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In This Issue

Senate Confirms Two New FTC Commissioners
Lindsay Lohan Sues E-Trade Over 'Milkaholic' Baby Ad
LifeLock Settles with FTC for $12 Million Over False Claims
Fees for NAD Challenges to Increase
Suit Against Tobacco Companies Over 'Light' Cigarettes Hits Snag
Maine Repeals Law Prohibiting Marketing to Children

Senate Confirms Two New FTC Commissioners

The Senate has unanimously confirmed two new commissioners to the Federal Trade Commission, filling out the Commission for the first time in almost two years.

Edith Ramirez will fill the seat vacated by Deborah Majoras, who stepped down in March 2008. Ramirez, who graduated from Harvard Law School and Harvard-Radcliffe College, clerked for the Honorable Alfred T. Goodwin, a 9th Circuit judge, before joining Gibson, Dunn & Crutcher.

Ramirez, now a partner at a firm in Los Angeles, focuses on intellectual property and business litigation.

The second confirmed commissioner, Julie Brill, was most recently a Senior Deputy Attorney General and Chief of the Consumer Protection and Antitrust Division for the North Carolina Department of Justice. She also spent 20 years working for the Vermont Attorney General's Consumer Protection and Antitrust Divisions.

Brill will replace Pamela Jones Harbour, whose term ended in September 2009. With the confirmation of Brill, Harbour announced her resignation effective April 6, 2010.

Ramirez's term will last until Sept. 26, 2015, while Brill's term will not expire until Sept. 26, 2016.

Why it matters: The new commissioners will begin work immediately following their confirmation. Having received awards in recognition for her consumer protection and privacy work, as well as testifying before Congress regarding data security breach legislation, Brill's addition to

UPCOMING EVENTS

April 9, 2010

the FTC is in line with the Commission's recent focus on privacy issues.

back to top

Lindsay Lohan Sues E-Trade Over 'Milkaholic' Baby Ad

Lindsay Lohan filed a $100 million lawsuit against E-Trade claiming that her privacy rights were violated by a commercial the company aired during the Super Bowl.

The latest in the company's ongoing series of ads featuring talking babies who play the stock market using E-Trade's services, the "Girlfriend" ad featured a male baby apologizing to a female baby for not calling her the night before.

Suspicious, she asks if that "milkaholic Lindsay" was over. Another female baby's head pops into the screen and asks, "milk-a-whaaaaat?"

Lohan's suit, filed in New York state court, claims that E-Trade "knowing[ly] us[ed] a likeness of [her] name, characterization, and personality for advertising purposes, and for purposes of trade and commercial benefits" without her consent.

Lohan's lawyer, Stephanie Ovadia, told *The New York Post* that Lindsay has single-name recognition, à la Oprah or Madonna.

"Many celebrities are known by one name only, and E-Trade is using that knowledge to profit," Ovadia, said. "They used the name Lindsay. They're using her name as a parody of her life. Why didn't they use the name Susan? This is a subliminal message. Everybody's talking about it and saying it's Lindsay Lohan."

In addition to $50 million in exemplary damages and $50 million in compensatory damages, Lohan is seeking all copies of the ad, as well as an injunction to stop it from airing.

The size of the damages request is due in part to the fact the commercial aired during the 2010 Super Bowl – the most watched television show in history – and the Winter Olympics, meaning the ad was seen by hundreds of millions of people.

A spokesperson for the company that produced the spot said it "just used a popular baby name that happened to be the name of someone on the account team."

In a statement, E-Trade said its advertising campaign "is meant to be witty and memorable, while effectively communicating the powerful investing tools and services offered by E-Trade. We believe the claims are without merit and we intend to defend ourselves vigorously in this case."

Why it matters: Lohan may face several hurdles in her suit, from her

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April 14-15, 2010
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Philadelphia, PA
The Union League
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April 21-23, 2010
ABA Antitrust Law Spring Conference
Topic: "Mock Trial 2010: A Jury Review of Exclusionary Conduct"
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Washington, DC
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May 19, 2010
Beverly Hills Bar Association Entertainment Law Committee
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comments on Twitter at the time the commercial aired (she joked about it, tweeting, "hahahaha vitamin D never tasted so good") as well as evidence that the ad was never directed at her (a reporter sat through the commercial's creation and when, in December, he specifically asked if Lohan was the intended target, the answer was "not at all.") In addition, Lohan may have to make an embarrassing case: that the single-name recognition E-Trade allegedly traded on is that of a party girl whom the public knows as someone who imbibes too much "milk." Whether or not the case moves forward, it does demonstrate that celebrities consider more than just their likeness protectable and the (purported) use of qualities associated with them in advertising can trigger expensive right of publicity suits.

back to top

LifeLock Settles with FTC for $12 Million Over False Claims

LifeLock Inc. settled charges that it made false claims about its identity theft protection and data security services with the Federal Trade Commission by paying $12 million and agreeing to change its advertising.

In its complaint, the FTC charged that LifeLock's ads claimed it could prevent identity theft for consumers who paid $10 each month for the service.

Specific claims included: "By now you've heard about individuals whose identities have been stolen by identity thieves. . . . LifeLock protects against this ever happening to you. Guaranteed" as well as "Please know that we are the first company to prevent identity theft from occurring."

However, the FTC said that the company only provided protection against certain forms of identity theft, not including the misuse of existing bank and credit card accounts, the most common type of identity theft.

The company also provided no protection against medical identity theft or employment identity theft, the FTC said.

In addition to false claims about its services, the company misrepresented its own data security, the complaint also charged.

The company claimed that "Only authorized employees of LifeLock will have access to the data that you provide us, and that access is granted on a 'need to know' basis" and "All stored personal data is electronically encrypted."

The FTC charged that the company routinely collected sensitive information from its customers – like Social Security and credit card numbers – and that the data was not in fact encrypted, nor was it only

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Under the terms of the settlement, LifeLock agreed to pay $11 million to the FTC and $1 million to 35 state attorneys general. The FTC will use the money to provide refunds to consumers.

The company also agreed to take more stringent measures to safeguard the personal information it collects from its customers and must establish a comprehensive data security program.

It is also prohibited from misrepresenting the “means, methods, procedures, effects, effectiveness, coverage, or scope of any identity theft protection service,” as well as misrepresentations about the risk of identity theft and the manner and extent to which LifeLock protects its customers’ personal information.

Why it matters: The settlement is at the intersection of false advertising and identity theft, an issue the FTC continues to focus on as the number one consumer complaint for each of the last 10 years.

back to top

Fees for NAD Challenges to Increase

The Council of Better Business Bureaus announced that it will increase the fee charged for challenges filed with the National Advertising Division.

Corporate partners of the CBBB will now pay $3,500, up from $2,500. For companies that are not corporate partners, the filing fees are charged on a sliding scale based on the company’s gross annual revenue.

Companies with gross annual revenue under $400 million pay $6,000; those with gross annual revenue between $400 million and $1 billion pay $10,000; and companies with more than $1 billion in gross annual revenue pay $20,000.

The NAD provides for a waiver or modification of the filing fee based on a showing of economic hardship.

In a statement, Eric Mower, the Chairman of the National Advertising Review Council Board of Directors, said the goal of the new fee structure “is to more equitably share the cost of self-regulation among member and non-member users of the system.”

“The additional revenue generated by the increase in filing fees will supplement the resources available to NAD and assure that the NAD process remains available to serve all members of the advertising industry,” said C. Lee Peeler, President and CEO of NARC.

The new filing fees were effective March 15, 2010.

Why it matters: For a company that seeks to challenge the advertising claims made by a competitor, the NAD remains the more cost-effective route. A lawsuit filed under the Lanham Act costs significantly more than a challenge before the NAD, even with the price bump.

back to top

Suit Against Tobacco Companies Over 'Light' Cigarettes Hits Snag

Class action plaintiffs who sued Philip Morris claiming that the company fraudulently marketed its "light" and "low-tar" cigarettes as safer products cannot rely upon the findings from the Department of Justice lawsuit on the same issue, a U.S. District Court Judge in Maine has ruled.

The plaintiffs filed suit against Philip Morris and Altria, its parent company, alleging the companies fraudulently marketed and advertised light and low-tar cigarettes as a healthier alternative to regular cigarettes.

The plaintiffs then filed a motion seeking to apply issue preclusion to prevent the defendants from relitigating issues that were decided in an earlier lawsuit brought by the Department of Justice against nine tobacco company defendants and two industry groups. In that suit, the DOJ claimed the defendants had participated in a decades-long enterprise to deceive the American public about the health effects and addictiveness of cigarettes, including light cigarettes.

U.S. District Court Judge Gladys Kessler ruled for the government and issued an opinion with 4,088 factual findings.

Philip Morris and Altria argued that the findings in that case – which lasted seven years and included a nine-month trial – should not apply to the consumer class action because the issues in the two cases were not identical, the relevant time periods were different, and new scientific evidence existed.

Judge John A. Woodcock Jr. agreed, denying the plaintiffs' motion for collateral estoppel.

The DOJ case involved multiple other defendants and Philip Morris and Altria "cannot be held liable for 'the collective wrongful acts of American tobacco companies,'" with the application of factual findings about other companies, Judge Woodcock wrote.

"Further, light cigarette litigation is a distinct subset within tobacco litigation as a whole, and the extent to which Judge Kessler separately considered issues unique to light cigarettes is unclear. Whether [the defendants] violated various state marketing and unjust enrichment statutes by fraudulently advertising light cigarettes is distinct from whether nine different cigarette companies and trade organizations participated in a decades-long enterprise to defraud consumers in six different ways. Liability in the pending actions must depend on the specific actions or inactions of the named defendants in relation to light cigarettes," Judge Woodcock wrote.

He also expressed concern that jurors could be confused about correctly applying the factual findings and might punish the defendants for injuries to non-parties with a higher damages award.

Why it matters: The ruling is a major blow to the plaintiffs and another victory for the tobacco companies in light cigarette cases. However, the case continues and the tobacco industry faces dozens of other class actions across the country alleging the fraudulent marketing of light and low-tar cigarettes.

back to top

Maine Repeals Law Prohibiting Marketing to Children

Citing constitutional challenges, a Maine legislative committee voted on March 11, 2010, to repeal the state's Act to Prevent Predatory Marketing Practices Against Minors.

The law, which went into effect on September 12, 2009, prohibited companies from knowingly gathering personal information of those under 18 without parental consent.

After the law was enacted, a group of plaintiffs – the Maine Independent Colleges Association, Maine Press Association, Reed Elsevier, and NetChoice – filed suit challenging its constitutionality.

Maine Attorney General Janet Mills agreed not to enforce the law, and the plaintiffs agreed to dismiss the suit.

In January, state senator Elizabeth Schneider, who sponsored the original legislation, proposed a new bill with similar intent but that was narrower in scope.

The Act to Protect Minors from Pharmaceutical Marketing Practices focused only on pharmaceutical advertisements and would have banned companies from collecting personal information about minors on the Internet for the purposes of pharmaceutical marketing.

Last week, Schneider withdrew that law from consideration.

Opponents argued both laws violated the First Amendment and restricted interstate commerce, and even the second attempt at legislation had come under attack for its potential to chill online speech.

Why it matters: The vote to repeal and the withdrawal of the second attempt at legislation should be the death knell for Maine's attempts at regulating marketing to minors. The full state legislature must still vote on the repeal, but given the constitutional concerns and the cost of fighting the inevitable challenges to the law, it seems unlikely that the legislature would keep it on the books.

back to top