Advertising Law Newsletter

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Manatt Partner Ivan Wasserman to Lead Webinar on FDA/FTC Regulations Governing Functional Foods

On August 16, 2011, Ivan Wasserman, a partner in Manatt's Advertising, Marketing & Media practice, will lead a 90-minute webinar discussion highlighting the significant regulatory requirements impacting functional food claims and how manufacturers and marketers can mitigate potential legal exposure.

As the FDA and FTC ramp up enforcement against functional foods – or foods fortified with health-promoting additives – Ivan's presentation aims to provide a greater understanding of the specific regulations that govern claims for these products, explore related NAD and Lanham Act litigation and discuss which claims and products have been targeted by recent FDA and FTC enforcement activity.

For more information or to register for the webinar, click here**.**

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New, Uniform Criteria for CFBAI Members

The Council of Better Business Bureaus' Children's Food and Beverage Advertising Initiative has announced new uniform criteria designed to further strengthen the efforts to self-regulate child-directed food advertising.

The 17-member CFBAI – which includes companies such as McDonald's Corp., Sara Lee, and Unilever – helped develop the criteria over a year-long process, with the aid of top food industry scientists and nutritionists who took into account U.S. dietary guidelines.

The criteria apply to ten product categories: juices; dairy products; grain, fruits and vegetable products; soups and meal sauces; seeds, nuts, nut butters and spreads; meat, fish, and poultry products; mixed dishes; main dishes and entrees; small meals; and meals. Previously, each company developed its own standards for products.

Each category has its own set of criteria. For example, juices cannot have any added sugars and must contain no more than 160 calories, while foods in the seeds, nuts, nut butters, and spreads category (such as peanut butter) cannot have more than 200 calories, 3.5 grams of saturated fat, 240 milligrams of sodium, and 4 grams of sugar per 2 tablespoons.

The new criteria encourage the development of new products with less sodium, saturated fat and sugars, and fewer calories, the CFBAI said.

"These uniform nutrition criteria represent another huge step forward, further strengthening voluntary efforts to improve child-directed advertising," Elaine Kolish, Vice President and Director of the CFBAI, said in a statement. "Now foods from different companies, such as cereals or canned pastas, will meet the same nutrition criteria, rather than similar but slightly different company-specific criteria."

Federal Trade Commission Chairman Jon Leibowitz also praised the CFBAI's new criteria. "The industry's uniform standards are a significant advance and exactly the type of initiative the commission had in mind when we started pushing for self-regulation more than five years ago," he said in a statement to *The New York Times*.

To read the category-specific uniform nutrition criteria, click here.

Why it matters: The new nutrition criteria will present major changes for some of the member companies, which account for more than 70 percent of all food ads targeting children. The CFBAI has estimated that one in three products currently advertised to kids does not meet the new standards. Many companies will either have to change their recipes or drop their child-focused advertising when the new criteria take effect on December 31, 2013. The industry's efforts are seen as an attempt to stave off federal regulation after the Interagency Working Group ("IWG"), which includes the FTC, proposed stricter nutritional criteria in April 2011. The IWG, which has sought public comments on its proposed criteria, plans to submit a final recommendation to Congress by the end of the year.

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Suits Over Group Texting Services

In a pair of class action suits filed the same day, Google and its subsidiary Slide, as well as Twilio, are facing allegations that their group texting services violate the Telephone Consumer Protection Act.

Disco, a group texting service created by Google's Slide unit, allows a user to create a group and send texts to up to 99 people at the same time by providing his or her full name and cell phone number. According to the complaint, the service does not require users to provide consent prior to creating a group or receiving messages, so group members receive unsolicited text messages from the defendants and others in violation of the TCPA.

Plaintiff Bret Lusskin alleged that he received approximately 106 text messages in a single day from the Disco service, which "became so overwhelming that it effectively 'jammed' [his] cell phone, rendering it completely inoperable until the flow of messages subsided."

Because group members can reply to the entire group, “a consumer could be subjected to hundreds of text messages before having an opportunity to opt out,” according to Lusskin’s complaint.

Defendant Twilio offers a similar product, GroupMe, where groups of up to 25 individuals can be created for texting en masse. While the suit notes that a group member will eventually be removed from the group if he or she does not respond, that removal occurs only after receipt of 15 to 30 unwanted messages.

“The overall result of this software design is that thousands of consumers receive text messages from and through GroupMe’s service that they neither consented to nor wanted,” according to plaintiff Brian Glauser’s complaint.

Both suits seek to treble the $500 statutory damages for each violation of the TCPA, as well as an injunction.

To read the complaint in *Lusskin v. Google*, click here.

To read the complaint in *Glauser v. Twilio*, click here.

Why it matters: The courts and the Federal Communications Commission have uniformly applied the TCPA which requires prior, express consent before sending a message. The new lawsuits offer a slight twist, as the users, not the service, actually send the texts. However, both suits emphasize that the defendants provide “the application program interface, the phone numbers, and equipment that facilitates and transmits all text messages” sent by the service and play “an integral role in the delivery, receipt and general transmission of each text message at issue.”

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S.C. Johnson Settles Windex “Greenwashing” Suits

After being sued for falsely advertising its Windex products as environmentally friendly, S.C. Johnson recently settled two “greenwashing” class action suits filed in California and Wisconsin.

While financial terms of the settlement were not disclosed, S.C. Johnson agreed to stop using its “Greenlist” logo on its products in its current form.

The lawsuits claimed that consumers were misled by the mark, believing that the Windex products had been certified as environmentally friendly by a third party, when in fact the mark is self-created. And despite the "Greenlist" logo, the company had not changed the ingredients of its Windex products, which contain environmentally harmful chemicals and pose a risk to children and wildlife, according to the complaint.

In a press release concerning the settlements, S.C. Johnson Chairman and CEO Fisk Johnson said the company decided to settle for two reasons.

"First, while we believed we had a strong legal case, in retrospect we could have been more transparent about what the logo signified. Second, and very importantly, Greenlist is such a fundamentally sound and excellent process we use to green our products, that we didn't want consumers to be confused about it due to a logo on one product," he said.

The Greenlist logo was "intended to signify that the Windex products had achieved the highest internal ratings according to the company's patented Greenlist process," according to the release, and the company "proudly" continues to use the process to help green the company's chemistry.

To read the complaint in *Koh v. S.C. Johnson*, click here.

Why it matters: Advertisers making environmental claims should be cautious when using marks or symbols that could be mistaken by consumers for third-party certifications. In addition to the S.C. Johnson settlements, Fiji Water recently faced a class action over similar allegations.

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eBay Could Be Liable for Trademark Infringement in EU

In a suit brought by L'Oreal against eBay, the European Court of Justice ruled that online auction sites could be liable for trademark infringement if they "actively promote" counterfeit goods.

"The proprietor of a trade mark is entitled to prevent an online marketplace operator from advertising – on the basis of a keyword which is identical to his trade mark and which has been selected in an internet referencing service by

that operator – goods bearing that trade mark which are offered for sale on the marketplace, where the advertising does not enable reasonably well-informed and reasonably observant internet users, or enables them only with difficulty, to ascertain whether the goods concerned originate from the proprietor of the trade mark or from an undertaking economically linked to that proprietor or, on the contrary, originate from a third party," the court said.

L'Oreal had filed several suits in EU countries, alleging that eBay should be liable for sales of counterfeit goods and imported products not intended for the European market.

The EU's highest court agreed, ruling that certain situations could result in liability for intermediary service providers.

Where "the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promotion of those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale," the court said.

It said the referring national court must determine whether eBay played such a role and was liable.

But where operators confine themselves to a "merely technical and automatic processing of data," and do not take an "active role," they will not be liable.

The court instructed the national court to decide whether damages and injunctive relief are required, noting that "it is sufficient….for [eBay] to have been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance."

In reaching its conclusions, national courts must "strike a fair balance between the various rights and interests" of the parties, but "are able to order the operator of an online marketplace to take measures which contribute, not only to bringing an end to infringements of those rights by users of that marketplace, but also to preventing further infringements of that kind. Those injunctions must be effective, proportionate, dissuasive and must not create barriers to legitimate trade," the court said.

To read the court's decision in *L'Oreal v. eBay*, click here.

Why it matters: The decision is at odds with case law in the United States, where the Second Circuit ruled last year that eBay did not violate Tiffany & Co.'s trademark rights by allowing sellers to list used items from the retailer on its Web site, even though the auction site knew or had reason to know that there was a substantial problem with the sale of counterfeit Tiffany jewelry on the site. While the U.S. court did hold that the site could be liable for false advertising, a federal court judge later dismissed the claim for lack of evidence.

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NAD Considers Bayer's Calcium Supplement Claims

While Bayer Healthcare provided reasonable evidence to support certain claims for its Citracal calcium supplement, the National Advertising Division recommended that it should modify or discontinue broad claims that the supplement's bone density builder has been "Clinically Proven to Significantly Increase Bone Density Up to 5%."

In a challenge brought by competitor Pfizer, the NAD said there was no clinical evidence that genistein, the ingredient believed to build bone mass in Bayer's supplement, offered benefits to users other than postmenopausal women with lower-than-normal bone density.

Bayer's unqualified claim that genistein could increase bone density could reasonably be understood to convey the message that it had been clinically proven to build bone density in *all* people, regardless of their age and gender, the NAD said.

Despite Bayer's argument that its target audience and sales are predominantly driven by post menopausal women, the NAD said that a particular group's interest in a product was not the relevant inquiry. While "it may be true that the advertiser's marketing plan demonstrates its intent to only market to women over the age of fifty, it is well-established that an advertiser is responsible for all the reasonable messages conveyed by its unqualified claim to the population as a whole," the NAD said, recommending that Bayer discontinue the claim.

And due to “the powerful impact clinically proven claims have on customers, NAD further recommends that the qualifying language appear as part of the claim rather than in a separate disclaimer,” the panel added.

However, the NAD determined that Bayer had submitted sufficient evidence to continue using the product name “Citracal PLUS Bone Density Builder” and that absent extrinsic evidence of customer confusion, the name was not misleading.

Finally, the NAD analyzed the following claim: “How is this different from regular calcium supplements? As you age, it gets harder to build bone density with calcium and vitamin D alone. Citracal Plus Bone Density Builder is the only leading calcium supplement to contain Genistein, an ingredient found in nature in soy that has been clinically proven to significantly increase bone density by up to 5%.”

While Bayer argued that the claim was a product difference claim, the NAD said it was a comparative superiority claim.

“The question is clearly an invitation to the consumer to make a comparison between the advertiser’s product and other supplements on the market,” the NAD said. Because Bayer lacked evidence of head-to-head testing to support such a claim, the NAD recommended that it be discontinued.

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

Why it matters: In addition to regulators and legislators, the NAD is also keeping an eye on dietary supplements, as evidenced by the Bayer decision.

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