# Advertising Law

February 23, 2012

## In This Issue



## FTC Warns Background Check Mobile Apps Over FCRA Compliance

**The marketers of six mobile applications recently received warning letters from the Federal Trade Commission cautioning them to review their policies and procedures to ensure their compliance with the Fair Credit Reporting Act.**

Businesses are subject to the FCRA when they assemble, evaluate, or supply information on consumers to third parties for the purpose of providing a "consumer report." A consumer report includes information that "relates to an individual's character, reputation or personal characteristics" and is used or expected to be used for employment, housing, credit, or other similar purposes.

As mobile apps supply such information, they must comply with the FCRA, the FTC said.

The recipients of the warning letters – Everify, Inc., the marketer of the Police Records app; InfoPay, Inc., the marketer of the Criminal Pages app; and Intelligator, Inc., the marketer of Background Checks, Criminal Records Search, Investigate and Locate Anyone, and People Search and Investigator apps – provide background screening reports, including criminal histories.

"Employers are likely to use such criminal histories when screening job applicants," associate director of the FTC Maneesha Mithal wrote in the warning letters.

To comply with the FCRA, companies must take reasonable steps to ensure that recipients have a "permissible purpose" to use the reports. They must also take reasonable steps to ensure the maximum possible accuracy of the information conveyed in reports and provide users of the reports with information about their obligations under the Act, Mithal explained.

For example, if the consumer report is used for employment purposes, then the app must provide the employer with information about its obligations under the FCRA. This includes notice to employees and applicants of any adverse action taken on the basis of the report, as well as their right to a copy of the report and a free reinvestigation of information the consumer believes to be in error.

"If you have reason to believe that your reports are being used for

### Newsletter Editors


**Linda A. Goldstein**
Partner
Email
212.790.4544

**Jeffrey S. Edelstein**
Partner
Email
212.790.4533

**Marc Roth**
Partner
Email
212.790.4542


### Practice Area Links

Practice Overview
Members

### Upcoming Events

March 3-5, 2012
**The Institute for Perception's Advertising Claims 2012 Short Course**
**Topic:** "Advertising Claims Support: Case Histories and Principles"
**Speaker:** Chris Cole
Sea Island, GA
For more information

March 7-11, 2012
**Engredea's Ingredients and Innovation Conference (co-located with ExpoWest)**
**Topic:** "Talkin' 'bout the Regulations" and "Business 401 Workshop: Negotiating the Regulations"
**Speaker:** Ivan Wasserman
Anaheim, CA
For more information

March 12, 2012
**PLI's Counseling Clients in the Entertainment Industry 2012 Seminar**
**Topic/Speaker:** "Video Games and Computer Entertainment," Marc Roth
**Topic/Speaker:** "Television, Video & User-Generated Content," Kenneth Kaufman
New York, NY and via webcast
For more information

March 19-20, 2012
**ACI's Legal & Regulatory Summit on Food & Beverage Marketing & Advertising**
**Topic:** *"From Weight Loss to Healthy Eating* - How to Prevent Health Claim Nightmares: Practical Guidance for Structuring Claims that Will Withstand Government Scrutiny and Private Litigation*"*
**Speaker:** Linda Goldstein
Washington, DC
For more information

March 28-30, 2012
**60th ABA Section of Antitrust Law Spring Meeting**
**Topic:** "Pot to Frying Pan – Settlement Agreements as Antitrust Violations"
**Speaker:** Chris Cole
Washington, DC
For more information

May 4, 2012
**New York City Bar Association's Sweepstakes, Promotions, & Marketing Laws: Comprehension & Compliance Seminar**

employment or other FCRA purposes, you and your customers who are using the reports for such purposes must comply with the FCRA. This is true even if you have a disclaimer on your website indicating that your reports should not be used for employment or other FCRA purposes," the letters cautioned.

To read the warning letter to Intelligator, click here.

**Why it matters:** The FTC's warning letters are a reminder that mobile applications are subject to the same laws and requirements as other companies. While the agency said it had not made a determination as to whether the recipients were in fact violating the FCRA, it encouraged the marketers to review their apps, policies, and procedures for compliance. In making such a determination, companies should evaluate other factors such as advertising placement and customer lists.

back to top

## You're Out! False Ad Suit Filed Against Hall of Famer

**With football season over and the countdown on for pitchers and catchers to report for spring training, one fan has already taken action.**

An Iowa resident and fan of baseball Hall of Famer George Brett filed suit against the former player and his company, alleging that its Ionic necklaces are falsely advertised. Seth Thompson claims he bought the necklace for $30 at the 2011 College World Series, hoping "to experience the increased energy and focus and reduced fatigue and stress" that was advertised for the device.

Although he used the necklaces "as instructed and advertised, [he] did not experience any of the promised benefits," the suit alleges.

The company claimed its necklaces and bracelets relieved stiffness in the neck and shoulders, leading to stabilization of the whole body, promoted recovery from sports fatigue, restored important ion balance, and improved concentration and focus.

Although the plaintiff notes that some of the allegedly misleading claims have been removed from the Web site, the complaint says the product packaging continues to make similar representations, including claims that the products "Rejuvenate your body from physical activity & stress. IONIC necklace helps relieve stiffness to the shoulders and neck, eventually stabilizing your whole body."

The complaint also alleges that product distributors – including Amazon and various sporting goods sites – also make misleading statements in which they "promise" to help the body recover from physical activity and stress.

"Most consumers, when reading these claims, and seeing the products endorsed by a high-profile baseball player, assume that these products have the health benefits that are marketed and advertised and that scientifically significant research supports [these statements], when in fact that is not the case," the complaint asserts.

Alleging that the advertising violates Iowa's consumer protection law,

**Topic:** "Mobile Marketing - Certainties & Uncertainties"
**Speaker:** Marc Roth
New York, NY
For more information

### Awards

Recognized for Excellence in the areas of Advertising, Marketing and Media

Named a Top Practice Nationally for Marketing and Advertising

Practice leaders included among the prestigious *Best Lawyers* in the country

the suit seeks damages for a national class of consumers who purchased the products within the last four years, as well as an injunction against the purportedly deceptive advertising.

To read the complaint in *Thompson v. Brett Bros. Sports International*, click here.

**Why it matters:** Brett retired in 1993 after 21 years with the Kansas City Royals, where he won three batting titles and made 13 All-Star teams. After being inducted into the Hall of Fame in 1999, Brett became president of the company in 2001 and appears in its advertisements. The suit against him and his company is reminiscent of last year's federal class action against Power Balance, which charged the company and its owners with deceptively marketing their bracelets, wristbands, pendants and other accessories as capable of giving wearers psychological benefits like improved balance, strength, and flexibility. That suit – which also involved endorsements by athletes like Shaquille O'Neal and Lamar Odom – settled for $57 million.

back to top

## Court Dismisses "Percent Fat Free" Meat Suits

**A federal court judge dismissed a lawsuit against Kraft Foods and Hormel Foods that claimed the companies mislabeled their products as "98 percent fat free."**

The suit alleged that ads and labels for the companies' deli meats were deceptive because the meats actually contained more than 10 times the amount of fat listed on the product labels.

The "crafty labels," as described by the complaint, listed the percentage-fat-free claims immediately adjacent to the calories per serving, which suggested to consumers that the two statements modified each other.

"Without exception, people who have earned medical degrees, PhDs, JDs, master's degrees, and people with decades of real-world experience, including financiers, developers and executives, all have been deceived by [the defendants'] labels," according to the complaint.

But earlier this month U.S. District Court Judge Susan C. Bucklew dismissed the suits with prejudice.

Judge Bucklew had previously dismissed state law claims that the labels were misleading because they were preempted by the U.S. Department of Agriculture's regulation of the labeling of meat and poultry products.

She then gave the plaintiff a second chance to make his argument based on the non-label advertising of the defendants.

But the plaintiff failed to allege misleading and deceptive advertisements from such sources, the courts said.

All but one of the screen shots provided by the plaintiff included pictures of the defendants' labels in its advertising, she wrote.

"[B]ecause [the plaintiff] is simply attempting to challenge Hormel's labels indirectly through its advertisements," the court said full dismissal of the suit was warranted.

The one advertisement submitted on a third-party vendor's site failed to sustain the suit.

"Given that calories are not referenced, and given that 'percent fat free' claims have been based on weight, not calories, for the past seventeen years, [the plaintiff] has not alleged a basis upon which it could be concluded that an objectively reasonable person would construe Hormel's 'percent fat free' claim in the advertisement was unfair or deceptive," Judge Bucklew wrote.

She reached a similar conclusion in the suit against Kraft, although she noted other deficiencies in that suit as well.

The plaintiff failed to specifically identify which advertisement he saw, when he saw it, which specific meat product he purchased, or the specific date of purchase, she said, further supporting dismissal of his claims.

To read the court's order dismissing the suit against Hormel, click here.

To read the court's order dismissing the suit against Kraft, click here.

**Why it matters:** In addition to relying on the USDA regulations to dismiss the suits, the court said that the Food and Drug Administration had also rejected the idea that "percent fat free" claims should be based on the amount of total calories contributed by fat, as opposed to the weight of the product. "[T]he FDA determined that consumers are most familiar with such claims being expressed in terms of grams per serving," the court noted.

back to top

## Lawyer Wins False Ad Suit – In Small Claims Court

**Could false advertising litigation be headed to small claims court?**

Heather Peters, a former lawyer, was a member of a class action suit against Honda Motor Co. alleging the car company made deceptive claims about the gas mileage for its hybrid Civic.

But when she learned that class members would receive only about $100 and rebate coupons for the purchase of a new car – while the class attorneys would receive almost $8.5 million – she opted out of the lawsuit.

Instead, she filed her own suit in California small claims court, seeking $10,000, the maximum damages award possible.

And after a two-day trial, Los Angeles County Superior Court Commissioner Douglas Carnahan awarded her $9,867.

Peters said Honda's claims that the Civic could achieve as much as 50 miles per gallon were false and that her 2006 hybrid averaged no more than 41 or 42 mpg, even on its best day. A 2010 update to the car's software that Honda said would limit battery deterioration didn't improve mileage either, she contended.

California small claims court rules prohibit companies from using attorneys to defend the suits.

Honda argued at trial – represented by a company "Technical

Specialist," not an attorney – that Peters' low mileage was a result of her maintenance of the car or the manner in which she drives.

But the Commissioner disagreed.

"At a bare minimum, Honda was aware. . .that by the time Peters bought her car there were problems with its living up to its advertised mileage," he wrote.

Honda has not commented on the verdict, but has the right to ask that the case be retried in Los Angeles County Superior Court, where it could offer a more robust defense through company counsel.

To read the Commissioner's judgment in *Peters v. American Honda Motor Inc.*, click here.

**Why it matters:** Her win "is a victory for Civic Hybrid owners and consumers everywhere," Peters told the *Los Angeles Times*. "Sometimes big justice comes in small packages." Peters also said that since her story has been publicized, she has been contacted by about 500 other Honda owners seeking representation in small claims court. Peters said she plans to reactivate her legal license to represent other plaintiffs in a multi-front legal battle against Honda in small claims courts across the state.

back to top

## Super Bowl Ad Controversy Between Ford, GM

**It wouldn't be the Super Bowl without a legal controversy over an advertisement.**

This year, Ford sent a cease-and-desist letter to General Motors prior to the game, seeking to halt the airing of a commercial depicting a Chevrolet Silverado surviving the "2012 Mayan apocalypse."

The ad showed the truck driving through a devastated landscape while the song "Looks Like We Made It" plays before the driver finds other survivors – all of whom are driving the same truck.

When one of the guys asks about a friend named Dave, another answers: "Dave didn't drive the longest-lasting most dependable truck on the road. He drove a Ford."

Despite Ford's letter saying the GM ad contained "unsubstantiated and disparaging claims" and requesting that the ad be pulled from the company's Web site, YouTube, and NBC, GM declined to do so.

Ford's attorney, Lynne M. Matuszak, wrote that Chevy's "longest-lasting, most dependable" claim communicates to viewers that the Silverado is "safer and more durable than any Ford pickup truck," a message that is "entirely unsupported."

Citing research that Ford has more trucks on the road with over 250,000 miles than Chevrolet and statistics that the Ford F-150 received higher ratings on safety tests, the letter states that "Chevrolet has no basis to imply that the Silverado is either safer or more durable than Ford's pickup trucks, yet that false claim is precisely what is conveyed to the consumer."

Further, Ford argued that the commercial "unfairly denigrates Ford's

pickup trucks. By specifically calling out Ford in its commercial, Chevrolet creates the disparaging impression that Ford owners are at risk because their pickup trucks are less safe and less durable than Chevrolet's pickups. . . .Chevrolet has absolutely no basis to disparagingly imply that, in the event of a catastrophic event, Ford's pickup trucks and their respective owners will be reduced to ashes."

To watch the ad, click here.

To read Ford's cease-and-desist letter, click here.

**Why it matters:** "We can wait until the world ends, and if we need to, we will apologize," GM's global chief marketing officer Joel Ewanick told the *Detroit News* about the brouhaha. The ad was a "fun way" of putting the company's claim that "the Silverado is the most dependable, longest-lasting full-size pickup on the road" in the context of the apocalypse, he added. Ford's Truck Communications manager, Mike Levine, found the ad less than fun, telling *AdAge* that the company "will always defend our products." He added that "this sort of advertising protest happens from time to time. Any further actions will be handled by our legal experts."

back to top