Advertising Law

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Manatt Senior Partner Honored as a Hollywood Power Lawyer

Manatt's L. Lee Phillips, a senior partner in the firm's Los Angeles office, has been named to *The Hollywood Reporter*'s prestigious Power Lawyers list for the fifth consecutive year. The list features 100 of the most prominent attorneys influencing the entertainment industry in high-stake deals and lawsuits.

Phillips, who has been a leader in the music industry for more than 35 years, has appeared in the list's talent category since its beginning in 2007. Phillips represents major musicians and recording artists, including Barbra Streisand, Tracy Chapman, Steve Perry of Journey, the Eagles, and Neil Young. He has represented major record companies and focuses his practice on contract negotiations and general advisory matters.

The Hollywood Reporter, a multimedia platform serving as the definitive interpretive voice of the entertainment industry, publishes its Power Lawyer list annually. The list canvasses the year's show business landscape to determine the attorneys behind the biggest deals and cases. Candidates are evaluated against their peers, including other litigators and dealmakers.

View the list here.

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Senate Committee Discusses Online Privacy, Do Not Track

The Senate Committee on Commerce, Science and Transportation conducted a hearing about online privacy at which Federal Trade Commission Commissioner Julie Brill testified, supporting the idea of a Do Not Track mechanism both online and on mobile devices.

Brill told senators at the hearing on "Privacy and Data Security: Protecting Consumers in the Online World" that the FTC has brought more than 300 privacy-related actions, including spam cases, data security cases, Fair Credit Reporting Act cases, spyware cases, and cases enforcing the Children's Online Privacy Protection Act.

Referencing the FTC's December 2010 report on privacy, Brill said the FTC recommended a "privacy by design" approach to regulating privacy, including the use of a Do Not Track mechanism.

"Any Do Not Track system should not undermine the benefits that online behavioral advertising has to offer, by funding online content and services and providing personalized advertisements that many consumers value," Brill said.

The mechanism should be "flexible," she added, and "should allow companies to explain the benefits of tracking and to take the opportunity to convince consumers not to opt out of tracking," possibly including "an option that enables consumers to control the types of advertising they want to receive and the types of data they are willing to have collected about them, in addition to providing the option to opt out completely."

The agency also recommended that companies should improve their privacy policies, Brill said.

Although fellow Commissioner J. Thomas Rosch voted to issue the testimony, he authored a separate statement recommending that both the FTC and lawmakers undertake an effort to learn more about Do Not Track before moving forward with such legislation, expressing concern that the parties are "acting blindly."

"We must gather competent and reliable evidence about what kind of tracking is occurring before we embrace any particular mechanism. We must also gather reliable evidence about the practices most consumers are concerned about," he said.

At the hearing, Sens. Rockefeller and Kerry also discussed their proposed privacy legislation. Sen. John Rockefeller (D-W.V.) introduced the Do Not Track Online Act of 2011 while Sens. John Kerry (D-Mass.) and John McCain (R-Ariz.) introduced the Consumer Privacy Bill of Rights Act of 2011. Sens. Kerry and McCain's bill does not include a provision for a Do Not Track mechanism, but would require companies to inform consumers about their online collection practices and allow them to opt out of behavioral targeting.

In her testimony, Brill noted that the FTC has not advocated for a particular bill.

To read the text of Commissioner Brill's testimony, click here.

To read Commissioner Rosch's statement, click here.

Why it matters: The Committee hearing evidences the continued push for privacy legislation in Washington and the continuing divide over the need for a Do Not Track mechanism, with both the FTC and lawmakers split on whether it is a necessary piece of privacy protection. Advertising groups and privacy and consumer rights organizations contributed to the hearing via letters, advocating for and against Do Not Track. In their letter to the Committee, the U.S. Chamber of Commerce, the Interactive Advertising Bureau, and other ad associations weighed in on behalf of continued self-regulation. "Any government restriction on the ability of companies to gain revenue from advertising would result in less free or subsidized content being made available to users and would inhibit innovative start-ups," the groups wrote in their letter. On the other end of the spectrum, consumer advocacy organizations such as the Electronic Frontier Foundation,

the ACLU, and the Center for Digital Democracy argued in a letter that “technology has outpaced the law. . . . Consumers have no meaningful ability to limit the use of their personal information that they provide to companies online.”

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Nivea Settles with FTC Over Skin Cream Claims

The Federal Trade Commission settled with Beiersdorf, Inc., the maker of Nivea, after the agency alleged that the defendant falsely advertised that the skin cream could help consumers slim down and reshape their bodies.

The company agreed to pay $900,000 and is barred from making claims that its products cause substantial weight or fat loss when applied to the skin.

In its complaint, the FTC charged that the company used sponsored Google search results and television advertisements to promote Nivea My Silhouette! with “Bio-Slim Complex,” a combination of ingredients, including white tea and anise, which it claimed could reshape and slim the body.

In one television ad cited by the agency, a woman applies Nivea My Silhouette! to her stomach and thighs and after going through her closet, tries on a pair of old jeans that still fit. The voiceover for the ad says, “New Nivea My Silhouette! with Bio-Slim Complex helps redefine the appearance of your silhouette and noticeably firm skin in just four weeks. So you can rediscover your favorite jeans. And how they still get his attention. New Nivea My Silhouette! with Bio-Slim Complex. Touch and be touched.”

Sponsored search ads purchased by the defendant included phrases such as “stomach fat” and “thin waist” so that Nivea ads would appear during those searches, the FTC said.

In addition to paying $900,000, Beiersdorf agreed to stop making claims that any product applied to the skin causes substantial weight or fat loss, or a substantial reduction in body size. The company is also required to have competent and reliable scientific evidence for any claims regarding the health benefits of its products and is prohibited

from making such claims absent two randomized, double-blind, placebo-controlled human clinical studies.

To read the complaint in *In the Matter of Beiersdorf*, click here.

Why it matters: "The real skinny on weight loss is that no cream is going to help you fit into your jeans," FTC Chairman Jon Leibowitz said in a press release about the settlement. "The tried and true formula for weight loss is diet and exercise."

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California Enacts Online Sales Tax

California Governor Jerry Brown signed into law a bill that will require out-of-state retailers to collect California sales tax from residents.

The law, which took effect upon signing, is an attempt to raise revenues by collecting tax from consumers, and is "a common-sense idea," Gov. Brown told the *Los Angeles Times*.

While the new law is predicted to raise more than $300 million per year in revenue for state and local governments, e-tailers such as Amazon and Overstock announced that they plan to stop using California-based marketing affiliates.

Affiliates receive commissions for referrals of click-through customers, but because they are based in the state, Amazon would be forced to abide by the law, which applies to retailers with a physical connection to California – such as offices, warehouses, or employees.

The Performance Marketing Association, the national trade association representing affiliate marketers, bemoaned the law's passage, noting that it put 25,000 California businesses at risk.

"These California web-based companies earn income from ads placed on their websites. In 2010 they paid $151 million in state income taxes. The result of [the new law] will mean these small businesses will go out of business or move out-of-state to preserve

their incomes. As a result, California's current deficit and economic outlook will get worse," the PMA said in a statement.

To read the new law, click here.

Why it matters: California is the latest state to pass a law attempting to tax Internet sales. The laws have been controversial, with lawsuits challenging their constitutionality in Colorado as well as in New York and North Carolina. A New York trial court judge upheld the state's law, a decision currently on appeal by Amazon.

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U.S. Supreme Court Strikes Down Ban on Violent Video Games

In one of the final decisions issued this term, the U.S. Supreme Court overturned California's law banning the sale or rental of violent video games to minors.

The 7-2 Court said that video games deserve the same First Amendment protection as other formats, such as books, plays, and movies.

In 2005, California enacted a law that prohibited the sale or rental of "violent video games" to minors, requiring special packaging for such games.

A group of video game and software companies challenged the law, arguing that it violated the First Amendment.

Writing for the majority, Justice Antonin Scalia found "gore" in other art forms directed to children, using the example of Cinderella's evil stepsisters getting their eyes pecked out by birds, the graphic nature of Dante's *Divine Comedy*, and mandatory high school reading, including like *Lord of the Flies* and *The Odyssey*. Despite the allegedly more "interactive" nature of video games, the Court said that "all literature is interactive."

Further, while the state attempted to address a legitimate and serious social problem, the Justices said the evidence that video games cause violence in children was lacking.

"The state's evidence is not compelling," the Court said. The evidence relied upon shows "at best some correlation between exposure to violent entertainment and miniscule real-

world effects, such as children's feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game."

Because California "singled out the purveyors of video games for disfavored treatment – at least when compared to booksellers, cartoonists, and movie products" and offered "no persuasive reason why," the law could not stand, Justice Scalia wrote.

"Even where the protection of children is the object, the constitutional limits on governmental action apply," the Court held.

Other Justices, in a concurrence, written by Justice Samuel Alito and Chief Justice John Roberts, indicated that they are not entirely opposed to laws restricting the sale of video games to children. Emphasizing the "rapidly evolving" nature of technology, Justice Alito did not foreclose the possibility that a law providing "narrow specificity" in a similar ban would pass constitutional scrutiny.

Justice Clarence Thomas authored a dissent that focused on children's limited First Amendment rights and the ability of parents to control access to their offspring, writing that the freedom of speech, as originally understood by the drafters of the Constitution, did "not include a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians."

In his dissent, Justice Stephen Breyer said he would have upheld the law, as the regulation of communication addressed to children does not need to conform to the requirements of the First Amendment in the same way as those applicable to adults, and it imposed "no more than a modest restriction on expression."

To read the Court's decision in *Brown v. Entertainment Merchants Association*, click here.

Why it matters: The Association of National Advertisers filed an amicus brief opposing the California law "to respond to the growing effort of policymakers across the country to 'childproof' ever widening categories of speech in our society," Dan Jaffe, executive vice president of government relations for the ANA, said in a statement. "The Supreme Court has repeatedly held that speech that is perfectly lawful for adults cannot be overly restricted under the guise of protecting children and they reaffirmed that in today's decision." Calling the decision a "major victory," Jaffe added that the "First Amendment is

the ultimate safety net for all marketers when any government seeks to ban or restrict advertising."

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Class Action Update: More "Natural" Lawsuits, Kellogg's Settles

In recent consumer class action news, two complaints were filed against ConAgra Foods alleging that the company deceptively marketed its cooking oils as "100% Natural," while Kellogg's settled a suit over false advertising of its Rice Krispies and Cocoa Krispies cereals.

Plaintiffs in California and New York filed suit against ConAgra just days apart, making identical allegations that the company is deceiving consumers by claiming its four types of cooking oils are "100% Natural" even though the oils are made from genetically modified plants or organisms.

Genetically modified organisms are "'unnatural' by definition," according to the New York complaint filed by plaintiff Kelly McFadden, "engineered by the cross-breeding of seeds to allow for greater yield and resistance to pesticides."

"The reasonable consumer assumes that seeds created by exchanging genetic material between different species to exhibit traits not naturally theirs are not '100% natural,'" according to the complaint. ConAgra also marketed its oils to "evoke wholesomeness and health," using the image of the sun around the Wesson name, the plaintiff alleged.

The suit seeks to certify a class of New York purchasers of Wesson's canola oil, vegetable oil, corn oil, and best blend products, asking for a halt to use of the allegedly deceptive claims as well as compensatory and punitive damages.

The California suit makes similar allegations.

"Plaintiff paid for a 100% natural product, but did not receive a product that was 100% natural. Plaintiff received a product that was genetically engineered in a laboratory, and had its genetic code artificially altered to exhibit not 'natural' qualities," according to the complaint filed in California federal court by Robert Briseno.

Briseno's suit seeks similar injunctive and pecuniary relief for a nationwide class of plaintiffs.

In other class action news, Kellogg's agreed to pay $2.5 million to fund a settlement for repayment to class members who alleged the company falsely advertised its Rice Krispies and Cocoa Krispies cereals as supporting the immune system even though the company lacked scientific evidence for the claims.

Plaintiffs can receive $5 per box purchased during the relevant time period – without proof of purchase – for up to three boxes per household.

Last June, Kellogg's settled with the Federal Trade Commission over similar charges, agreeing to advertising restrictions related to health benefits about its food products. The agreement updated a July 2009 consent order relating to claims that its Frosted Mini-Wheats cereal was "clinically shown to improve kids' attentiveness by nearly 20%."

Under the expanded order, Kellogg's can no longer make claims for Rice Krispies that the cereal "now helps support your child's immunity," and was prohibited from making claims about any health benefit of any food unless its claims were backed by scientific evidence and not misleading.

To read the complaint in *McFadden v. ConAgra,* click here.

To read the complaint in *Briseno v. ConAgra*, click here.

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

Why it matters: Both the ConAgra lawsuits and the Kellogg's settlement are examples of common issues in advertising class actions. Health claims have received close scrutiny recently, as demonstrated by Kellogg's multiple actions with the Federal Trade Commission. And a number of other lawsuits have been filed alleging that "natural" products are no such thing, including those against Ben & Jerry's for its use of the phrase "All Natural" on its ice cream and frozen yogurt packaging as well as against Snapple, for labeling its drinks "All Natural" when they contained high-fructose corn syrup.

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Noted and Quoted...Reuters Turns to Ivan Wasserman for Insight on New Dietary Ingredient Notification

On July 5, 2011, Reuters caught up with Ivan Wasserman, a partner in Manatt's Advertising, Marketing & Media Division, to discuss the draft guidelines recently issued by the Food and Drug Administration to help manufacturers notify regulators of new dietary ingredients.

Earlier this year, the FDA was tasked with preparing guidelines that will help clarify for manufacturers when they should file a new dietary ingredient notification (NDI) in order to comply with a 1994 safety notification law. Since the law passed, the FDA has only received 700 notifications and expects there are more than 55,000 dietary supplement products. According to Ivan, companies often struggled to determine which products required notice and documentation to show the products were safe. "Once everyone understands what it means and how to comply with it, you'll see compliance increasing," he said. "If (the FDA) doesn't see an increased number of NDI submissions ... I wouldn't be surprised to see some type of uptick in enforcement."

Click here to read the full article.

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