silk carton with the word “organic” on the label.

The product has not been certifiably organic since the spring, when manufacturer Dean Foods began using soybeans that had not been USDA certified, the complaint states.

Although it filed the complaint against Target, Cornucopia is placing much of the responsibility for the confusion on Silk manufacturer Dean Foods. “Target is almost the victim here of the subterfuge by Dean Foods, that took a brand that used to be 100 percent organic and slowly converted it to conventional soybean and labeled it ‘natural,’” said Mark Kastel, co-director of the institute. Dean Foods changed the organic character of its Silk product but did not change its UPC code or explicitly inform consumers, Kastel said.

In a statement, the WhiteWave division of Dean Foods, which oversees the Silk products, said, “Silk continues to offer both organic and natural options to consumers, both of which are carried at Target. . . . [A]ll Silk and Horizon organic and natural products are clearly labeled as such.”

Cornucopia also recently targeted Target for allegedly blurring the distinction between natural and organic in its advertising of its private label Archer Farms line.

Why it matters: The federal government has guidelines for determining whether a product can be labeled organic or natural. Nevertheless, there’s a lot of confusion among consumers and others over the difference between the two. Cornucopia is putting the onus on retailers to monitor the food items they stock for compliance with federal guidelines.

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Lawsuit Accuses Cash4Gold of Shortchanging Consumers

The parent company of Cash4Gold is the focus of a class action lawsuit accusing it of misrepresenting its services and defrauding customers who sent in their gold jewelry in exchange for cash.

The 100-plus-page complaint against Cash4Gold’s parent company, Green Bullion Financial Services, LLC, was filed in federal court in the Central District of California last month. In the lawsuit, the two named plaintiffs claim that Cash4Gold’s “unlawful behavior can be distilled down to three specific frauds.”

First, the complaint alleges, Cash4Gold promises to provide the highest care for any goods sent to its facility, a promise asserted in two sections on the company’s Web site. “However, this high degree of care is a lie, as items sent to Cash4Gold are commonly ‘lost.’ At best, this means that Cash4Gold is not exercising the high degree of care it has

Executive Meeting Center
Long Beach, CA

[for more information](#)

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December 17, 2009
ERA Spotlight Webinar
Session

Topic: "Endorsements and
Testimonials"

Speakers: [Linda Goldstein](#) of
Manatt Phelps & Phillips, Rich
Cleland of the FTC, Jonathan
Gelfand of Product Partners,
LLC and Julie Coons of the
Electronic Retailing
Association as moderator

[for more information](#)

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January 21-22, 2010
6th Annual Film, TV & New
Media Law Conference

Topic: "Brand Integration
Deals"

Speakers: [Jordan Yospe](#)
Millennium Biltmore Hotel
Los Angeles, CA

[for more information](#)

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January 21-22, 2010
6th Annual Film, TV & New
Media Law Conference

Topic: "Trademark Rights for
the Entertainment Lawyer:
Use of Trademarks in Creative
Works"

Speaker: [Mark Lee](#)
Millennium Biltmore Hotel

promised and is liable for negligence. At worst, this means that Cash4Gold is intentionally stealing the goods sent to it and is liable for conversion,” the complaint states.

Second, the complaint alleges that Cash4Gold’s 12-day return policy, which asserts that customers dissatisfied with the price offered for their jewelry may have it returned to them, “is a lie.” The complaint goes on to explain that the 12-day period “is measured from the date on the check sent to consumers. Then Cash4Gold, as a matter of company policy or practice, routinely issues the checks, sets them aside, and mails them out days later so that customers do not receive their checks until after the 12-day return window has already passed. . . . [C]ustomers are simply unable to reject Cash4Gold’s offer or to have their jewelry returned to them. In fact, in many cases, Cash4Gold actually melts down jewelry before the ‘return period’ has even passed, since it knows that due to its mailing schedule, customers literally have no way to successfully exercise the ‘return policy.’”

Third, the suit states that “to support and disguise the two major frauds of stealing customers’ jewelry and completely fabricating the existence of a return policy, Cash4Gold utilizes a ‘customer service’ staff which is deliberately frustrating and openly lies to the company’s customers.” It claims that Cash4Gold’s customer service representatives are specially trained in techniques designed to mislead consumers.

Why it matters: Cash4Gold hit on a gold mine with its two-year-old service, launched during a down economy and a surge in the price of gold. But it has also been the target of hundreds of consumer complaints, investigative reports by TV journalists that suggest that the company greatly undervalues the jewelry it receives, alleged employee exposés, and critical articles on Web sites like consumerist.com and cockeyed.com. Given all the unfavorable publicity, it’s not surprising that the company is now facing a class action lawsuit.

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Craigslist Found Not Liable for Prostitution Ads

A federal court in Chicago has thrown out a complaint against the classified ad Web site Craigslist over ads for prostitutes that can be found on the site.

The civil complaint, filed by Cook County Sheriff Tom Dart in March, accused Craigslist of being a public nuisance and of violating federal, state, and local prostitution laws. The complaint went so far as to claim that Craigslist “solicits for a prostitute . . . by arranging meetings of persons for purposes of prostitution.”

In a 20-page decision, the court made short work of Dart’s complaint. “Sheriff Dart’s lengthy complaint relies heavily on a few conclusory allegations to support the contention that Craigslist induces users to post ads for illegal services,” the court wrote. “Even at this stage of the case we are not required to accept those allegations at face value and they are not meaningfully different from the allegations that our Court of Appeals rejected last year

Los Angeles, CA

[for more information](#)

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January 26-27, 2010

American Conference

Institute's 23rd National

Advanced Forum on

Advertising Law

Speaker: [Linda Goldstein](#)

New York Marriott Downtown

New York, NY

[for more information](#)

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January 26-27, 2010

American Conference

Institute's 23rd National

Advanced Forum on

Advertising Law

Speaker: [Terri Seligman](#)

New York Marriott Downtown

New York, NY

[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 ...

. . . Sheriff Dart may continue to use Craigslist's Web site to identify and pursue individuals who post allegedly unlawful content . . . but he cannot sue Craigslist for their conduct."

A few weeks after Dart filed his complaint, South Carolina Attorney General Henry McMaster threatened to launch a criminal investigation against the operators of Craigslist unless it dealt with the prostitution ads. Craigslist sued, and a court issued an injunction that prevented him from filing criminal charges. McMaster eventually backed off.

Why it matters: Although the attorney general's case was thrown out, Craigslist did make some changes in response to complaints from Dart and other attorneys general, as well as adverse publicity generated from an incident in Boston in which a man dubbed the Craigslist killer went after women who advertised on the site. The Web site replaced its "erotic" section with a new "adult" section and hired employees to monitor the adult area and remove anything that failed to meet the site's terms of use.

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Congress Targets Drug Ad Tax Breaks Again

Yet another piece of legislation has been introduced in the Senate to do away with the federal tax deduction on ads for prescription drugs.

A bill (S. 1763) has been introduced to eliminate the federal tax deduction for all advertising and marketing expenses for prescription drugs.

There are rumors that the co-sponsors are looking to tack their proposal onto the health-care reform legislation, and there's a possibility that they may propose it as an amendment when the legislation is considered by the full Senate.

Industry spokespersons say the move could jeopardize the handshake deal between drug companies and the Obama administration and Senate Finance Committee leaders, which calls for drugmakers to pick up an estimated \$80 billion in healthcare costs over 10 years in exchange for no further crackdowns on the industry.

The proposed legislation to eliminate the tax deduction for healthcare advertising is being called the "Protecting Americans from Drug Marketing Act." The bill seeks to amend the Internal Revenue Code of 1986 "to deny the deduction for advertising and promotional expenses for prescription pharmaceuticals."

The American Advertising Federation estimates that disallowing the advertising tax deduction would increase the costs of advertising and marketing for affected companies by up to 35 percent.

Dan Jaffe, executive VP-government relations for the Association of National Advertisers,

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said the ANA and the ad community are aware of the proposed legislation and are “disappointed that this effort to treat prescription-drug advertising differently and more adversely than any other category of advertising continues to surface. . . . There is no reason that the right to deduct the costs of these ads should be eliminated. They should be treated as they always have been in the past—no differently than any other ordinary and necessary business expense.”

Why it matters: Lawmakers continue to introduce proposals to eliminate the tax deduction for prescription drug ads, and the industry continues to fight these bills as they surface. This latest bill probably will not be the last, and drug industry lobbyists are keeping a careful watch on Congress on this front.

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