# Advertising Law

manatt

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## Ziploc Can Substantiate Evolve Bag Claims – With More Info

**The National Advertising Division (NAD) determined certain environmental claims made by S.C. Johnson & Son regarding its Ziploc Evolve storage bags could be supported but recommended that the company provide clearer information about its use of wind energy in the product's production.**

In its advertising for the Evolve line of storage bags, the company claimed that its new ultra light bags are "better for the environment," are "made with 25% less plastic," and are "made with wind energy." The claims included an asterisk to a disclosure at the bottom of print ads and in television commercials, "Made with a combination of renewable energy and energy from traditional sources."

Although the NAD concluded that Ziploc could substantiate the claims, it expressed concern that the ads also implied that the Evolve bags were manufactured wholly from wind energy. "Because the appeal of renewable energy is the promise of reduced greenhouse gas emissions, it is important that advertisers avoid overstatement when making claims about the use of

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renewable energy," the NAD said.

S.C. Johnson contended that "made with" claims are ubiquitous and that consumers would not be confused into believing that only wind energy was used to manufacture the bags.

But the NAD said that additional information was necessary because a reasonable consumer might conclude that the claim "made with wind energy" meant that it was produced entirely with clean or renewable energy – especially, the NAD said, as the claim was a dominant feature of the advertising campaign, and "is reinforced with images of windmills, vegetables, and wind-blown fields of green. In contrast, the disclosure language appears only in small type and, in the television commercial, appears only fleetingly."

Therefore, NAD recommended that the "made with wind energy" claim be modified to expressly convey that Evolve bags are "made partially from wind energy, or that they are manufactured using wind energy provided the claim clearly communicates that using means a combination of wind and traditional energy sources."

In its advertiser's statement, S.C. Johnson said it disagreed with the NAD's conclusion, but said it would take the concern into account in any future Ziploc Evolve advertising, noting that the commercial and print ads were no longer running.

To read the NAD's press release, click here.

**Why it matters:** "When information is material and necessary for qualifying a claim it must be disclosed clearly and conspicuously in close proximity to the claim it is intended to qualify," the NAD said. The decision also serves as a reminder to advertisers that environmental claims are on the NAD's radar, especially in light of the Federal Trade Commission's recently proposed update to the Green Guides. As the draft Green Guides would require that the nature of the renewable source was disclosed, and would likely require specific mention of fossil fuels that were used, a similar result would likely follow.

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## Court Reinstates $49 Million Judgment for FTC

**The First Circuit upheld a $49 million judgment for the Federal Trade Commission in a case against defendants whose infomercials claimed its products cured every disease from obesity to Parkinson's to cancer.**

The case dates back to 2002, when the FTC filed a complaint against Massachusetts-based Direct Marketing Concepts, ITV Direct, and the co-owners of the companies. The FTC alleged that the defendants claimed in infomercials that its Coral Calcium product was a "coral-derived calcium supplement [that] cures cancer, multiple sclerosis, and other degenerative diseases by rendering acidic bodies more alkaline," and touted that its Supreme Greens product cured cancer and caused weight loss.

A federal court ruled for the FTC in 2008, enjoined the infomercials and ordered the defendants to pay a $49 million judgment. On appeal, the defendants argued that the health claims were reasonably based, or in the alternative, that the ads were puffery and included clarifying disclaimers.

In rejecting both theories, the appeals court noted that the defendants' claims were "extrapolations, distortions, and sometimes, seemingly, utter fabrications," that the defendants could not provide adequate substantiation under "even the most lax standard of scientific reliability." As for the disclaimers, the court said that the disclaimers used did nothing to affect the meaning of the "specific and measurable health claims."

The defendants also objected to the method used to calculate damages. It contended that gross receipts should have been used as the basis for a disgorgement order rather than net profits. The appeals court recognized "broad discretion" available to the district court to fashion remedies, and added that any uncertainty over amounts was due to the defendants' poor bookkeeping, and not error by the FTC.

To read the decision in *FTC v. Direct Marketing Concepts*, click here.

**Why it matters:** The decision is a resounding reminder of the difficulty defendants face when a challenge is brought against the FTC in court. The First Circuit could not have been clearer:

"Despite the volume of the defendants' arguments, we find no more substance in them than the district court found in their infomercials," it said, adding that the judgments should stand as a way for the defendants "to cure their customers in a way that their bogus supplements could not."

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## Judge Denies Class Certification in Suit Over Health Effects of McDonald's

**A federal judge denied class certification for plaintiffs who claimed that McDonald's engaged in a long-running marketing scheme designed to mislead consumers into believing that daily consumption of its food would not result in adverse health effects**.

U.S. District Court Judge Donald C. Pogue found that the plaintiffs failed to provide sufficient evidence to establish a class of plaintiffs with identical claims and that too many individual, factual questions were present to create a class.

The complaint was filed in 2002 by four children and their parents, who alleged that between 1985 and 2002, the minors became obese and suffered other adverse health effects, such as coronary heart disease, pediatric diabetes, and high blood pressure after consuming McDonald's foods. The suit argued that McDonald's engaged in a deceptive marketing scheme to mislead consumers into falsely believing that its food products – such as Filet-O-Fish, hamburgers and french fries, and Chicken McNuggets – were healthy.

Over the last eight years, the case has bounced from state to federal court and the parties have engaged in various pretrial motions.

In the latest ruling, the court refused to grant class certification or to certify an issue class to determine whether the defendant was liable. The plaintiffs' claims would require "individualized inquiries…to determine whether each plaintiff suffered injury as a result of being deceived by [McDonald's] allegedly misleading representations," Judge Pogue wrote. "Because plaintiffs have failed to present specific evidence of a sufficiently numerous class of individuals who were both exposed to [McDonald's] allegedly deceptive marketing scheme *and* have subsequently suffered from the same adverse medical conditions as those alleged by plaintiffs to have been the result of their exposure," he ruled that class certification was inappropriate.

The presence of medical conditions such as obesity or high cholesterol "depends heavily on a range of factors unique to each individual," the court said. Despite the plaintiffs' argument that a general causal link exists between consumption of McDonald's products – because they are high in fat, salt, and cholesterol, and low in fiber and certain vitamins – the court said individualized inquiries were required to rule out various other factors, such as the level of regular physical activity in which each plaintiff engaged.

Judge Pogue also denied issue certification for the plaintiffs, ruling that they had failed to provide specific evidence that other plaintiffs with similar injuries existed.

To read the motion denying class certification in *Pelman v. McDonald's Corp.*, click here.

**Why it matters:** The ruling is a blow to the plaintiffs and a victory for McDonald's. Even with a small number of plaintiffs, the suit faces an uphill battle as indicated by Judge Pogue in his decision. Each plaintiff will have to prove the causal nexus between eating Chicken McNuggets and his or her resulting health issue, exclusive of various other possible factors that contributed to their alleged health related claims.

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## FTC Drops Google Street View Inquiry

**The Federal Trade Commission has ended its probe into the gathering of data by Google Street View – including the collection of personal e-mails, passwords, and Internet browsing history – that were sent over unsecured Wi-Fi networks. Google came under fire earlier this year after the company announced an inadvertent**

**capture of Wi-Fi signals while its vehicles were taking pictures for its Street View service.**

The FTC said its concerns over the breach of consumers' privacy were mitigated by Google's promises to increase employee training regarding privacy matters and not to use any of the data it collected to market its products or services. "This assurance is critical to mitigate the potential harm to consumers from the collection of payload data," David Vladeck, Director of the FTC's Consumer Protection Bureau, wrote in a letter.

Mr. Vladeck also urged the company to develop and implement reasonable procedures, "including collecting information only to the extent necessary to fulfill a business purpose, disposing of the information no longer necessary to accomplish that purpose, and maintaining the privacy and security of information collected and stored." The decision was met with criticism by privacy advocates. "We're not sure exactly why the FTC failed to act, but we intend to find out," Marc Rotenberg, president of the Electronic Privacy Information Center, told the *E-Commerce Times*.

To read Mr. Vladeck's letter closing the inquiry, click here.

**Why it matters:** Scrutiny over Google's Street View service is still ongoing. Google faces inquiries by a coalition of 30 state attorneys general and possible prosecutions in Europe. The United Kingdom recently launched a new investigation that could result in fines for the company, while investigations continue in France, Germany, and Spain. Additionally, the FCC is currently investigating whether Google violated communications laws through its street-mapping service.

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## Florida Settles Over Rebate Offers

**Florida's Attorney General announced a settlement with Systemax and two subsidiaries, Tigerdirect and Onrebate, over allegations that the companies failed to pay rebates to consumers as advertised.**

The companies will pay a total of $300,000, comprising $200,000 for attorneys' fees and costs, and a $100,000 donation to the Florida Alliance of Boys and Girls Clubs. They also agreed to implement certain marketing limitations and procedure changes.

Specifically, the defendants agreed to refrain from making any false or misleading statements about the ease of submitting rebate forms and the time frame in which a consumer will receive his or her rebate. They also agreed to process and pay rebates within the time period advertised, resolve any outstanding complaints, and establish procedures for the proper handling of rebate submissions.

The AG's office filed a complaint against the Delaware-based companies in August 2008 after a yearlong investigation. According to Florida Attorney General Bill McCollum, consumers complained that the companies' rebate program was difficult to navigate, often resulted in consumers forfeiting their rights to rebates, and rebates that were received often arrived after the promised eight- to ten-week period.

To read the settlement agreement, click here.

**Why it matters:** Companies that offer rebates should remember to follow applicable state laws and regulations or potentially face legal action.

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## Kellogg Settles Suit Over Frosted Mini-Wheats Claims

**A federal judge approved a $10.5 million settlement in a class action claiming that Kellogg falsely advertised its Frosted Mini-Wheats cereals as "clinically shown to improve children's attentiveness by nearly 20%." Class members will receive $2.75 million and $5.5 million will be given to charities to feed underserved communities.**

The plaintiffs filed suit in May 2009 alleging that Kellogg's advertising, marketing, and

promotional campaigns for the nine varieties of Frosted Mini-Wheats made claims that consumption of the cereal improved kids' attentiveness, memory, and other cognitive functions to a degree not supported by clinical evidence. After mediation earlier this year, the parties reached a settlement. Under the terms of the settlement, class members may seek reimbursement of $5 per box of purchased product, up to $15 per consumer.

In addition, Kellogg agreed to refrain from using any assertion to the effect that "eating a bowl of Kellogg's Frosted Mini-Wheats cereal for breakfast is clinically shown to improve attentiveness by nearly 20%" for a period of three years. However, Kellogg may make claims about the impact on attentiveness from eating the product, as long as it limits and qualifies its claims. For example, "Clinical studies have shown that kids who eat a filling breakfast like Frosted Mini-Wheats have an 11% better attentiveness in school than kids who skip breakfast," would be acceptable under the settlement as long as it is substantiated.

Finally, "because identification of class members in this case is difficult or impossible," Kellogg said it would distribute $5.5 million worth of various Kellogg-branded food items to charities that provide food to the indigent.

To read the complaint in *Dennis v. Kellogg Co.*, click here.

To read the settlement agreement in *Dennis v. Kellogg Co.*, click here.

**Why it matters:** The settlement solves another of Kellogg legal woes: in July 2009, the FTC barred Kellogg from making the claims at issue in the class action lawsuit. And earlier this year, the agency settled with Kellogg in an expanded consent order over claims the company made about its Rice Krispies cereal. Product packaging claimed the cereal "now helps to support your child's immunity," and that "Kellogg Rice Krispies has been improved to include antioxidants and nutrients that your family needs to help them stay healthy." Under the terms of the consent order with the FTC, Kellogg is now prohibited from making claims about any health benefit of any of its food products unless the claims are backed by scientific evidence and are not misleading.

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## McAfee Can't Dismiss Data-Pass Class Action

**In the latest data-pass news, a federal judge denied a motion to dismiss several counts in a class action against security software company McAfee. The suit alleges that McAfee transferred consumers' credit card information immediately after they purchased software but before they downloaded it. Pop-up ads would appear from a third party with a "Try It Now" button that, when clicked by consumers, would enroll them in a monthly program.**

The plaintiffs claim they believed they needed to click on the button to download their software and that McAfee received a fee for each customer who subscribed to the services of Arpu, Inc. via the ad on McAfee's site. The complaint alleges that the plaintiffs only later learned they were enrolled in a monthly program with Arpu, costing $4.95 per month, and that McAfee transferred their confidential billing information without adequately disclosing what they were signing up for.

U.S. District Court Judge Lucy H. Koh said the plaintiffs could sue under California's unfair business practices statute even though they could not claim any actual damages. Because the plaintiffs sought disgorgement of profits and restitution from McAfee based on the company's business practices, their claims satisfied the state law, she said.

Discussing the plaintiffs' allegations, the judge said there were several facets of the pop-up ad that could deceive a "significant portion of the public" into believing that the ad was affiliated with McAfee. The sequential placement of the ad, the fact that Arpu's name appears nowhere on the pop-up, and the fact that the only reference to a third party appears in fine print makes it "difficult not to view the ad as an attempt to conceal [the] source and to pass off both the ad and the product as McAfee's own," the judge said.

Judge Koh also noted differences that could have tipped consumers off, adding that the plaintiffs were "unable to allege with any precision McAfee's role in or responsibility for the content of the pop-up ad." Although the court allowed the plaintiffs' state law claims to

continue, it dismissed claims under the Lanham Act, determining that the allegedly deceptive elements of the pop-up ad were not sufficient to establish a likelihood of injury by direct diversion of sales or a lessening of goodwill.

To read the complaint in *Ferrington v. McAfee*, click here.

To read the motion to dismiss in *Ferrington v. McAfee*, click here.

**Why it matters:** The suit is the most recent headline about data-pass marketing lately, following Senator Jay Rockefeller's (D-W.Va.) proposed legislation, the Restore Online Shoppers' Confidence Act, which would establish prohibitions and restrictions for all online post-transaction offers and limit the use of "negative option" sales. In addition, the three major post-transaction companies – Affinion, Vertrue, and Webloyalty – changed their practices earlier this year to require consumers to re-enter their credit card information to enroll in their discount clubs. The companies and their online retail partners have also faced scrutiny from state attorneys general; Webloyalty and Affinion and various partners both recently reached multi-million dollar settlements with the state of New York.

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## Labeling Suit Against Quaker Oats Preempted

**Federal law preempted most of the claims in a class action suit against Quaker Oats, a U.S. District Court judge has ruled. The plaintiffs claimed that the Quaker Oats' Chewy brand granola bar box labels misled consumers about their health value by using terms like "wholesome" and "smart choices made easy" as well as pictures of children playing.**

In reality, the granola bars contain "dangerous amounts of trans fat," according to the complaint, which sought an injunction to stop the company from making a "0 grams trans fats" statement on its label, as well as corrective advertising.

Quaker Oats lists hydrogenated vegetable oil in the ingredient list for Chewy Bars, but the nutrition label states that a single bar contains "0 grams trans fats." Quaker Oats argued that under Food and Drug Administration regulations, it was allowed to make such a claim because any level of trans fat that falls below 0.5 gram per serving must be rounded down to zero.

But the plaintiffs contended that including the "0 grams" statement on a side panel of the box - removed from the nutrition facts section but plainly visible to consumers - was false and misleading. The court disagreed, noting that "[n]othing in the FDA statutes or regulations requires Quaker Oats to declare the trans fat level in this manner." The court further said that Quaker Oats' claims that the Chewy Bars contain "whole grain oats" and do not include high fructose corn syrup were not misleading, even though the product contains hydrogenated vegetable oil, because "the presence of trans fats alone is not a 'disqualifying' nutrient which would prevent Quaker Oats from emphasizing whatever other health benefits are available from the Bars' other ingredients or because it lacks certain ingredients." The court also held that the plaintiffs' claims pertaining to Quaker Oats' use of the term "wholesome" and "smart choices made easy," as well as the depictions of oats, nuts, and children, could continue.

Because the FDA has "not developed even an informal policy governing or defining the word 'wholesome,'" the plaintiffs could argue under state law that the use of the term was misleading to consumers, U.S. District Court Judge Richard Seeborg said.

"Taking plaintiffs' allegation that trans fats are not safe in any amount as true, and crediting the inference plaintiffs draw from the box (that is, that active, healthy children are fueled with Chewy Bars)," the court said it was too soon to dismiss the suit.

To read the complaint in *Chacanaca v. The Quaker Oats Co.*, click here.

To read the motion to dismiss in *Chacanaca v. The Quaker Oats Co.*, click here.

**Why it matters:** The court's decision is a mixed bag for Quaker Oats. While the court refused to let the plaintiffs create a heightened standard for claims relating to trans fats – the subject of several class actions against food manufacturers – it did allow the claims based on more subjective terms not regulated by the FDA, like "wholesome," to continue.

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