Advertising Law

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In This Issue

Edward F. Glynn, Jr., Renowned Advertising Attorney, Joins Manatt in Washington, D.C.

Manatt is pleased to welcome Ed Glynn as a partner in the Advertising, Marketing & Media Division based in the firm's Washington, D.C., office. Mr. Glynn is widely recognized for his extensive track record in successfully representing leading marketers in investigations before the Federal Trade Commission and in challenges to advertising at the National Advertising Division of the Council of Better Business Bureaus.

A former senior official with the FTC, Mr. Glynn advises regional, national and international clients in connection with the review of advertising and marketing practices for compliance with federal and state regulatory requirements and industry governing guidelines. He also concentrates his practice in mergers, acquisitions and joint ventures reviewed by the FTC and the Antitrust Division of the Department of Justice.

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Q&A with Steve Raptis: A Minor Delay In Providing Notice of a Lawsuit May Void Insurance Coverage

While an advertiser might well expect a competitor to challenge the validity of its claims about a product or service, what it might not be prepared for are the related and significant insurance coverage challenges that could impact the advertiser's ability to recover losses tied to a false advertising lawsuit. According to a recent Second Circuit decision applying New York law, failing to strictly comply with certain mandatory terms and conditions of insurance policies, for example, providing the insurer with timely notice of legal claims, can result in the insured forfeiting coverage.

This week, our newsletter editors consulted with Manatt partner Steve Raptis, who counsels corporate policyholder clients in all aspects of insurance. Steve discussed the Second Circuit's decision in *Rockland*

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Practice Area Links

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Members

Upcoming Events

December 5-6, 2011
Digital Gaming and Lottery Policy Summit
Topic: "Lottery 2.0 - Welcome to the Social Networks"
Speaker: Linda Goldstein
Washington, D.C.
For more information

December 12, 2011
FDLI Dietary Ingredient Regulation and Compliance Workshop
Topic: "Determining Whether a New Dietary Ingredient Notification is Necessary"
Speaker: Ivan Wasserman
Washington, D.C.
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Awards

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Exposition Inc. v. Great American Assurance Co., which held that an insured's delay of three months in sending its insurer court papers involving a trade name infringement lawsuit against the insured was not timely as a matter of law, and the insured was not entitled to a defense as a result. Steve also offered insight regarding what advertisers and other companies should do to protect their rights to insurance coverage if they are the subjects of a lawsuit.

Editors: As an initial matter, why should advertisers be concerned with issues involving insurance coverage?

Raptis: Any company that advertises needs to be sensitive to insurance coverage issues because a number of advertising-related claims the company could face, including (among others) false advertising and infringement of trademark and trade dress, may be covered under general liability policies. These policies require that the insured comply with certain mandatory terms and conditions, including an obligation to provide the insurer with notice of claims (including forwarding court papers to the insurer) and, in some cases, an obligation to provide notice of circumstances that may result in a claim even where no claim has been asserted. As the *Rockland* case demonstrates, failing to comply strictly with these terms and conditions can result in the insured forfeiting coverage.

Editors: Tell us more about the *Rockland* decision and whether it's consistent with other notice decisions in New York and elsewhere.

Raptis: The provision at issue in *Rockland* required that the insured provide notice of a claim "as soon as practicable," and that it forward any court papers to the insurer "immediately" upon receipt. The insured received the underlying complaint (alleging, among other counts, tortious interference with contractual relations and trade name infringement) on June 27, 2008, but failed to provide a copy of the complaint to its insurer until October 1, 2008, roughly three months later. The Second Circuit affirmed the district court's holding, as a matter of law, that the insured's three-month delay did not comply with the requirement that the court papers be provided "immediately." Many jurisdictions do not enforce this language as stringently as New York's courts, but rather interpret "immediately" to mean within a reasonable time under the circumstances. However, the district court's opinion suggests that the insured's three-month delay in forwarding the complaint would not have satisfied this more lenient standard either.

It also bears noting that most jurisdictions require the insurer to prove that it suffered prejudice as a result of an insured's late notice before the insurer can avoid its coverage obligations. New York traditionally has not required a showing of prejudice, but adopted a prejudice requirement by amendment to its notice statute in July 2008. The amendment is not retroactive, and applies only to policies issued after January 17, 2009. Unfortunately for the insured in the *Rockland* case, the policy at issue was issued before that date.

The bottom line is that courts in different jurisdictions apply very different rules with respect to timing of notice, and courts in the same jurisdiction purportedly applying the same rule are not always consistent in their approach. Policyholders need to understand that hard and fast rules are difficult to come by in this area.

Editors: So what practical advice should advertisers take away from the *Rockland* decision?

Raptis: First, start working through insurance issues as soon as you think you may get sued. At a minimum, review any potentially applicable policies to determine what you need to do to preserve potential claims, and seek legal advice as appropriate. This is a crucial step because most general liability policies require notice of circumstances that may result in a claim, even if no claim has yet been asserted. Therefore, in some cases, failing to provide notice until you have been sued may be too late if you were aware of such circumstances prior to the lawsuit being filed. Be aware of initial notice requirements, especially if you don't deal with insurance claims regularly. Addressing insurance issues early may also provide a better opportunity to investigate the circumstances of the underlying claim, anticipate the insurer's defenses to coverage, and help support your insurance claim.

Second, understand the appropriate role of your broker. For instance, don't assume that simply informing your broker of a claim or potential claim constitutes notice to your insurer. As the district court in the *Rockland* case pointed out, under the law of New York and many other jurisdictions, the broker is deemed to be the agent of the insured, not the insurer. Therefore, notice to the broker likely will not constitute notice to the insurer unless the broker communicates the notice to the insurer in writing. If you are to provide notice through your broker, the notice needs to be in writing, and you need to make sure you receive a copy of the notice. Don't rely on your broker to advise you whether particular claims are covered. This is a legal determination that requires a deep understanding of insurance law (which varies significantly state by state) and should be informed by principles of insurance contract interpretation, which often favor insureds in ways not necessarily reflected on the face of the policy. Most brokers aren't qualified to provide this highly specialized advice.

Third, provide notice of lawsuits and forward related court papers to your insurer as soon as you receive them. There is no good reason for delay, and the consequences of even a minor delay, as *Rockland* demonstrates, can be disastrous. Providing notice often will trigger an investigation of your claim, which typically results in the request for additional information and documents. Generally speaking, you are required to comply with these requests (pursuant to your duty of cooperation), even if they are onerous, as long as they are reasonable under the circumstances. Finally, be aware that your insurer can and will use this information to support its defenses to coverage, so it would behoove you to provide information and documents in a manner that does not lend support to these defenses.

Editors: From an ordinary insured's perspective, what's the most important lesson to be learned from *Rockland*?

Raptis: Judicial decisions regarding the timing of notice are all over the map, and clear rules are rare. The result in *Rockland* was severe, but it serves as an important reminder to all insureds, not just those in New York, that any delay in providing written notice and forwarding important court papers places insurance coverage at substantial risk.

Don't delay. If you are uncertain about what should or should not be disclosed in the context of providing notice, seek advice from experienced legal counsel as soon as possible.

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Google+ Subtracts Promotions

Google launched its new "Pages" feature on Google+ recently, which allows companies, products, groups, and brands to create their own page on the burgeoning social network.

But unlike Facebook, Google+ does not allow Page owners to conduct contests or promotions on their pages.

"You may not run contests, sweepstakes, offers, coupons or other such promotions directly on your Google+ Page," according to the Google+ Pages Contest and Promotion Policies. "You may display a link on your Google+ Page to a separate site where your Promotion is hosted so long as you (and not Google) are solely responsible for your Promotion and for compliance with all applicable federal, state and local laws, rules and regulations in the jurisdiction(s) where your Promotion is offered or promoted."

In addition, Google reserves the "right to remove your Promotion content from Google+ Page for any reason," the policy states, and the Page owner releases Google from any liability associated with the Promotion.

The policy reflects a different course of action from Facebook, which updated its Promotions Guidelines in May and expanded opportunities for marketers by broadening the scope of products and possible entrants for promotions.

Facebook now makes products like alcohol, dairy, firearms, gambling, gasoline, prescription drugs, and tobacco eligible for promotion. Entrants may include minors under the age of 18 and the site allows a purchase in order for consumers to enter a promotion if permitted by law.

Facebook established some limitations. Promotions must be administered using Facebook applications and clear boundaries have been announced on the use of its name and trademark.

In addition, promotions cannot rely solely upon Facebook features or functionality – so a contest cannot be automatically entered by "liking" a brand's page, checking in to a specific location, uploading a photo, or commenting on a wall.

To read Google+'s Policy on Contests and Promotions, click here.

Why it matters: Google+ offers companies additional means to connect with consumers online, albeit without the ability to conduct contests or sweepstakes. The company did not comment on whether the policy could change in the future. Facebook's changes earlier this year expanded marketing opportunities, so Google could change its policy in time. Currently, however, Page owners risk having their content or page removed for violating Google's no-promotions policy.

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DAA Releases Updated Privacy Principles

The Digital Advertising Alliance released "Principles for Multi-Site Data," its new privacy guidelines for its Internet advertising industry program.

Under the new guidelines, DAA members are now banned from collecting consumer data for uses such as employment, credit, health treatment or insurance eligibility.

The new principles take effect next year.

Consumers will also be offered the option to opt out from multisite data collection – Web viewing data collected from a particular computer or device over time and across nonaffiliated Web sites.

The changes were made in response to criticism by the Federal Trade Commission and privacy advocates, who argued that the earlier iteration of principles – which require that ad networks offer consumers an opt-out of the collection of their information for behavioral advertising purposes – still allowed companies to collect data for nonbehavioral advertising purposes.

The guidelines include mandated compliance with the Children's Online Privacy Protection Act and a requirement to obtain opt-in consent to collect and use multisite data that contains health or financial information.

"With the addition of these new principles, combined with the fast-growing adoption and online display of the Advertising Option Icon, the business community has taken another step to address concerns of policy makers regarding online data collection and use," Peter Kosmala, managing director of the DAA, said in a statement.

To read the "Principles for Multi-Site Data," click here.

Why it matters: Despite the enhanced principles, some critics remained unsatisfied. "The ad lobby has purposely crafted definitions that would enable marketers to collect and target consumers for their most sensitive financial and health concerns," Jeff Chester of the Center for Digital Democracy told *Broadcasting & Cable*. "We will urge the FTC to reject these principles since it sanctions the kinds of data collection that places consumers at risk." But the FTC itself expressed praise for the changes. The DAA "has announced important changes to address how data can be collected and used online. We've been encouraging them to make these changes and believe it's an important step for consumers and for self-regulation," Jessica Rich, deputy director of the agency's consumer protection bureau, said in an e-mail to Bloomberg news.

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Site Promoting Itself as "Facebook for Kids" Settles with FTC Over COPPA Violations

The Federal Trade Commission has settled with children's social networking site Skid-e-kids, which the agency said violated the Children's Online Privacy Protection Act by collecting personal information from children under age 13.

The site, which targeted ages 7 to 14 and promoted itself as "Facebook

and Myspace for kids," agreed to destroy the personal information of 5,600 children that the FTC said it had illegally collected without parental consent since October 2009.

The agency charged James O. Godwin, the operator of www.skidekids.com, with making deceptive claims based on the site's privacy policy, which require that child users provide a parent's valid e-mail address to register and first obtain permission for the child to participate. Not only did the site not collect parental e-mail addresses, children were also able to provide personal information like their date of birth, first and last name, and city during the registration process, all in violation of COPPA, according to the complaint.

Once registered, children could update their profiles with information, create public posts, become friends with other members, play games, watch movies and videos, and upload their own videos and photos.

Under the terms of the settlement, Godwin agreed to destroy the personal information already collected and is barred from future violations of COPPA as well as misrepresentations about the collection, use, and disclosure of children's information.

In addition, Godwin must provide a link from the site to online educational materials and retain an online privacy professional or join an FTC-approved safe harbor program, as well as comply with reporting requirements for a period of five years.

The consent decree imposed a $100,000 civil penalty, all of which was suspended except for $1,000 if Godwin complies with the agreement.

To read the complaint in *U.S. v. Godwin*, click here.

To read the consent decree, click here.

Why it matters: The consent decree, executed not long after the agency issued its proposed updates to the COPPA Rule, demonstrates the FTC's continued focus upon privacy issues and its enforcement of COPPA. Given the agency's attention, companies should ensure that their sites are in compliance with COPPA.

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NAD Considers Advertiser's Use of "Like" Promotion

In a case of first impression, the National Advertising Division determined that Coastal Contacts, Inc., must provide a clear and conspicuous explanation for the additional terms and conditions attached to a Facebook promotion requiring consumers to "like" a product page.

Coastal Contacts told consumers on its Facebook page to "Like this Page! So you too can get your free pair of glasses!"

Competitor 1-800-Contacts brought the challenge, arguing that Coastal failed to include any qualifying language about the conditions and obligations upon which the free claims were contingent – the cost of shipping and handling, for example. Because the "free" eyeglasses claim was misleading, the promotion was therefore fraudulent, 1-800-Contacts said, and the "like" endorsements should be removed.

Coastal countered that it had modified the promotion and provided all qualifying information as part of its advertisements so that consumers were aware of the terms prior to "liking" the page. It noted consumers were free to take back their "likes" if they did not agree to the terms and conditions or did not eventually obtain a free pair of glasses.

Emphasizing the importance of clearly and conspicuously disclosing the material terms and conditions of "free" claims, the NAD agreed that Coastal must provide clarification about the promotion, even as modified.

Coastal should note the approximate cost of shipping and handling immediately below or alongside the main claim and should include the limit on the total number of glasses to be given away in the main claim and not as part of the disclosure, the NAD recommended. Because consumers had to scroll down to see the terms, the advertiser should also enhance the notice of further conditions on the main screen as well as the font size of the disclosures.

The NAD concluded, however, that Coastal's use of the number of "likes" it had received in press releases given to investors was not fraudulent, although some details were misleading and should be clarified. The number of "likes" or "fans" reported in the press releases represented the total number of "likes" Coastal had received from all the company's Facebook pages targeted to different countries and it should clarify that the numbers were based on totals, not just the U.S. Facebook page, the NAD recommended.

"[O]utside the context of the Facebook platform, the total number of 'likes' a company, product or service's Facebook page has received is used as a measure of the company's social presence which, in turn, speaks to the company's ability to engage consumers, enhance loyalty to the brand, broaden their customer base and, of course, increase sales," the NAD said. Because "likes" mean many things to consumers, the overall message of a Facebook "like" "is one of general social endorsement."

With no evidence that Coastal's "likes" were obtained through misleading or artificial means, removal, as requested by the challenger, was not necessary. As the NAD noted, Coastal did in fact have the general social endorsement that the "likes" conveyed.

The NAD noted that the outcome of the case would have been "quite different," had the record demonstrated that consumers who participated in the "like-gated" promotion could not or did not receive the benefit of the offer or that Coastal used misleading or artificial means to inflate the number of its "likes."

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

Why it matters: The decision provides guidance to advertisers who make use of their Facebook "likes" and offer "like-gated" promotions. NAD Director Andrea Levine told *AdAge* that the decision is significant because of the increasing popularity of "like-gated" promotions. The "concept of corporate 'likes' being broadly procured through offers of discounts and sweepstakes is becoming very, very common and very broad, but they need to be produced through truthful promotions," she said. "We used the opportunity in the decision to caution that

companies that are utilizing deceptive practices to get 'likes' would have to go back and remove those 'likes' from the website."

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U.K. Bans "Sexually Provocative" Perfume Ad

Child star Dakota Fanning has raised the ire of the United Kingdom's Advertising Standards Authority.

Seventeen-year-old Fanning, the face of Marc Jacobs' "Oh, Lola" fragrance, was featured in a print ad, seated in a short, pink, polka-dot dress with the perfume bottle between her legs.

The ASA said it received four complaints that the ad was offensive.

While perfume maker Coty UK acknowledged that the perfume bottle was "provoking," it argued that it was not indecent and that the ad was not inappropriately sexualized because "it did not show any private body parts or sexual activity."

Further, it noted that the ad appeared in highly stylized fashion magazines, readers of which were unlikely to find it offensive "because it was similar to many other edgy images in those magazines." The magazines that ran the ad did not receive any complaints, Coty said.

But the ASA disagreed.

Calling the position of the perfume bottle "sexually provocative," the ASA said Fanning looked to be under the age of 16.

"We considered that the length of her dress, her leg and position of the perfume bottle drew attention to her sexuality. Because of that, along with her appearance, we considered the ad could be seen to sexualize a child. We therefore concluded that the ad was irresponsible and was likely to cause serious offence," the ASA determined.

The ASA banned the ad from appearing in any magazine in the U.K.

To read the ASA's decision, click here.

Why it matters: The ASA determined that the perfume ad violated two provisions of its advertising code: Rule 1.3, "Marketing communications must be prepared with a sense of responsibility to consumers and to society," as well as Rule 4.1, "Marketing communications must not contain anything that is likely to cause serious or widespread offence."

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