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### Formula Maker Wins \$13.5 Million in False Advertising Suit

**A federal jury has awarded baby formula maker PBM Products \$13.5 million in damages against rival Mead Johnson Nutrition, maker of Enfamil. The award ranks among the largest ever for a false advertising case.**

PBM supplies store brand infant formulas to retailers like Target. The suit, which was filed in April, is the third PBM has brought against Mead Johnson for false advertising claims.

The dispute centered on a comparative advertising campaign that Mead Johnson launched in an effort to boost sagging sales. The company issued promotional materials that made statements such as “It may be tempting to try a less expensive store brand, but only Enfamil Lipil is clinically proven to improve brain and eye development,” and “There are plenty of other ways to save on baby expenses without cutting back on nutrition.” It also sent a direct mailer to more than 1 million people that depicted two side-by-side images of a cartoon duck – one blurry and one clear – to convey the notion that products lacking Enfamil’s blend of ingredients are inferior and could cause poor eye and brain development.

The court issued a post-verdict order dismissing a laches defense made by Mead Johnson. In the order, the court found that “Mead Johnson has failed to prove that PBM has not diligently pursued its Lanham Act claim.” It rejected Mead Johnson’s argument that the claims at issue had been made for over two years, noting that when evaluating consumer deception, “an advertisement must be viewed in context.” In this case, the court found:

The 2008 Mailer taken as a whole and in context clearly takes a new approach in tone and



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message towards store brand infant formula. Mead Johnson consciously decided that its marketing should be more aggressive and risky as it witnessed a decrease in its sales and an increase in store brand sales. The 2008 Mailer and its attack on store brands was the result of that marketing decision.

The court ordered injunctive relief requiring Mead Johnson to pull any ads or promotional material making claims about PBM's infant formula, and banning it from future marketing campaigns that state or imply that PBM's infant formula is inferior.

Enfamil has gotten into trouble over its advertising before. Earlier this year, the National Advertising Division of the Council of Better Business Bureaus referred a similar comparative ad campaign by the brand to the Federal Trade Commission.

**Why it matters:** The \$13.5 million damages award is unusually high for a false advertising case, but the product at issue – infant formula – is a volatile one. Enfamil may have decided to roll the dice with a jury since the injured party was another company – as opposed to infants themselves. But whenever the health and welfare of infants are involved, the risks of taking one's case before a jury will be higher.

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## Feds Delay New Online Betting Payment Ban

**In a win for opponents of a 2006 Internet gambling payment ban, the Treasury Department and Federal Reserve have pushed back its effective date by six months. The law, which was to go into effect on December 1, now has a new compliance deadline of June 1, 2010.**

In a notice in the Federal Register, the Treasury and Federal Reserve said that the December 1 implementation date for the Unlawful Internet Gambling Enforcement Act would not be achievable for some financial institutions. "Commentators expressed concern that the act and the final regulation do not provide a clear definition of 'unlawful Internet gambling,' which is central to compliance," the two agencies said. The six-month delay will allow banks to establish policies and procedures to require gambling businesses to document the legality of their activities, they said. In addition, they said some federal lawmakers have "expressed an intent to consider legislation that would allow problematic aspects of the act to be addressed."

The law, which forced a number of European-based betting operations to go out of business, bans credit card, check, and electronic fund transfer payments by U.S.-regulated financial institutions in connection with "unlawful Internet gambling."

But opponents argue that the statute is hopelessly vague and ambiguous, because instead of defining the types of online gambling that are illegal, it defers to existing federal and state laws. Opponents also contend that the law is discriminatory, since it carves out an exception for online horse race betting permitted under the Interstate Horseracing Act of

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1978. The ban has also been challenged as an unfair trade restriction at the World Trade Organization.

Congress passed the law in 2006, when Republicans still controlled both the House and Senate. The Treasury and Fed issued the final regulations to enforce the law just before former President George W. Bush left office in January. At the time of its passage, Rep. Barney Frank (D-Mass) was a vocal opponent of the law and has since vowed to overturn it. Frank, who now chairs the House Financial Services Committee, spearheaded a bill to overturn the ban, but the full House never acted on the measure. Earlier this year, he reintroduced the bill, which would effectively overturn the ban and create a framework for the Treasury to license Internet gambling operators, collect taxes from them, and enforce rules for transparency. In October, he urged a 12-month delay in the implementation deadline because of confusion it is generating and to give him time to push through his bill overturning the ban.

Frank applauded the Treasury and the Fed for delaying the regulations, which he said would “curtail the freedom of Americans to use the Internet as they choose” and put unrealistic burdens on financial institutions. “This will give us a chance to act in an unhurried manner on my legislation to undo this regulatory excess by the Bush administration and to undo this ill-advised law,” Frank said in a statement.

**Why it matters:** The Bush administration waged an ongoing war against Internet gambling by, among other moves, arresting and prosecuting a number of executives of overseas betting operations as they passed through the United States. The 2006 law also cost many overseas online betting firms billions of dollars since it prohibited banks from processing funds associated with gambling. However, it has always been a matter of dispute whether the Bush administration’s antigambling campaign was based on sound law. But with Democrats in the majority in Congress and in the White House, there’s a good chance that Rep. Frank will succeed in getting the 2006 law overturned.

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## Court Deletes Spam Suit Against Online Ad Company

**A federal appellate court has upheld a lower court’s dismissal of a spam lawsuit by an Internet service provider (ISP) against the online ad company Epic Advertising.**

In its December 2, 2009, opinion in *Asis Internet Services v. Azoogie.com, Inc.*, the Ninth Circuit Court of Appeals ruled that ASIS could not proceed with its lawsuit under the federal CAN-SPAM act because it had not suffered economic damages from spam allegedly sent by an affiliate of Epic, and therefore lacked standing under the act.

Citing its 2009 decision, *Gordon v. Virtumundo, Inc.*, the court wrote:

The mere cost of carrying spam emails over Plaintiff’s facilities does not constitute a harm as required by the statute. While Plaintiff argues that employee time was spent on spam-

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related issues, Plaintiff concedes that it has no records detailing employee time. Plaintiff also spent money on email filtering, though the cost of email filtering did not increase due to the emails at issue. Such ordinary filtering costs do not constitute a harm.

The Ninth Circuit also found that Epic, formerly known as AzooogleAds, was not liable under a separate California state law because it had not sent the contested emails itself.

ASIS had argued that Epic/AzooogleAds violated CAN-SPAM and California state law by using an affiliate that allegedly arranged for more than 10,000 email ads to be sent. Epic countered that the complained-of messages were sent to addresses allegedly obtained by another company, Seamless Media, which had allegedly obtained a lead from another party, which in turn had obtained the lead from a spammer. Although Epic admitted that it had a contract with Seamless Media, it argued that it did not know that Seamless allegedly indirectly obtained addresses from spammers. It also disputed that the vast majority of the spam in fact reached the intended recipients.

**Why it matters:** This decision is in keeping with other CAN-SPAM decisions dismissing lawsuits where damages appear to be minimal or nonexistent. At this juncture, it seems as if only the largest ISPs and social networking Web sites, as well as state regulators, will have much success in bringing antispy lawsuits.

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## **FTC to Weigh Support of News Industry**

**Federal Trade Commission Chairman Jon Leibowitz said earlier this month that the agency will explore whether the federal government should step in to help the news industry, which is struggling to survive at a time in which the combined effect of the Internet and the recession has caused ad revenues to plummet.**

“We should be able to take action if necessary to preserve the news that is vital to democracy,” Chairman Leibowitz said in a speech on the first day of a two-day FTC workshop on the future of journalism. He said the commission will study whether and how the government should change the manner in which the industry is regulated. He floated some ideas, like exempting news-gathering organizations from antitrust laws, granting them special tax treatment, amending copyright laws, and extending government subsidies to commercial news organizations.

Another agency, the Federal Communications Commission, is currently revisiting a long-standing rule that prevents a company from owning newspapers and TV stations in a single market.

But Chairman Leibowitz cautioned that changes in the news business must be much better understood before any policy changes are made. As for their part, media executives at the hearing said that some relaxation of antitrust and tax rules might be helpful, but also expressed concern about excessive government involvement in the news business.

News Corp. Chairman and Chief Executive Rupert Murdoch said at the workshop that media companies need to figure out how to convince readers to pay for high-quality journalism. “Good journalism is an expensive commodity,” he said. Murdoch owns *The Wall Street Journal*, the online version of which is subscription-based. Murdoch also criticized Internet sites that reuse or repost news articles published by others without paying for them. “To be impolite, it’s theft,” he said.

Arianna Huffington, editor in chief of the Web site Huffington Post, spoke after Murdoch. She pointed out that sites such as hers that collect and link to news content from other providers drive a great deal of online traffic to *The Wall Street Journal*. “It’s time for traditional media companies to stop whining,” she said.

A Google executive backed Huffington, saying that Google and similar online news aggregators benefit news organizations by sending users to their sites. “The reality is that the vast majority of publishers want to be discovered,” Josh Cohen, senior business product manager for Google News, said at the FTC event. Cohen said it was technologically very simple for a publisher to instruct Google’s Web crawler not to index its news site. The implication was that publishers choose not to do so because they understand the value of having their articles show up on Google News.

Congress is also looking at ways to help the ailing news industry. This spring, Sen. Benjamin Cardin (D-Md.) proposed a law that would allow newspapers to operate as tax-exempt institutions. Congress has held several hearings on the financial challenges facing the industry.

**Why it matters:** The news industry’s traditional business model – based largely on revenues generated by ads placed in printed papers – is clearly broken. More and more readers are getting their news from the Internet, or from electronic reading devices like Amazon’s Kindle. Although the government may be able to help the industry, such help would not fix the fundamental problems with the old advertising-based model, and may result in unintended consequences and unwanted governmental oversight of a fiercely independent industry.

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