Advertising Law @ manatt

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In This Issue

Tobacco Firms Sue To Block Marketing Limits

A coalition of cigarette makers have filed a lawsuit to block marketing restrictions in a law that authorizes the Food and Drug Administration to regulate tobacco.

The plaintiffs include R.J. Reynolds Tobacco Co., maker of Camel cigarettes, and Lorillard Inc., maker of Newport menthols. The two companies are, respectively, the second and third biggest tobacco manufacturers in the country.

The lawsuit challenges aspects of the Family Smoking Prevention and Tobacco Control Act, which was enacted in June. The new law, which takes full effect in three years, gives the FDA authority over tobacco for the first time. It doesn't permit an outright ban of nicotine or tobacco, but allows the agency to regulate what goes into tobacco products, publicize those ingredients, and prohibit certain marketing campaigns, especially those geared toward children. For instance, it permits the FDA to force reductions in nicotine levels, ban candy flavorings, and block labels such "low tar" and "light." Companies also must put large graphic warnings over any carton images.

The plaintiffs complain the law bans them from using "color lettering, trademarks, logos or any other imagery in most advertisements, including virtually all point-of-sale and direct-mail advertisements." They also say the law prevents them from "making truthful statements about their products in scientific, public policy and political debates." And they complain that newly mandated health warnings would relegate the companies' branding to the bottom half of the cigarette packaging, making it "difficult, if not impossible, to see."

All of these restrictions, the plaintiffs argue, infringe impermissibly on their constitutional right to free speech.

Joining RJR and Lorillard in the complaint filed in federal district court in Kentucky are National Tobacco Co., Discount Tobacco City & Lottery Inc., and Kentucky-based Commonwealth Brands, which is owned by Britain's Imperial Tobacco Group PLC. The complaint, which names the FDA and government and individual officials as defendants, seeks to put portions of the law on hold while the case is heard. Ultimately, although the complaint doesn't challenge the decision to give the FDA authority over tobacco products, it seeks to get the marketing provisions stripped out.

Altria, Inc., parent company of the nation's largest tobacco maker, Philip Morris USA, supported the new law, saying it was tough but fair regulation. Its smaller rivals opposed the law, saying it would lock in Altria's dominant market position. Altria's brands include Marlboro, which currently holds more than 40 percent of the cigarette market.

Why it matters: With previous laws limiting cigarette advertising and marketing going back for more than 40 years, tobacco marketers operate under the strictest regulatory regime in the country. But plaintiffs argue that the new set of restrictions goes too far in its attempt to limit cigarette marketing and in doing so, violates the First Amendment.

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Weight Watchers Sues Nestle Over Use of Trademark

Weight Watchers International Inc. has filed a complaint accusing Nestle SA of improperly displaying the Weight Watchers trademark on Web sites and packaging of diet frozen foods and desserts for Nestle-owned brands Lean Cuisine and Skinny Cow. According to the complaint filed in federal court in Manhattan, the products also infringe on Weight Watchers' "points" weight-loss system trademark.

"Nestle's Lean Cuisine and Skinny Cow brands are intended to target directly weight and health-conscious consumers—precisely the individuals who follow Weight Watchers International's points system and who purchase products that are sold under the Weight Watchers brand," the complaint states.

Nestle, which is the world's biggest food manufacturer, is parent company to Jenny Craig

Inc., a rival of Weight Watchers in the weight loss industry. Weight Watchers alleges that Nestle is unfairly benefiting from the trademark infringement by wrongly associating itself with Weight Watchers. The company is seeking unspecified damages and a court order blocking the infringement.

The case is not without precedent. Weight Watchers previously sued Campbell Soup Co. and U.K. supermarket giant Tesco for referring to Weight Watchers and its "points" trademark on packaging for certain products. Both cases settled.

Why it matters: Weight Watchers argues that the use of its trademark and points system will confuse consumers into thinking it has endorsed Nestle's products. The question centers around whether a company can use a trademark for a diet program to tell consumers that its foods fit into the program, and if so, whether the company needs to do so in a manner that doesn't cause consumer confusion.

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Gift Card Suit Against McDonald's Moves Forward

A California federal court has rejected a motion by McDonald's Corporation to dismiss a class action lawsuit alleging that the fast fooder refused to exchange a $5 gift card for cash in violation of California statutory and common law.

California Civil Code section 1749.5(b)(2) provides that "any gift certificate with a cash value of less than ten dollars ($10) is redeemable in cash for its cash value." Plaintiff purports to represent a class of individuals who sought and failed to redeem McDonald's gift cards for cash.

McDonald's challenged the plaintiff's standing to bring a claim under the UCL, arguing he did not suffer the required injury in fact. It also sought dismissal of the plaintiff's unfair enrichment claim, arguing that he did not lose money or property. Because plaintiff could still exchange the card for five dollars' worth of McDonald's merchandise, he had suffered no injury and no loss of money or property, McDonald's argued.

The court rejected both arguments, finding the plaintiff's allegation that he was denied money to which he has a right under law was sufficient to establish standing.

On the back of the gift cards, it states that "[t]he value on this card may not be redeemed for cash . . . unless required by law." The court dismissed a separate claim brought under California's false advertising law alleging that the language failed to apprise consumers of their right to request cash and deceived consumers into not requesting cash because, the court found, the plaintiff did not allege reliance on the language.

Why it matters: This case highlights one of the difficulties of complying with myriad

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state laws governing gift cards. According to the complaint, text on the back of the gift card itself takes into account any law requiring that the card be redeemable for cash. Yet the case is proceeding against McDonald's on the alleged action of an employee (among the company's many thousands of employees) who refused to redeem the gift card for cash.

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Complaints Against Video Ad Nets Rise

As the use of video ads rises, more online marketers are grumbling about the practices by video ad networks that run the ads.

The complaints center around accusations that video ad networks deceptively boost their ad impression numbers by running video units that start automatically when users visit a site—sometimes below the fold—making it unlikely that viewers would actually see the ads.

Part of the problem lies in the complexity of this relatively new form of marketing. Most video ad networks offer a variety of placements. Some are adjacent to actual content while many others are placed within display ads ("in-banner" video). Ad networks also can feature thousands of sites. The "fold" (text and imagery which can be seen only if the viewer scrolls down) can vary depending on the size of the user screen, which can range from an iPhone to a desktop monitor. These factors make it difficult and expensive for buyers to monitor their video ads.

Several digital media industry groups are starting to take notice of this new form of ad media, and the problems it presents. The Interactive Advertising Bureau is developing guidelines on auto-stream ads specifically. The online ad watchdog takes the position that legitimate reasons exist to begin a video upon page load, but does not encourage auto-play of video below the fold on a page that is not designed to focus on that video content. The IAB is also seeking to require more transparency on auto-play methodologies for digital video ads and developing guidelines for appropriate audience measurement of auto-play streams.

Why it matters: Buyers argue that it is the ad network's responsibility to monitor whether buyers are getting what they pay for. But others counter that some buyers are either uninformed or negligent when it comes to video network buys. The recession has put pressure on ad budgets, and buyers choosing between a pre-roll video at $50 CPM (cost per mille (thousand)) or networks dangling inventory at CPMs under $10 may simply opt for the latter without looking too hard at what they are getting.

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Speaker: Clayton Friedman

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November 18-20, 2009

4th Annual Word of Mouth Marketing Association Summit

Topic: "FTC Developments"

Speaker: Anthony DiResta

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Dannon Settles Activia Lawsuit for $35 Million

The Dannon Company has agreed to pay up to $35 million to settle a class action lawsuit accusing it of falsely advertising its Activia and DanActive products.

The monies will go to a fund to reimburse consumers who bought Activia and DanActive yogurt. Under the settlement, Dannon will also change labeling and marketing for the two brands, including increasing the visibility of the scientific names of the strains of probiotics in the products.

The lawsuit, filed last year in federal district court in California and later moved to Ohio, accused Dannon of overstating the brands' health benefits. According to the complaint, Dannon spent more than $100 million between January 2006 and July 2007 on marketing Activia, sales of which were $128 million in 2006 and roughly $300 million in 2007.

Anyone who bought the yogurts since their introduction in 2006 (Activia) and 2007 (DanActive) can make a claim for reimbursement of up to $100. A Web site will be set up with details for consumers.

In a statement, Dannon, a unit of France's Groupe Danone, denied any wrongdoing and said it agreed to settle to "avoid the uncertainty and expense of further litigation." Dannon expressed confidence that similar claims by the Federal Trade Commission "will be resolved soon."

Why it matters: In recent years, claimed health benefits have become a popular way to market food products. At the same time, such claims are being carefully scrutinized by government agencies (and plaintiffs' lawyers). As Activia's successful launch demonstrates, health benefit claims can be a great way to sell a food product, but at the same time, companies must take care to ensure that any such claims comply with false advertising laws.

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Netflix Contest Raises Privacy Concerns

A new contest by online DVD rental service Netflix has privacy advocates questioning whether the initiative will infringe on members' privacy.

For the project, Netflix intends to publicly release "anonymized" data, including customers' gender, ages, ZIP codes, and previously rented movies, in the hopes that interested researchers will crunch that data to figure out how to better predict users' tastes.

January 21-22, 2010

6th Annual Film, TV & New Medial Law Conference

Topic: "Brand Integration Deals"

Speaker: Jordan Yospe

Millennium Biltmore Hotel

Los Angeles, CA

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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

The contest, which comes with a $500,000 prize, is a follow-up to a $1 million competition to build a better recommendation system. Last month, Netflix awarded the prize in the earlier contest to the seven-person team BellKor's Pragmatic Chaos.

Netflix says it is confident the contest will not compromise customers' privacy. "When we do, it will be completely anonymous. We've done everything we can to ensure our members' privacy and the security of their information," a Netflix spokesperson said.

Yet some privacy experts contend that researchers will be able to determine the identities of customers from other data that Netflix will make available. University of Colorado law professor Paul Ohm has issued a public plea to Netflix to change its plans. "Researchers have known for more than a decade that gender plus ZIP code plus birthdate uniquely identifies a significant percentage of Americans (87% according to Latanya Sweeney's famous study)," Ohm wrote. He added that even without exact birthdates, interested researchers will be able "to tie many people directly to these supposedly anonymized new records."

Netflix has previously faced the scrutiny of privacy advocates. For its last contest, the company released anonymous lists of users' reviews. But two University of Texas computer scientists published research concluding that it was possible to identify users by comparing reviews of obscure movies on Netflix with reviews on Imdb.com that were published under screennames.

Why it matters: Netflix's planned contest presents an interesting question. Some privacy advocates argue that the release of the data might violate the federal Video Privacy Protection Act, which bans movie rental stores from revealing personally identifiable information about consumers. If it is true that gender plus ZIP code plus birthdate can uniquely identify 87% of Americans, is that enough to qualify as personally identifiable information? What percentage, if any, is enough to qualify as personally identifiable information?

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Speaker: Terri Seligman

New York Marriott Downtown

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Our Practice

Whether you're a multi-national corporation, an ad

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Word of Mouth Marketing Association Annual Summit

November 18-20/Las Vegas, NV

Topping the agenda for WOMMA's upcoming Annual Summit in Las Vegas is a keynote address by Chuck Harwood, Assistant Deputy Director, Bureau of Consumer Protection, of the Federal Trade Commission, followed by a roundtable panel discussion of ethics, endorsements and disclosure. Roundtable panelists include Manatt partner and WOMMA General Counsel, Tony DiResta.

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