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Editors: Linda A. Goldstein | Jeffrey S. Edelstein | Marc Roth

Manatt Partners Linda Goldstein and Chris Cole to Speak at Leading Advertising Litigation Conference

On June 21-22, 2011, a who's who of the nation's advertising bar will convene at the American Conference Institute's "Litigating and Resolving Advertising Disputes" conference, to be held in New York. They will present strategies for bringing and defending federal Lanham Act cases and succeeding at the National Advertising Division (NAD).

At the ACI conference, Manatt Advertising, Marketing & Media Division Chair Linda Goldstein will pair up with Kathleen Dunnigan (NAD staff attorney) to explore "Inside Strategies for Effectively Utilizing the NAD to Resolve Advertising Disputes." Manatt partner Chris Cole will join Kathryn A. Meisel (Assistant General Counsel, Johnson &

Johnson) and others to participate in a panel discussion, “Winning Your Lanham Act Case in Federal Court: Plaintiff and Defense Success Strategies.”

NOTE: Be sure to take advantage of Manatt’s friend-of-the-firm discount by using the code provided in the registration materials available here.

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FTC Takes Action over “Free Trial” Offers

The Federal Trade Commission filed an enforcement action against several defendants accused of using deceptive tactics to offer consumers “free trials” of various products online, including acai berry weight-loss pills, teeth whiteners, and health supplements, as well as for free credit reports, penny auctions, access to government grants, and “work at home” schemes.

The defendants – Jesse Willms and 10 companies he controlled – used the offers to obtain consumers’ credit or debit card numbers and then charged consumers a monthly recurring fee for various “bonus” offers, the FTC alleged. According to the complaint, a typical claim read, “Your risk-free trial is almost ready to ship. Simply use this 100% secure order form to tell us how to bill the small cost to ship you your trial. Oh and don’t worry, today you are only being charged for the small shipping charge, and nothing more.”

The agency alleged the defendants made false claims about weight-loss and cancer cures and relied upon false endorsements by Rachel Ray as well as Oprah Winfrey, who filed a federal lawsuit against Willms for the unauthorized use of her name and likeness. They made false claims about the availability of refunds, recurring charges and the total cost of products. According to the complaint, the defendants also buried important terms and conditions from consumers in “small font, using pale colors that are difficult to view,” and separated this information from the box where billing information was entered. In addition, the FTC said consumers were deceived by the defendants’ penny auctions, which falsely indicated that by providing credit or debit card information they would receive free “bonus” bids. Instead, the defendants charged $150 for introductory bonus bids and $11.95 per month for ongoing bonus bids, the agency alleged.

The FTC said the defendants made more than $467 million off their free trial offers from consumers in the United States as well as Australia, Canada, New Zealand, and the United Kingdom. The complaint seeks a permanent injunction against the defendants, as well as an order freezing all assets.

To read the complaint in *FTC v. Willms*, click here.

Why it matters: Marketers should take care to ensure that all the material terms related to billing are clearly disclosed to consumers, as this area continues to be a hot issue for the FTC. "'Free' must really mean 'free' no matter where the offer is made," FTC Bureau of Consumer Protection Director David C. Vladeck said in a statement about the action, which was brought as part of the agency's ongoing efforts against Internet fraud.

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FTC Testifies About Mobile Devices, Privacy, COPPA

At a recent hearing addressing mobile devices and online data collection, FTC Bureau of Consumer Protection Director David Vladeck emphasized the challenges of protecting consumer privacy in the constantly changing world of mobile technology.

Testifying before a subcommittee of the Senate Committee on Commerce, Science, and Transportation, Vladeck discussed the agency's privacy-related cases over the last 15 years, noting that the FTC has taken "a number" of steps to focus on mobile technology. He used the example of a recent settlement with Reverb Communications, a public relations firm accused of illegally advertising its clients' gaming applications, or "apps," by having employees pose as consumers and post positive reviews on iTunes.

The settlement "demonstrates that the FTC's well-settled truth-in-advertising principles apply to new forms of mobile marketing. The mobile marketplace may offer advertisers new opportunities, but as in the offline world, companies must be able to substantiate claims made about their products. Developers may not make misrepresentations or unsubstantiated claims about their mobile apps, whether those claims are in banner ads,

on a mobile Web site, in an app, or in app store descriptions. FTC staff is working to identify other violations of these well-established principles in the mobile context," Vladeck said.

Vladeck acknowledged that the agency currently lacks the power to regulate many app developers, however, as many apps do not have a privacy policy in place. Because the FTC typically brings charges of deceptive practices or unfair conduct based on a company's failure to live up to its own policies, the absence of a privacy policy "makes things more difficult for us," as the agency cannot accuse the company of breaking its promises to users, he explained.

Vladeck referenced the FTC's preliminary staff report on privacy released in December and some of the concepts it recommended, including a Do Not Track mechanism for consumers to opt out of online tracking. Vladeck also discussed the agency's current review of the Children's Online Privacy Protection Act (COPPA), a process which began in April 2010. As part of its review, the FTC requested comment on issues such as whether geolocation information and persistent IP addresses should be added to the definition of "personal information" under COPPA, and how the Act should apply to mobile platforms and other new technology since it was last amended in 2000.

However, there was some criticism of the agency's efforts, including Commerce Committee Chairman Sen. John "Jay" Rockefeller (D-W.V.), who told Vladeck the process wasn't moving fast enough. "All I'm saying is: Get the rules out," Sen. Rockefeller said during Vladeck's testimony. "We hear you loud and clear," Vladeck replied. Sen. Rockefeller then asked whether Vladeck agreed that COPPA is "widely disregarded"; he replied that he "did not know" whether or not he agreed with that statement. Recent cases – such as the one against online gaming company Playdom which settled with the FTC for $3 million over charges that it illegally collected and disclosed the personal information of children under the age of 13 – will send a signal to the industry, however, about the FTC's seriousness about enforcing COPPA, Vladeck said.

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

To read the text of Sen. Rockefeller's remarks, click here.

Why it matters: In addition to the FTC, representatives from Facebook and Google testified about mobile devices and privacy in the Senate's second hearing on the topic in a week. Lawmakers continue to focus on privacy issues, and with two pieces of Senate legislation pending from Committee members – Sen. John Kerry's Consumer Privacy Bill of Rights and Sen. Rockefeller's Do Not Track Online Act – expect more activity on privacy issues in Washington.

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California Considers Social Networking Law

A California legislator has introduced a state bill that would regulate the privacy controls of social networking sites.

Under SB 242, the Social Networking Privacy Act, social networking sites would be required to establish a default privacy setting making all information about a user – except his or her name and city of residence – private, absent the express agreement of the user. During the registration process, users would be allowed to choose their privacy settings in an "easy to use format," to decide how much information to make public, and sites would have to provide an explanation of users' privacy controls in "plain language." If requested by a user (or the parent of a minor under the age of 18), the law mandates that sites remove personal information within 48 hours.

Currently, most sites, like Facebook, default to making a user's photos, information and posts public unless adjusted by a user. "You shouldn't have to sign in and give up your personal information before you get to the part where you say, 'Please don't share my personal information,' " state Sen. Ellen Corbett, author of the bill, told the *San Francisco Chronicle*.

Notably, the bill defines a social networking site as "an Internet Web-based service that allows an individual to construct a public or partly public profile within a bounded system, articulate a list of other users with whom the individual shares a connection, and view and traverse his or her list of connections and those made by others in the system," which allows for broad application. Fines under the law include penalties of up to

$10,000 per willful and knowing violation. The Senate Judiciary Committee passed the bill, and it has now moved to the floor of the state Senate.

The bill already faces tough opposition, as a group of Internet companies – including Facebook, Google, Skype, Twitter, and Yahoo – sent a letter to Sen. Corbett arguing the law is unnecessary and unconstitutional. The law would actually decrease overall consumer privacy, the coalition argues, by not allowing consumers to try the site and make contextual decisions about what information to make public and what to keep private. Because no harm has been demonstrated, the law is unnecessary and could have a serious detrimental effect on the technology sector in the state, according to the letter, by exposing California companies to "massive and unwarranted civil liability."

The group also contends that the law violates users' First Amendment rights by imposing restrictions on their free speech, and would stand in opposition to the Commerce Clause by imposing different rules on California citizens and companies than the rest of the country.

"SB 242 would significantly undermine the ability of Californians to make informed and meaningful choices about use of their personal data, and unconstitutionally interfere with the right to free speech enshrined in the California and United States Constitutions, while doing significant damage to California's vibrant Internet commerce industry at a time when the state can least afford it," the companies wrote.

To read the Social Networking Privacy Act, click here.

To read the letter in opposition, click here.

Why it matters: While privacy is a popular subject for legislation and social network sites are a current target for lawsuits and privacy advocates, the law nevertheless faces an uphill battle to passage. Sites beyond the major social networks have expressed concern about the implications of the privacy regulations and the impact on Internet business.

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Oreck Faces Class Action over Vacuum Claims

After recently settling similar claims with the Federal Trade Commission, Oreck Corporation now faces a class action lawsuit in Illinois federal court alleging that the company's advertising for its Halo vacuum is false and misleading. Earlier this year, Oreck agreed to pay the FTC $750,000 to settle charges that it made false and unproven claims about the Halo and its ProShield Plus air purifier.

Relying on that settlement, plaintiff Gregory Ruscitti claims that Oreck "deceptively marketed, advertised, packaged, labeled and otherwise promoted its Oreck Halo vacuum as effective, through normal use, in killing virtually all bacteria, germs, mold and allergens that exist in households," according to the complaint. In June 2010, Ruscitti purchased a Halo, an upright vacuum with a built-in light chamber and HEPA filter bag, sold in excess of $500. In television, print and Internet advertising, Oreck claimed that the Halo could substantially reduce the risk of flu, and eliminate virtually all common germs and allergens, Ruscitti said.

Claims included, "The light chamber in the Oreck Halo has killed up to 99.9% of bacteria exposed to its light in one second or less," in an infomercial, while a print ad showed a woman wearing a gas mask with the tagline, "Want a new way to help battle the flu?" The suit seeks to certify a nationwide class of consumers, alleging violations of Illinois' consumer fraud and deceptive trade practices law. It seeks general and statutory damages, with punitive and treble damages where available.

To read the complaint in *Ruscitti v. Oreck Corporation*, click here.

Why it matters: The lawsuit demonstrates the two-front war companies must wage against both regulatory actions and consumer suits over advertising claims, as well as the importance of substantiating health claims made about a product. Under the terms of the FTC settlement, Oreck agreed to refrain from making claims about a product's health benefits without "competent and reliable scientific evidence for support," and the agency noted that the action was part of its ongoing efforts to protect consumers "from bogus health claims."

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