VENABLE LLP

advertising and marketing

A PUBLICATION OF VENABLE'S REGULATORY PRACTICE GROUP

January 24, 2013

Issue Editors

Jeffrey D. Knowles
jdknowles@Venable.com
202.344.4860

Roger A. Colaizzi
racolaizzi@Venable.com
202.344.8051

Gary D. Hailey
gdhailey@Venable.com
202.344.4997

Gregory J. Sater
gjsater@Venable.com
310.229.0377

In This Issue

Jeffrey D. Knowles
jdknowles@Venable.com
202.344.4860

Edward P. Boyle
epboyle@Venable.com
212.808.5675

Emilio W. Cividanes
ecividanes@Venable.com
202.344.4414

Thomas E. Gilbertsen
tegilbertsen@Venable.com
202.344.4598

Leonard L. Gordon
lgordon@Venable.com
212.370.6252

Stuart P. Ingis
singis@Venable.com
202.344.4613

Randal M. Shaheen
rmshaheen@Venable.com
202.344.4488

Daniel S. Silverman
dssilverman@Venable.com
310.229.0373

News

FTC Studies Alcohol Marketing Practices, Prepares Recommendations

According to a January 22 Reuters story, the Federal Trade Commission (FTC) plans to release recommendations for the alcoholic beverage industry's online advertising practices sometime this summer. Since April 2012, the FTC has been studying data from 14 large beer, wine, and liquor marketers to understand how the industry currently promotes itself on the Internet and via social media platforms such as Facebook and Twitter.

In April, the FTC required the advertisers to provide information for the agency's fourth major study on the effectiveness of voluntary industry guidelines in reducing advertising and marketing by alcohol manufacturers to underage audiences. However, it was the first time the FTC had sought information on Internet and digital marketing and data collection practices from alcohol advertisers. In addition to the Internet and digital marketing data, the FTC required the advertisers to supply data on advertising expenditures and placements, as well as background information about the advertisers' business practices.

Click here to read the Reuters story.

Click here to read the FTC's April 2012 press release announcing the study.

Analysis

FTC's *POM* Decision Provides Food for Thought

In a decision that surprised no one, the FTC last week affirmed the decision made last summer by the FTC's Administrative Law Judge (ALJ) finding that pomegranate marketer POM Wonderful made deceptive disease claims in its advertising, write Venable partners **Leonard L. Gordon** and **Randal M. Shaheen** in a recent post to Venable's advertising law blog, **www.allaboutadvertisinglaw.com**.

The FTC, Gordon and Shaheen write, found more of POM's ads to be false or deceptive than had the ALJ (17 ads in addition to the 19 the ALJ had found false or deceptive), and it ordered stricter injunctive relief. The FTC also rejected POM's argument that the use of qualifiers such as "may" or "can" modified the statements in the ad such that disease claims were not made. Similarly, the FTC rejected POM's argument that the humor, hyperbole, and parody found in many of the POM ads somehow blocked or modified the disease claims.

The FTC also ordered as "fencing in" that POM have two randomized clinical trials to substantiate any future disease claims. While this is consistent with the FTC's position in other recent cases regarding the substantiation required for disease claims, Gordon and Shaheen write it is the first time they have seen the FTC go on record as saying it can require substantiation in an order above what might otherwise be required to substantiate a claim as "fencing in." This raises the possibility that a company under a consent order might not be able to make a claim, otherwise supported by adequate and competent reliable scientific evidence, because it has been "fenced in" while its rivals, who are not under a similar consent order, might be free to do so.

Throughout the decision, Gordon and Shaheen write in the post, the FTC provides much for advertisers, especially food advertisers, to consider.

Kaveri B. Arora
kbarora@Venable.com
212.370.6202

Michael P. Bracken
mpbracken@Venable.com
202.344.4179

Honors and Awards

Top ranked in *Chambers USA* 2012

Law Firm of the Year, National Advertising, *U.S. News and World Report*, 2011-2012

Top-Tier Firm *Legal 500*

For more information about Venable's award-winning Advertising and Marketing practice, please visit our website at www.Venable.com/Advertising-and-Marketing

Click here to read the full blog post by Gordon and Shaheen.

Click here to read the FTC's press release and decision in the *POM* case.

10th Circuit Decision Clarifies No ECPA Liability for Behavioral Advertising Participant

A federal appellate court in Denver recently upheld summary judgment for an Internet service provider (ISP) defending class action allegations that it violated the Electronic Communications Privacy Act of 1986 (ECPA) by acquiring information about subscriber web-surfing activities as part of a program to tailor online advertisements for its subscribers. Online advertisers and advertising firms, as well as web publishers and website hosts, will have just as much interest as communication carriers in the U.S. Court of Appeals for the Tenth Circuit's year-end decision, write Venable partners **Edward P. Boyle**, **Emilio W. Cividanes**, **Thomas E. Gilbertsen** and **Stuart P. Ingis** in a recent client alert.

This decision, the partners write, solidifies a spate of recent district court decisions confirming the compliance of various online advertising platforms with state and federal privacy laws. The new decision is one of very few federal appellate court decisions construing ECPA's application to online behavioral advertising, and distinguishes entities directly acquiring Internet traffic from businesses whose participation is less direct and therefore not subject to ECPA liability under an aiding and abetting theory. The decision also recognizes that by defining authorized "interceptions" to include ordinary-course-of-business acquisitions of electronic communications, Congress immunized the ISP's challenged activity from ECPA claims provision.

Click here to read the full summary and analysis of the *Embarq* decision.

A "Natural" Class Action Ends Up on the Rocks

A New York federal judge recently denied class certification in a lawsuit alleging that the Skinnygirl Margarita cocktail was falsely advertised as "all-natural." Although this decision will do little to stem the tide of "all-natural" class actions that have swamped food and beverage companies, it does illustrate two possible challenges to certification, write Venable attorneys **Leonard L. Gordon** and **Kaveri B. Arora** in a recent post to Venable's advertising law blog, **www.allaboutadvertisinglaw.com**.

In September 2011, the purchaser claimed that Skinnygirl Cocktails and its parent company, Beam Global Spirits & Wine, Inc., committed false advertising under New York law and sought class certification of fellow purchasers. This month, the judge denied certification, finding that the purchaser's claims failed to meet the typicality requirement of Federal Rule of Civil Procedure 23(a). This rule requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class.

Typicality was not satisfied for two reasons: the purchase was not subject to New York law because the purchase was made in Massachusetts, and the purchaser admitted that he bought the product to "appease his wife" as opposed to any reliance on the "all-natural" advertising claim.

Click here to read the the full blog post and learn more about Rule 23(a) as a line of defense in class actions.

Another CIPA Customer Service Call Class Action Is Disconnected?

Last week the U.S. Court of Appeals for the Ninth Circuit ruled on the issue of whether a business can be held liable under the California Invasion of Privacy Act (CIPA) for monitoring or recording its own customer service telephone calls in the ordinary course of business. The decision in *Faulkner v. ADT*, write Venable attorneys **Thomas E. Gilbertsen**, **Daniel S. Silverman** and **Michael P. Bracken** in a recent client alert, is another example of the growing judicial hostility to CIPA class actions challenging companies that monitor or record their in-bound customer calls.

In *Faulkner*, the plaintiff brought a putative class action suit against ADT in California state court alleging that his calls to ADT's customer service lines were confidential communications under CIPA and that ADT violated his privacy rights under that statute by recording his call to the company without first obtaining his consent.

After the case was moved to federal court, it was dismissed with prejudice because the plaintiff failed to plead an “objectively reasonable expectation” that his customer service call with ADT was not being recorded or overheard. On appeal, the Ninth Circuit expressed grave doubts about plaintiff’s CIPA claims but remanded the case in what it called an “overabundance of caution” to allow plaintiff to amend his complaint in an attempt to meet federal pleading standards.

In so doing, Gilbertsen, Silverman and Bracken write, the appellate panel intimated that it agreed with the district court’s reasoning that a customer does not have a reasonable expectation of privacy for typical customer service calls to a business, especially when confidential information such as a social security number or an unlisted telephone number is not revealed.

The *Faulkner* decision is a welcome blow to would-be and current CIPA plaintiffs. However, the Venable attorneys write, businesses should remain cautious and notify customers at the outset of every call that the call is being monitored or recorded until California state and federal courts uniformly adopt the stance that such calls do not carry a reasonable expectation of privacy.

Click here to read the full text of the client alert covering the *Faulkner* decision.

Upcoming Events

ABA Consumer Protection Conference - Washington, DC
February 7, 2013

This biennial conference will focus on the future of consumer protection, privacy and advertising laws. Please join Venable partner **Amy Ralph Mudge** as she moderates "Copycat Private Class Actions: Making and Breaking the Links."

Click here to learn more.

Electronic Retailing Association Great Ideas Summit - Miami
February 25-27, 2013
Venable is proud to sponsor the VIP Reception of ERA's Great Ideas Summit 2013. Also, please join Venable partner **Jeffrey D. Knowles** as he presents the educational session "Up, Down and Sideways - How Enforcement Actions Traverse the Value Chain" on Tuesday, February 26. Meet the attorneys of **Venable's Advertising and Marketing Group** on the show floor at booth #304.

Click here to learn more about ERA GIS 2013 and register.

International Home and Housewares Show - Chicago
March 2-5, 2013
The International Home + Housewares Show offers you the opportunity to see first-hand consumer lifestyle and product trends for all areas of the home, both inside and out, under one roof. Venable partner **Randal M. Shaheen** will host a representative from a big-box retailer and a recycling-managerment executive to present "How to Make Green by Being Green and Staying Clear of the FTC." Join us and learn how to green your business – in more ways than one.

Click here to register for Housewares.

Venable is a sponsor of the **DRMA Chicago Networking Bash**, which occurs during the Housewares show, on March 4. Please join our attorneys for an evening of networking with direct-to-consumer professionals.

Engredea, Natural Products Expo West and Nutracon - Anaheim, CA
March 6-10, 2013
Venable is a proud sponsor of this conference, which brings together the community of leading suppliers and manufacturers to source new ingredients, packaging, technologies, equipment, and services in the global nutrition industry. Venable partner **Todd A. Harrison** will speak at the Nutracon conference on March 6. Venable partner **Claudia A. Lewis** will speak on medical foods at Engredea on March 9. Come see us on the Engredea show floor at booth #355.

Click here to register.

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Visit Venable's advertising law blog at www.allaboutadvertisinglaw.com.

CALIFORNIA MARYLAND NEW YORK VIRGINIA WASHINGTON, DC

1.888.VENABLE | www.Venable.com

575 7th Street, NW, Washington, DC 20004