Advertising Law

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In This Issue

Know When to Hold 'Em: DOJ Opens Door for Online Gambling

The likelihood that online gambling will soon be legalized has increased now that the Department of Justice issued a recent memorandum opinion.

For roughly a decade, the DOJ took the position that the Wire Act prohibited the use of the Internet to place any form of bets or wagers.

Illinois and New York therefore requested a formal opinion from the agency as to whether they could sell tickets online to in-state adults where the online transmission of data would cross state lines.

In reversing its long-held stance, the DOJ said that its former reading of the Wire Act created tension with the federal Unlawful Internet Gambling Enforcement Act, or UIGEA, which specifically states that "unlawful Internet gambling" does not include bets "initiated and received or otherwise made exclusively within a single state," and provides that "[t]he intermediary routing of electronic data shall not determine the location or locations in which a bet or wager is initiated."

Concerned that its former interpretation of the Wire Act could be criminalizing conduct that is lawful under the UIGEA, the agency reversed its position. The Act makes unlawful the use of any wire transmission of interstate or foreign wagers "on any sporting event or contest."

The DOJ has now concluded that "Interstate transmissions of wire communications that do not relate to a 'sporting event or contest' fall outside of the Wire Act," according to the opinion. "Because the proposed New York and Illinois lottery proposals do not involve wagering on sporting events or contests, the Wire Act does not prohibit them."

Although the statute seems clear on its face, the existing case law was mixed. Accordingly the DOJ turned to the legislative history where it found evidence that the Act's principal purpose was "to stop the use of wire communications for sports gambling in particular," with a particular focus on off-track betting on horse races, basketball, baseball, football and boxing.

Moreover, Congress passed a contemporaneous second statute that specifically addressed types of gambling other than sports betting – an

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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
Topic: "Battle of the Brands: Resolving Disputes Involving Competitors' Comparative Claims"
Speaker: Chris Cole
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
For more information

March 19-20, 2012
ACI's Legal & Regulatory Summit on Food & Beverage Marketing & Advertising
Topic: *"From Weight Loss to Healthy Eating* - How to Prevent Health Claim Nightmares: Practical Guidance for Structuring Claims that Will Withstand Government Scrutiny and Private Litigation"
Speaker: Linda Goldstein
Washington, DC
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indication that the legislators limited the Wire Act's applicability to sports betting only.

The opinion, which was issued on September 20, 2011, was not released by the agency until December 23, 2011.

To read the DOJ's memorandum opinion, click here.

Why it matters: The opinion makes clear that it is not addressing the legality of the proposed gambling systems under the UIGEA. However, it notes that the UIGEA explicitly applies to interstate, not intrastate, online gambling and only prohibits financial transactions relating to gaming activities that are already illegal under other federal or state laws. This leaves the door open for states to consider state-specific online gambling and online poker available only to intrastate residents, similar to the lotteries currently being considered by Illinois and New York.

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Advocates, Proponents Weigh In on COPPA Updates

As the timeline for making comments on the Federal Trade Commission's proposed changes to the Children's Online Privacy Protection Act Rule came to an end, groups have staked out their positions.

The FTC issued its proposed changes in September 2011. Major changes included clarification on the applicability of COPPA to online services; the broadening of definitions such as "personal information" and "collection"; updated requirements for parental notice; and new requirements surrounding data retention and deletion.

Responding to the agency's requests for comments on the proposed changes, groups such as the Interactive Advertising Bureau, the American Association of Advertising Agencies, the American Advertising Federation, the Association of National Advertisers, the Direct Marketing Association and the U.S. Chamber of Commerce, expressed concern and opposition.

In its written comments, the IAB "encourage[d] the Commission to rethink its approach," arguing that the changes currently proposed "would have substantial negative effects for parents, children and companies alike."

The expanded definition of "personal information," for example, would include tracking cookies, device serial numbers and IP addresses. The IAB argued that such changes could "bring a wide range of activities, including online advertising and analytics activities, within the scope of COPPA for the first time."

Further, the group said that the FTC should not establish a new rule prohibiting the collection of any data from children under age 13 for behavioral advertising purposes absent a "clear record" that companies

are using the techniques on that age group. Such a rule could bring many businesses into the scope of COPPA, which could limit children's access to Internet content, the IAB wrote.

Alternatively, a coalition of 17 groups, including the Center for Digital Democracy, the World Privacy Forum, and the American Academy of Pediatrics, praised the proposed changes in their comments.

"Given children's limited cognitive abilities and the sophisticated nature of contemporary digital marketing and data collection, strong arguments can be made that behavioral targeting is an inappropriate, unfair, and deceptive practice when used to influence children under 13," the coalition wrote. "At the very least, marketers should be constrained from engaging in such practices without obtaining meaningful, prior consent from parents."

To read the IAB's comments, click here.

To read the coalition's comments in support of the COPPA amendments, click here.

Why it matters: Due to "popular demand," the FTC had extended the deadline for comments on the proposed amendments from November 28 to December 23, 2011. Now that all the comments have been received, the ball is in the agency's court for the next step in the amendment process.

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Gilbert Arenas Loses His Appeal

In holiday litigation news, the Ninth Circuit handed Gilbert Arenas a lump of coal, affirming the federal court's decision to deny his trademark dilution and violation of publicity rights suit.

Arenas sued the production company behind the reality show *Basketball Wives*, arguing that the appearance of his ex-fiancée and mother of his four children suggested his affiliation with the show and the dilution of his trademark rights.

The trial court denied his request to enjoin the airing of the show, in part because of his own history of sharing the "mundane" details of his life via Twitter.

The defendant was protected by the First Amendment, the trial court ruled, and the show appeared to be transformative as at "its core, the show is about the women who have or have had relationships with basketball players rather than the players themselves."

Expressing no view on the merits of Arenas' claim, the Ninth Circuit held that the district court did not abuse its discretion and therefore affirmed the denial of a preliminary injunction.

To read the Ninth Circuit's order in *Arenas v. Shed Media*, click here.

Why it matters: While the Ninth Circuit decision is a setback for Mr. Arenas, it is unclear whether he will continue to pursue his suit.

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FDA Releases Limited Guidance for Social Media Use

After months of waiting by the pharmaceutical industry, the Food and Drug Administration quietly released its "Guidance for Industry Responding to Unsolicited Requests for Off-Label Information About Prescription Drugs and Medical Devices" in the *Federal Register*.

While the pharmaceutical industry had been hoping for explicit guidance about social media marketing, the agency declined to provide detailed instructions and rules.

Instead, the draft guidance addresses how manufacturers and distributors of prescription human and animal drug products and medical devices can respond to unsolicited requests for information about unapproved or uncleared indications or conditions of use related to
FDA-approved or -cleared products.

The guidance divides off-label requests for information into two categories: public and nonpublic.

If a consumer makes a public request – on a Web site or in a third-party discussion forum that is visible to a broad audience, for example – the company should limit its response to providing its contact information so that individuals can follow up independently with the firm to obtain specific information about the off-label use of the product through a nonpublic, one-on-one communication, the agency advised.

When a consumer asks a question in a nonpublic setting, via e-mail or hotline, for example, companies should respond in a private, one-on-one communication.

The information provided in response should be "truthful, non-misleading, accurate, balanced, and non-promotional," the agency said, tailored to answer only the specific question asked.

The answer should include complete copies of scientific reprints, technical literature, or other medical information, not just summary documents, and should also include representative publications that reach contrary or different conclusions regarding the use at issue. In addition, the answer should include a copy of the FDA-required labeling, a complete list of references for the information included, and prominent statements that the FDA has not approved the product as safe for the use addressed as well as the indications currently approved and all relevant safety information.

Companies should maintain a record of their conversation with the consumer, the FDA said.

The draft guidance distinguishes solicited requests for information, using the example of a company announcing the results of a study via Twitter suggesting that an off-label use of its product is safe and effective. Any comments and requests received as a result of the original message would be considered solicited requests, the agency said.

"Solicited requests may be considered evidence of a [company's] intent that a drug or medical device be used for a use other than that specifically approved or cleared by FDA," the guidance cautions.

Alternatively, the FDA's current policy on unsolicited off-label requests is that "regardless of whether the initial unsolicited request for off-label information was made in a non-public or public forum, the FDA does not intend to use the [company's] actions as evidence of a new intended use, nor expect distributed materials to conform to existing regulatory requirements for promotional labeling or advertising, if the firm responds in the manner outlined in the guidance."

To read the FDA's draft guidance, click here.

Why it matters: In the *Federal Register*, the FDA said that the guidance "is the first of multiple draft guidances the agency plans to publish that address questions and issues related to emerging electronic media," acknowledging that it has received a petition from drug manufacturers, held a public hearing, and received 72 public comments on the topic. Comments on the current draft guidance will be accepted until March 29, 2012.

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Diamond Foods Settles Suit Over Walnut Claims

Diamond Foods has agreed to settle a false advertising class action by paying $2.6 million to consumers who purchased the company's walnuts since March 2006.

The class challenged Diamond's assertion that the walnuts were beneficial to heart health because of their omega-3 fatty acids, using claims such as "fatty acids your body needs for promoting heart health."

The complaint cited a February 2010 Food and Drug Administration warning letter to the company that it lacked sufficient evidence to link walnut consumption with heart health and was violating food labeling rules by marketing the walnuts as if they were intended to treat a medical condition.

By paying the plaintiffs $8.25 per 3-pound package, the settlement provides "class members with meaningful monetary relief," according to a joint motion by the parties in support of the settlement.

Further, class members may claim up to three 3-pound bags and 5 bags of other sizes by sworn attestation and may claim up to 24 bags with the submission of proofs of purchase.

In addition to bearing the costs of settlement logistics (including claim administration, class notice fees, and attorneys' fees of $850,000), Diamond also agreed to discontinue the "heart health" claims on its labeling and Web sites.

"Under the proposed settlement, class members have an opportunity to recover an approximate retail price for the walnut products they purchased and the allegedly unlawful and misleading product labeling has been discontinued," the filing emphasized.

To read the motion for preliminary settlement approval in *Zeisel v. Diamond Foods*, click here.

Why it matters: The suit represents another in a recent trend of consumer class actions filed after a company receives a warning letter

from the FDA or is the subject of a National Advertising Division decision. The *Zeisel* plaintiffs contended that by failing to remove the unauthorized claims from the walnut labels after receiving the FDA warning, Diamond violated various California state laws. Although Diamond continues to dispute the plaintiffs' allegations, the settlement came about after U.S. District Court Judge Jeffrey White certified the suit's nationwide class in June 2011.

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