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August 20, 2020

Brand Legal Committee Update

Presented by Barry Benjamin, Nancy Stagg, Laura Miller, Farah Cook and Bryan Wolin

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FTC Update

Barry M. Benjamin

FTC Active in the Pandemic / Covid-19 Space

- July 21: **FTC and Missouri AG Warn Hearing Aid Sellers About Deceptive Stimulus Payment Claims**
  - Mailers included language like "Call Today to Secure Your Stimulus Money. For Stimulus Voucher Appointments, Call Today!" and "CORONA-VIRUS (sic) PANDEMIC HEARING AID STIMULUS PACKAGE ANNOUNCED FOR MISSOURI"
  - Mailers also included a document designed to look like a $1,000 check made out to the consumer labeled "OFFICIAL AUTHORIZED VOUCHER" and with instructions to endorse it on the back
- July 21: **FTC Testifies Before Congress on Efforts to Combat COVID-19-related Scams**
  - Addresses "Miracle Cures" – FTC has sent over 250 warning letters to advertisers
  - Addresses MLM companies misleading consumers about connection with the US SBA
- July 31: **FTC Sues California Marketer of $23,000 COVID-19 "Treatment" Plan**
  - Golden Sunrise Nutraceutical – treatment promises ""disappearance of viral symptoms within two to four days"
- Aug. 14: **FTC Sends Letters Warning 20 More Marketers to Stop Making Unsupported COVID-19 Treatment**
  - Alleged treatments include intravenous Vitamin C infusions, ozone therapy, supplements, nasal spray, skincare products, and acupuncture can prevent or treat COVID-19

FTC Acts to Stop Deceptive Insulation and Energy-Savings Claims

- July 29: FTC files complaints against four different companies, selling paint products used to coat buildings and homes
- FTC alleges that each D deceived consumers about their products' insulation and energy-savings capabilities, by falsely overstating the R-value rating of the coatings
- Overstating R-value deceives about heat flow and insulating power
- R-value is a measure of its resistance to heat flow: the higher the R-value, the greater the insulating power
- Consumers can use R-value to improve the energy efficiency of their homes
- Note, different than the FTC's actions re "UP TO" claims from 2012, where FTC had consumer surveys finding that consumers expected to experience the maximum percentage advertised

Loot Boxes – Class Actions

Aug. 14: **FTC Staff Issue Perspective Paper on Video Game Loot Boxes Workshop**

- FTC Staff issued a paper detailing key takeaways from the agency's "Inside the Game" workshop of August 2019.
- Loot boxes are random rewards that players may buy within a video game for a small fee or earn through game play.
- Monetization from gamification: these types of in-game micro-transactions (along with others, not just Loot Boxes) have become a multi-billion-dollar market, accounting for a significant percentage of revenue derived from video games, particularly for free video games downloaded via mobile apps.
- Paper summarizes academic research and industry self-regulatory initiatives discussed at the workshop and in comments submitted to the public docket.
- Loot boxes may be gambling; violate the lottery laws; may encourage players to overspend; may mask real costs to players through confusing terms or inadequate disclosures.
- Participants called for meaningful disclosures to help players make informed decisions, additional research and consumer education, and improved industry self-regulation.

Loot Boxes

Aug. 10: **Google moves to dismiss proposed California class action by parents alleging the Google Play store encourages children to gamble through Loot Boxes.**

- Primary defense is CDA 230 – Google is merely the platform delivering the games of others.
- Complaint alleges that Google Play makes billions by luring consumers, including children and teenagers, to buy the surprise loot boxes for the chance to receive rare virtual items in their games.
- Players don't know what they're getting until they buy the loot box, which entices players to keep gambling their luck and real-world money

Aug. 12: **Clash Of Clans Game Creator Sued Over 'Loot Box' Gambling**

- Game maker Supercell Oy creates addictive and exploitative games that use "loot boxes" to promote gambling to children
- Claim is that D unlawfully promotes gambling to children and adults through use of in-game purchases that give a randomized chance to win game-play items such as avatars or weapons

FTC Takes Victory Laps

July 27: **In Final Court Summary, FTC Reports Volkswagen Repaid More Than $9.5 Billion To Car Buyers Who Were Deceived by "Clean Diesel" Ad Campaign**

- FTC filed a final summary federal court, reporting that Volkswagen and Porsche repaid more than **$9.5 billion** since 2016 to car buyers under the FTC's orders stemming from the companies' deceptive "clean diesel" advertising of VWs and Audis fitted with illegal emission defeat devices.
- Given a choice between (a) give car back in exchange for compensation, or (b) have the car modified to comply with clean-air rules, more than 86% chose to return their car through a buyback or early lease termination.

Aug. 11: **FTC Sends Refunds Totaling More Than $9.1 Million to Customers Defrauded by Deceptively Marketed "Amazing Wealth System"**

- FTC is mailing checks / PayPal payments of more than $9.1 million to customers who paid for an "Amazing Wealth System" workshop.
- Defendants, FBA Stores and related companies and individuals, falsely claimed their "Amazing Wealth System" would enable people to create a profitable online business selling products on Amazon.
- However, Ds had no affiliation with Amazon; Buyers did not earn the advertised income; most consumers lost significant amounts of money; and many customers had problems with their Amazon stores.

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False Advertising Litigation

Bryan J. Wolin

Patent Publication Privilege

Au New Haven, LLC v. YKK Corp. (S.D.N.Y. July 30, 2020)

- YKK (the zipper company) obtained a broad, but not unlimited, license for a water-resistant zipper patent.
- Four advertising claims at issue, all pertaining to the scope of YKK's patent.
- Defendant YKK moved for summary judgment on the basis of the patent publication privilege.
- Court discussed the tension between the right to tout patent rights and the prohibition against false advertising.
- Elevated Standard: "Bad Faith" to overcome the patent publication privilege.
- Dismissed some, but not all, claims.

Contributory False Advertising Liability

DNA Sports Performance Lab, Inc., v. Major League Baseball, et al. (N.D. Cal. Aug. 1, 2020)

- Plaintiffs sell health supplements "extracted from the shed tissue of elk antlers," which contain a "naturally occurring, bio-identical form of IGF-1," a performance-enhancing substance.
- Major League Baseball and the Player's Union have both banned the substance.
- Player's Union allowed the use of competitor product, Klean Athlete, and entered into a licensing agreement with Klean Athlete, which was publicized by Klean Athlete in a single press release.
- Defendants moved to dismiss and for sanctions.
- Court found that plaintiffs sued the wrong parties.
- The Ninth Circuit has not yet adopted contributory false advertising liability, but even if they had it would not inure on these facts.

Standing to Sue and Heightened Pleading Standard

N. Bottling Co. v. Henry's Foods, Inc. (D.N.D. July 22, 2020)

- Northern Bottling Co., Inc. is the exclusive bottler and distributor of certain Pepsi-Cola brand soft drinks in certain parts of North Dakota and South Dakota. Henry's Foods, Inc. sells food and drinks, including Pepsi products, to retail outlets in Northern's exclusive territory.
- Northern alleges that Henry's made a variety of false or misleading claims while selling Pepsi products in Northern's territory.
- Henry's moved to dismiss, arguing lack of standing and failure to state a claim.
- Court rejects standing argument, holding Northern (i) alleged injury that (ii) was proximately caused by Henry's acts.
- Court applied heightened pleading standard under FRCP 9(b), and granted motion to dismiss for failure to plead facts sufficient to meet that standard.

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Class Action Litigation

Nancy L. Stagg

- **COVID-19 LITIGATION: WHAT IS HAPPENING?**
  - **INSURANCE COVERAGE DISPUTES**
  - **PRICE-GOUGING CLAIMS**
  - **PRODUCT EFFICACY (FALSE ADVERTISING)**
- **FALSE ADVERTISING LITIGATION: WHAT (ELSE) IS HAPPENING?**

COVID-19 Class Action Litigation

- **BUSINESS INTERRUPTION INSURANCE COVERAGE DISPUTES**
  - Judicial Panel on Multidistrict Litigation denies petitions to centralize class actions (*In Re COVID-19 Business Interruption Protection Insurance Litigation*, MDL No. 2942, August 12, 2020)
    - Too many insurers (+100), too many different policies
    - Few common questions v. convenience and efficiency challenges
    - Over 450 cases filed since April 2020
    - Will consider "single insurer" MDLs for The Hartford, Lloyd's & others

COVID-19 Class Action Litigation

- **PRICE-GOUGING CLAIMS**
  - Eggs, Toilet Paper, Medical Supplies, Cleanup Supplies

(*Redmond v. Albertsons Companies, Inc.*, NDCA Case No. 3:20-CV-3692-JSC; *Fraser, et al. v. Cal-Maine Foods, Inc., et al.* NDCA Case No. 3:20-CV-2733)

- Allege UCL claims for violation of California Penal Code §396
- § 396 limits price increases during emergencies to no more than 10% above actual cost + "usual" markup
- Motions to dismiss nationwide class claims pending – other states don't regulate at all (AZ) or allow price increases ranging up to 25% (KS)
- But: California classes appear to survive initial pleading motions

COVID-19 Class Action Litigation

- **FALSE ADVERTISING (PRODUCT EFFICACY)**
  - Hand Sanitizer

  (*Merola v. Recreational Equipment, Inc., et al.* D. MA Case No. 1:20-CV-11504-WGY, August 11, 2020)
    - "SafeHands" alcohol-free sanitizer label claims "kills 99.99% of germs"
    - REI website states benzalkonium chloride is a "proven" alternative to alcohol & "kills 99.99% of common germs and bacteria, while also protecting against viruses and fungi"
    - Plaintiff alleges FDA does not permit use of "kills" and CDC states it is not a "proven" alternative with equal efficacy to alcohol
    - Nationwide & MA classes alleged for unjust enrichment & MA law

FALSE ADVERTISING LITIGATION: WHAT (ELSE) IS HAPPENING?

- PARKAY SPRAY: CA & HI false advertising claims preempted by federal Nutrition Labeling and Education Act; record insufficient to require Conagra to meet "butter, margarine, oil and shortening" NLEA category requirements versus "fats & oils: spray type." (*Allen, et al. v. Conagra Foods, Inc.;* NDCA Case No. 3:13-CV-01279-WHO, August 12, 2020)

- Notable: District Court repeatedly cites Plaintiffs' expert testimony against Plaintiffs

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Privacy Update

Farah F. Cook

Real Time Bidding Under Scrutiny

Ten Members of Congress, including Six Senators, ask FTC to Investigate Real Time Bidding

- The group, led by Oregon Senator Ron Wyden, asked the FTC to conduct probes of the Ad Tech industry to determine unfair and deceptive trade practices associated with real time bidding for online ads.

- As an allegedly unfair practice, the Senators highlight that companies use "sham" bids to collect consumers' personal information. The law makers allege that such bidding is unfair because the companies making the bid have no intent on actually placing an add, but rather use the bidding process to collect information on the ad recipient.

- The letter also highlights certain segment creation by Mobilewalla as "outrageous." The letter notes that Mobilewalla used location information to track Black Lives Matter protestors and to build segments of evangelicals.

CCPA Class Actions, Early Trends

Plaintiffs Use Creative Legal Arguments under the CCPA

- Many complaints citing the CCPA, rather than relying on the CCPA directly for a cause of action, they cite the CCPA as a predicate claim for actions under California's unfair competition law (UCL). The CCPA expressly states that the CCPA does not create a private cause of action, cutting against the argument that the CCPA could serve as a predicate claim for an unfair competition claim.

- For example, over a dozen complaints have been filed again Zoom, which have now been consolidated into a single complaint, In Re: Zoom Video Communications, Inc. Privacy Litigation.

- A separate case against ZoomInfo is based on the company's inadvertent sharing of device identifiers with other commercial parties, alleging that such sharing constitutes a data breach under the CCPA, and therefore may be used as a predicate violation under the UCL.

- In addition to money damages, at least one complaint, Sheth v. Ring, seeks an injunction requiring Ring to provide notices required by the CCPA.

Privacy Shield Shattered

EU Court Invalidates the Department of Commerce's EU-US Privacy Shield

- On July 16, 2020, the Court of Justice of the European Union ("CJEU"), in a case evaluating the validity of data transfers from the EEA to the U.S. ("case C-311/18" or "Schrems II"), invalidated the EU-US Privacy Shield.
- The CJEU also limited the Standard Contractual Clauses' ("SCCs") utility. Generally speaking, companies relying on the SCCs to import personal data must implement supplementary measures, in addition to those measures provided in the clauses, to protect imported personal data.
- EU regulators are working to identify such supplementary measures, so stay tuned for more updates.
- **Privacy Shield 2.0?** US Secretary of Commerce Wilbur Ross announced on August 8th that the US Department of Commerce and European Data Protection Board are working to develop a second iteration of the Privacy Shield that will address the CJEU's concerns.

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NARB & NAD

Laura C. Miller

SmileDirectClub, LLC, NAD Case #6387, July 17, 2020

- **Product:** Bright On Whitening Kit, which consists of a paint-on whitening pen plus a blue light device. The pen uses hydrogen peroxide, but its usage instructions call for a wear time of only 5 minutes twice a day. (Challenger's Crest Whitestrips typically require 30 minutes per day.)
- **Claims:** "3x faster to use than strips"; "premium whitening"; "brightest bright" smile
- **NAD Findings:**
  - "3x faster to use than strips" conveyed a broader message than supported by the evidence. Consumers will generally take away a message that the products compared have some equivalence in their attributes. No record evidence that SDC's product offers comparable whitening to Whitestrips and there is no disclosure regarding any material differences.
  - While SDC's product may be three times faster to use than Whitestrips, the comparison to strips – known for their teeth whitening capabilities – reasonably conveys a message of equivalency to tooth whitening outcomes. The 3x faster claim is alongside claims of "premium whitening" and "brightest bright" on packaging and website advertising. Without evidence that SDC's kit offers comparable whitening to Whitestrips, the claim should be discontinued.
  - Without the "3x faster" comparative claim, the claims that SDC's Bright On offers product users a high quality, "premium teeth whitener" or premium whitening," and allows users to achieve their "brightest bright" constitute non-actionable puffery.
- **SDC Statement:** Will comply with NAD's recommendations but disagrees that the expressly true statement that its products are 3x faster to use also conveys an implied efficacy claim.

Locations

Counsel to innovative companies and brands around the world

We help leaders create, expand, and protect the value of their companies and most prized assets by bringing an equal balance of business acumen, technical skill, and creative thinking to the opportunities and challenges they face.

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Charlotte
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