

Advertising Law

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Toothpaste, Juice Targets of New False Advertising Suits

Two new class action suits were recently filed against Procter & Gamble and Walgreen Co. over toothpaste and juice products.

Following a [National Advertising Division decision](#) that recommended P&G modify claims for its Crest Sensitivity Treatment & Protection toothpaste, a plaintiff filed suit alleging false advertising.

P&G advertised that its toothpaste could provide "Relief Within Minutes" but lacked sufficient support for the claim, the NAD said.

"While there is improvement in tooth sensitivity *over time*," the evidence was insufficient to support the "Relief Within Minutes" claims. NAD recommended that P&G discontinue the claims.

The class action, filed less than two months later in New Jersey, relies upon the NAD decision and alleges that P&G took an existing product, changed the packaging, color, and price, and then sold it as the new Crest Sensitivity product, which costs \$3 more – a 75 percent price premium.

Given that nearly 40 million people in the United States suffer from tooth sensitivity, the defendant's "Relief Within Minutes" claims were highly material to consumers, according to the complaint, which seeks to certify a nationwide class to receive compensatory and punitive damages.

In the second suit, the plaintiff claims that Walgreen's 100% Grape Juice and 100% Apple Juice contain "dangerously high levels of arsenic and lead" in addition to juice. The plaintiff contends that the grape juice has more than twice the amount of arsenic and three times the lead allowed by the Food and Drug Administration in bottled water.

The juices were sold without any label or warning to indicate that they contained arsenic and lead but did advertise that they were "Heart Healthy" and contained "no artificial preservatives, flavorings or colorings," claims meant to imply the juices are safe and healthy, according to the complaint.

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Upcoming Events

January 24-25, 2012
ACI's 25th National Advanced Forum on Advertising Law

Topic: "Capitalizing on the Mobile Marketing Message While Reducing Exposure to New and Unpredictable Liabilities"

Speaker: [Linda Goldstein](#)
New York, NY
[For more information](#)

February 13-14, 2012

Law Seminars International: Developing Applications for Mobile Devices

Topic: "Privacy: Practical Tips for Ensuring Regulatory Compliance"

Speaker: [Linda Goldstein](#)
San Francisco, CA
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The suit alleges that exposure to arsenic and lead can build up toxins in the body and cause serious injuries to the nervous system, chronic poisoning, and cancer – and pose particular problems for children – and seeks a corrective advertising campaign as well as individual restitution and damages.

To read the complaint in *Rossi v. The Procter & Gamble Co.*, click [here](#).

To read the complaint in *Boysen v. Walgreen Co.*, click [here](#).

Why it matters: The suit against Procter & Gamble cites heavily from the NAD decision, noting that the self-regulatory body “has expertise in determining the express and implied messages reasonably conveyed by an advertisement” and found the company’s claims unsubstantiated. Companies facing an unfavorable NAD result should not be surprised to find a consumer class action in its wake.

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FTC Settles Flash Cookies Action

In its first action addressing Flash cookies, the Federal Trade Commission has finalized a settlement with ScanScout, an online advertiser that the agency alleged used the cookies to track Internet users.

According to the Complaint, ScanScout deceptively claimed that consumers could opt out of receiving targeted ads by changing their browser settings to block cookies. However, changing browser settings did not remove or block the Flash cookies that ScanScout used to conduct behavioral advertising from April 2007 until September 2009.

Like HTTP cookies, Flash cookies can be used to store data correlated with a unique identification number on a computer – to recognize an individual user’s computer and resulting online activity – but are stored in a different location. According to the FTC, when users changed the privacy settings of their Internet browsers to delete or block cookies, the Flash cookies were unaffected.

Under the settlement agreement, ScanScout will be required to place a prominent notice on its homepage, stating “We collect information about your activities on certain websites to send you targeted ads. To opt out of our targeted advertisements, click here” and also include a direct link to the opt-out mechanism.

The agency mandated that the mechanism require no more than one action by a consumer and remain in effect for five years unless disabled by the user.

“Within close proximity” to the opt-out mechanism, ScanScout must also provide consumers with information about its data collection practices and the current status of the user’s choice (opted-out or not opted-out).

In addition, the site must refrain from making any misrepresentations about its collection, sharing, or use of consumer data.

ScanScout is still allowed to collect data – even from opted-out users – for certain purposes, like age verification, fraud prevention, and frequency capping.

To read the complaint in *In the Matter of ScanScout*, click [here](#).

To read the order finalizing the consent decree, click [here](#).

Why it matters: The agency's first action involving Flash cookies should serve as a cautionary tale to companies who also use such cookies. The FTC has demonstrated its focus on consumer privacy over the previous year and the suit against ScanScout provides a reminder to make accurate representations about data collection and use.

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Federal Food Marketing Guidelines Confront Hurdle

In a victory for opponents of the proposed nutritional guidelines for marketing food to children, the Omnibus Appropriations bill included a provision making the future of the program uncertain.

Pursuant to the new law (formally known as the Consolidated Appropriations Act), the Interagency Working Group (IWG) cannot spend money on the guidelines until its member groups – including the Federal Trade Commission, the Food and Drug Administration, the Department of Agriculture, and the Centers for Disease Control – conduct a cost-benefit analysis of their proposed regulations.

In April, the IWG released a preliminary report suggesting a set of guidelines for nutrition criteria on foods marketed to children and teenagers.

While the proposed guidelines would be self-enforcing, groups like the American Association of Advertising Agencies, the Association of National Advertisers, the Promotion Marketing Association, and the Grocery Manufacturers Association, as well as companies such as Kellogg and Viacom, vociferously [objected](#).

The guidelines would amount to “de facto regulations,” the ANA argued, and would require “massive re-engineering of the entire food industry based on nutrition standards that go far beyond any ever approved by a government agency.”

The groups also argued that the guidelines would violate the First Amendment rights of advertisers and food companies and would impact adults as well as children.

Even when members of the IWG seemed to back off from the original proposal in October, with Director of the FTC's Bureau of Consumer Protection David Vladeck saying that “significant revisions” were in order, the industry continued to [express concern](#).

Those efforts resulted in the rider added by Rep. Jo Ann Emerson (R-Mo.) to the Omnibus bill, which was signed into law by President Barack Obama on Dec. 23.

Industry groups hailed the provision.

Dan Jaffe, executive vice president of government relations at the ANA, said that because the proposed regulations would cost advertisers “multi-billions of dollars,” he doesn't think the cost-benefit analysis will be able to justify the cost of the regulations.

“The impact [of the proposed guidelines on the rate of childhood obesity] would have to be very, very high to outweigh their extreme cost,” he told *AdAge*.

To read H.R. 2055, the Consolidated Appropriations Act, click [here](#).

Why it matters: The provision certainly puts a hold on the proposed guidelines for the time being, although it may not be their death knell just yet. In a statement to *AdAge*, FTC spokesperson Cecilia Prewett indicated the program will continue. “Congress has clearly changed its mind about what it would like the Interagency Working Group to do with regard to the report on food marketed to children. The IWG will be assessing [the legislation’s] language and working toward congressional intent,” she said. And calling the legislation “a bogus stalling technique,” Margo Wootan, director of nutrition policy at the Center for Science in the Public Interest and a proponent of the program, said the guidelines will be “considerably” delayed, but “We will encourage the agencies to do this [cost-benefit] analysis as quickly as possible.”

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NAD Inquiry Leads to Mascara Ad Yank

After the National Advertising Division launched a review of Procter & Gamble’s advertisements for its CoverGirl NatureLuxe Mousse Mascara, the company pulled the ads.

The print ads touted the mascara as providing “2X more volume**... **vs. bare lashes” and “20% lighter**...**vs. the most expensive mascara.”

Featuring singer Taylor Swift, the ad included a disclaimer that her “lashes [were] enhanced in post-production.”

The NAD sought claim substantiation and also queried whether the lashes depicted in the photo were achieved solely using the Mousse Mascara – or what degree of post-production enhancement was used.

NAD found that the advertisements falsely and misleadingly implied that consumers who used the mascara would get lashes like those depicted in the advertisement and that the lashes depicted in the photograph were achieved solely using the product.

The NAD said it was “particularly troubled” by the photograph, “which serves clearly to demonstrate (i.e., let consumers see for themselves) the length and volume they can achieve when they apply the advertised mascara to their eyelashes.”

The NAD also referenced a recent decision from the United Kingdom’s Advertising Standard Authority in a similar case, where [two L’Oreal advertisements](#) for foundation were banned.

The ASA determined the ads were misleading because the accompanying images had been digitally manipulated and were therefore not representative of the results the products could achieve.

Noting that P&G had permanently discontinued use of the photograph and all of the challenged claims, the NAD said such action was “necessary and proper under the circumstances.”

To read the NAD’s press release about the decision, click [here](#).

Why it matters: "It is well-established that product demonstrations in advertisements must be truthful and accurate and cannot be enhanced," the NAD emphasized in its decision. Advertisers should note that the NAD action was not brought by a competitor – post-production enhancement techniques are not uncommon in the industry – but was brought by the NAD itself, possibly indicating a focus for future enforcement actions.

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Senate Seeks to Delay Implementation of ICANN's New Domain Names

Stepping into the controversy over ICANN's new domain names, the U.S. Senate Committee on Commerce, Science, and Transportation held a hearing where lawmakers requested a delay in implementation of the program.

The Internet Corporation for Assigned Names and Numbers (ICANN) launched a plan to create new, generic top-level domain names (TLDs) in an attempt to increase Internet address endings.

ICANN approved a plan that would allow entities to purchase domains like ".starbucks" or ".ford." The entity could then expand the domain with pages like "frappuccino.starbucks" or "mustang.ford."

An application fee costs \$5,000, which would be credited toward the evaluation fee of \$185,000.

Critics like the Association of National Advertisers, the American Association of Advertising Agencies, and the Interactive Advertising Bureau [argued that the new TLDs](#) will create a burden on companies by forcing them to spend money to purchase new domains as a defensive move to prevent other companies from doing so in order to protect their brands.

At the hearing, Dan Jaffe, executive vice president of government relations at the ANA, estimated that brands might have to spend \$2 million or more to acquire the TLDs.

The former chairman of ICANN's board, Esther Dyson, said she had reversed her initial support of the program, calling it "a tax on the Internet. Creating a whole new set of redundant names isn't useful."

Multiple Committee members, including Chairman Sen. Jay Rockefeller (D-W. Va.), requested that ICANN slow down the implementation process for TLDs.

"If ICANN is determined to move forward, it should do so slowly and cautiously," Sen. Rockefeller said at the hearing. "The potential for fraud, consumer confusion and cybersquatting is massive and argues for a phased in implementation."

But Senior Vice President of ICANN Kurt Pritz testified that the group does not expect a dramatic increase in the need for defense registrations and that ICANN's plan includes protections for trademarks to protect their brands, including a rapid take-down system.

Pritz said the existing schedule will remain in place.

"The application window will open on January 12 and close on April 12,"

he said. "We are committed to evaluating the process after the initial round."

Why it matters: A few days after the hearing, the Federal Trade Commission [sent a letter](#) to ICANN to express its concern that the new TLDs "could leave consumers more vulnerable to online fraud and undermine law enforcers' ability to track down online scammers." The agency suggested that ICANN implement the new program as a pilot program, substantially reduce the number of TLDs set to be introduced in the first application round, and develop a new program to monitor consumer issues that arise during the first round of implementation. "If ICANN fails to address these issues responsibly, the introduction of new generic TLDs could pose a significant threat to consumers and undermine consumer confidence in the Internet," the Commissioners wrote. "A rapid, exponential expansion of generic TLDs has the potential to magnify both the abuse of the domain name system and the corresponding challenges we encounter in tracking down Internet fraudsters." Earlier this week, the U.S. Department of Commerce also weighed in. Lawrence Strickling, Assistant Secretary of Commerce, wrote in a letter to ICANN that steps need to be taken to ease corporate concerns over the Web-name expansion. However, despite the concern of lawmakers and regulators, neither Congress nor the FTC has the power to stop ICANN from implementing its program. With the application period fast approaching and ICANN sticking with its plan, trademark holders should determine whether or not they will spend the money to register for a new TLD.

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Defendants Found in Contempt for Violation of FTC Order

Lane Labs-USA and its president Andrew Lane were found in contempt of a court order barring them from making deceptive health claims, a U.S. District Court judge has ruled, finding in favor of the Federal Trade Commission.

The agency filed suit against the defendants in 2000, alleging they made false claims that a shark cartilage product and skin cream called BeneFin and Skin Answer were clinically proven to prevent, treat, or cure cancer.

To settle the suit, the defendants agreed to an order that barred them from making unsupported health claims about any food, drug, or dietary supplement. They were also banned from misrepresenting "the existence, contents, validity, results, conclusions, or interpretations of any test, study or research."

In 2007, the FTC filed contempt charges, alleging that the defendants violated the 2000 order in their marketing of calcium supplement AdvaCAL.

The defendants advertised that AdvaCAL was "three to four times more absorbable" than other calcium supplements, a claim that the defendants did not possess competent and reliable scientific evidence to support for any segment of the population, the agency said.

The New Jersey federal court first denied the FTC's contempt motion, a

decision that was reversed by the 3rd Circuit in October 2010.

On remand, the court granted the motion for a contempt order.

Despite the defendants' arguments that they had substantially complied with the order because their violations were "technical" or "inadvertent," the court disagreed.

The defendants' "three to four times more absorbable" claim directly violated the original consent order. "This violation was not simply caused by a delay in response or a mistake in form. Nor was the defendants' extensive distribution of the claim the result of a simple oversight. Rather, this was a consistent, substantive violation of [the consent order], and as such, was a violation unprotected by the defense of substantial compliance," U.S. District Court Judge Dennis M. Cavanaugh wrote.

The court must still determine monetary damages pursuant to the order.

To read the U.S. District Court's decision in *FTC v. Lane-Labs*, click [here](#).

To read the 2000 consent order, click [here](#).

Why it matters: The court acknowledged that the defendants acted in good faith, but said that "Good faith alone, however, does not bar a conclusion that defendants acted in contempt." Further, the court expressed concern with the FTC's delay in bringing the contempt suit. Because the defendants made many of the statements at issue in 2001, Judge Cavanaugh called the agency's "failure to act on these statements until January of 2007 bewildering. This extensive delay understandably led defendants to believe that they were in compliance with the [consent order], and for the FTC to bring its motion after six years seems to the court to be fundamentally unfair."

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Congressional Updates: VPPA Amendment Passes, Battle Over SOPA

Legislation impacting advertisers recently made headlines in Congress, with an amendment to the Video Privacy Protection Act (VPPA) gaining the approval of the House of Representatives while the Stop Online Piracy Act (SOPA) caused such dissension it resulted in two days of hearings and no vote.

Under the VPPA, video service providers must destroy customers' personally identifiable information "as soon as practicable, but no later than one year from the date the information is no longer necessary for the purpose for which it was collected." The law does not provide any exemptions to this requirement – even the consumer's consent to maintain their information past one year.

Seeking an integration with Facebook that would enable users to share their movie selections, [Netflix threw its support](#) behind H.R. 2471. The bill would amend the VPPA so that video service providers would be able to obtain a consumer's "informed, written consent" in order to share their information on social networks.

Despite some opposition – lawmakers expressed concern about the

privacy implications of the amendment – the bill passed the House by a vote of 303 to 116.

A similar version has not yet been introduced in the Senate.

In other legislative news, the House Judiciary Committee convened to vote on H.R. 3261, the Stop Online Piracy Act, which has the support of groups like the Motion Picture Association of America and the Recording Industry Association of America, as well as companies like Disney and Sony.

The bill – along with its Senate counterpart, the Protect IP Act – would authorize the Attorney General and copyright holders to seek court-ordered penalties against Web sites accused of enabling copyright infringement, even if the operators of the sites are physically located outside of the country.

In addition, ISPs, search engines, payment processors, and advertising networks would be banned from engaging in business with the infringing sites.

Critics argue that the statute is too broadly written, could lead to censorship, and poses real problems for sites that contain user-generated content, like YouTube and Facebook.

And SOPA opponents Sen. Ron Wyden (D-Ore.) and Rep. Darrell Issa (R-Calif.) recently introduced an alternative anti-piracy bill, the Online Protection and Enforcement of Digital Trade (OPEN) Act. Their bill does not mandate that search engines stop indexing sites or service providers to halt traffic to specific URLs like SOPA, and it already has the backing of companies including AOL, eBay, Facebook, Google, LinkedIn, Twitter, Yahoo, and Zynga.

Although the Committee began a mark-up of SOPA as scheduled, the debate raged for two days before lawmakers called a halt to their work on the controversial measure without an official vote. The two-day ordeal was characterized as a “circus” by the *Washington Post* and “heated – and at times absurd” by *MediaPost*.

To read H.R. 2471, click [here](#).

To read SOPA, click [here](#).

To read the OPEN Act, click [here](#).

Why it matters: While the VPPA amendment sailed through the House and has the support of Netflix, Facebook, and groups like the Digital Media Association, it faces an uphill battle in the Senate from consumer privacy-focused lawmakers like Sen. Al Franken (D-Minn.), who *The New York Times* reported is expected to hold a hearing on the amendment in early 2012. And given the debate surrounding SOPA, its passage also remains a question mark.

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Happy 5th Birthday, CFBAI!

The Council of Better Business Bureaus (CBBB) is celebrating the five-year anniversary of the Children’s Food and Beverage Advertising Initiative (CFBAI), which was launched in November 2006 when ten companies agreed to limit what foods they

advertised to children under the age of 12.

Over the last five years, the program has grown to include a total of 17 companies – including McDonald’s Corp., Sara Lee, and Unilever – that represent the vast majority of food and beverage advertising to children, the CBBB said.

The scope of the program has also expanded its coverage, with recognition of new and emerging media like smartphone ads and advertising in children’s video games and DVDs.

“Thanks to CFBAI’s participants, kids now see ads for a wide variety of healthier products, including cereals, crackers, yogurts, soups, snacks and meals, that have less sugar, sodium and fat, and are more nutritious,” Elaine D. Kolish, CBBB vice president and director of CFBAI, said in a statement. “These days, children are regularly seeing ads for products that include, for example, whole grains.”

The CBBB said its most significant advance came in 2011, with the establishment of [category-specific uniform nutrition criteria](#). The criteria apply to ten product categories like dairy products, juice, and main dishes and entrees. Previously, each company developed its own standards for products. But under the new uniform criteria, each category has established limits – juices cannot have any added sugars and must contain no more than 160 calories, for example.

“The companies that participate in the CFBAI have made major changes in their business practices since the program was launched,” Kolish said. “Under self-regulation, they’ve significantly improved the products in child-directed ads in both traditional and new media, none are advertising to kids in elementary schools, and none are doing product placement in child-directed entertainment or editorial content.”

The CBBB issued a five-year retrospective report, which it said showed “there was excellent compliance with the participants’ commitments to advertise to children only products meeting meaningful nutrition criteria or not to engage in child-directed advertising.”

To request a copy of the five-year report, click [here](#).

Why it matters: The CFBAI’s anniversary celebration comes at a time of increased focus on marketing to children. [Industry groups](#) are currently battling a proposal from various government agencies that would establish a set of guidelines for nutrition criteria marketed to children and teenagers, arguing that government oversight is unnecessary in light of self-regulatory programs, including the CFBAI.

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