Defending Liberty
Pursuing Justice

CONSUMER PROTECTION LAW UPDATE

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Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Bruce A. Colbath
bruce.colbath@weil.com
Ellie D. Boragine
ellie.boragine@weil.com
Stacey M. Mayer
stacey.mayer@weil.com
Jessica L. Costa
jessica.costa@weil.com

AGENDA

- Federal Trade Commission
- State Attorneys General
- National Advertising Division
- Lanham Act Cases
- Private Litigation

I. Federal Trade Commission

FTC Charges Three Medical Discount Plans with Deceptive Marketing Practices

- As part of a federal-state coalition, the FTC and 24 states have filed a total of 54 lawsuits and regulatory actions against companies engaged in deceptive practices targeting the "*uninsured, uninsurable, and unemployed*."
- The FTC has been investigating companies fraudulently marketing "medical discount plans" as health insurance.
- Temporary Restraining Orders were granted against *Consumer Health Benefits Association, Health Care One, LLC,* and *United States Benefits, LLC,* preventing the companies from marketing their products and ordering a freeze of their assets.
- FTC is seeking permanent injunctions against all three companies.

FTC Charges Three Medical Discount Plans with Deceptive Marketing Practices (cont.)

- *Consumer Health Benefits Association* ("CHBA")
  - Targeted consumers who searched for health insurance on the internet
  - Consumers paid between $29-$280 in enrollment fees before receiving any written information about the plan
  - FTC alleged CHBA made numerous false claims, including, but not limited to:
    - CHBA plan was widely accepted
    - Consumers could use discount card with any health care provider that accepts insurance
    - CHBA was accepted wherever Blue Cross Blue Shield was accepted
    - Misrepresenting their refund policies

- *Health Care One, LLC*
  - Marketed a medical discount plan disguised as health insurance
  - Falsely implied it was affiliated with the federal government
  - Promised consumers that they would receive substantial savings on healthcare costs
  - Advertised "100% satisfaction" and a "money back guarantee," however, consumers were often unable to cancel or get a refund and those refunds that were made were subjected to hefty "processing fees"

- *United States Benefits, LLC*
  - Advertised as major medical health insurance, however, was actually a membership in a "benefits association" that provided healthcare-related discounts with little value
  - Charged consumers enrollment fees ranging from $100-$500 and monthly fees ranging from $300-$1,300

Internet Marketers Ordered to Stop Deceptive Advertising and Unfair Billing Practices

FTC v. Central Coast Nutraceuticals ("CCN")

- FTC sought and received a Temporary Restraining Order against CCN, marketers of *AcaiPure* and *Colopure.* The TRO halts the company's internet sales.
- FTC brought its enforcement action after CCN refused to comply with the National Advertising Division's recommendation to modify its product claims
- The FTC alleges that CCN deceptively advertised AcaiPure as a weight loss product and Colopure as an aid for preventing cancer
  - Falsely claimed that AcaiPure lead to rapid and substantial weight loss
  - Falsely claimed that AcaiPure results were backed by "double-blind, placebo-controlled weight loss studies"
  - Deceptively claimed that Colopure helped prevent colon cancer by "detoxifying organs"
  - Falsely claimed that celebrities like Oprah Winfrey and Rachael Ray endorsed AcaiPure
- CCN is also charged with deceptively advertising its refund and "risk free trial" policies
  - Deceptively promised a "risk free" trial and then continued to bill consumers' credit and debit accounts
  - Deceptively claimed that consumers would receive full refunds if requested
  - Failed to adequately disclose that consumers would be automatically enrolled in a membership program and charged for additional monthly supplies of a product
- FTC alleged that CCN made $100 million off of fraudulent charges to the bank and credit card accounts of consumers who responded to their advertising for "free" trials.
- The FTC has indicated that the CCN lawsuit is a preview of future actions against firms selling similar products.

FTC Settles Charges of Deceptive Internet Endorsement

In the Matter of Reverb Communications, Inc.

- FTC issued an administrative complaint against Reverb Communications ("Reverb"), a public relations agency, for deceptive advertising and for violating the revised endorsement and testimonial guidelines issued in 2009
- Reverb employees posed as consumers posting game reviews of Reverb's clients' products at the Apple ITunes Store
- The reviews failed to disclose that the reviewers were actually employees hired to promote the games and that Reverb often received a percentage of the sales. The FTC determined that these facts were material to consumers who viewed the endorsements
- Under the proposed settlement, Reverb is required to remove any previously posted endorsements that misrepresent the employees as independent users or ordinary consumers and that fail to disclose a connection between Reverb and the seller of the product.
  - Reverb is also barred from making such reviews in the future without disclosing their connection with the seller
- **"The online post by a person connected to the seller, or someone who receives cash or in-kind payment to review a product or service, should disclose the material connection the reviewer shares with the seller of the product or service. This applies to employees of both the seller and the seller's advertising agency"**
- Charges against Reverb were the first brought under the revised guidelines
  - FTC has indicated that decisions under these guidelines will be reached on a case-by-case basis

FTC Concludes Investigation of Alleged Unfair Practices against LimeWire, LLC

- FTC had been investigating a security vulnerability in older versions of LimeWire peer-to-peer software that put users at risk of inadvertently sharing sensitive information

- FTC voluntarily closed its investigation and decided not to recommend any further action because:
  - More recent versions of LimeWire incorporate safeguards against the inadvertent sharing of sensitive documents into the user interface
  - There is a high attrition rate for older versions of LimeWire
  - LimeWire's inability to force users to upgrade the older versions
  - The possibility that users of the older versions may have been able to avoid the disclosure of sensitive information

- Under 15 U.S.C. §45(n), an act or practice is not unfair unless it causes "injury to consumers which is not reasonably avoidable by consumers themselves"
  - As the older versions allowed consumers to avoid disclosing their information, LimeWire did not engage in an unfair practice

- LimeWire is expected to continue to advise consumers to upgrade to the most recent version of its peer-to-peer software, to promote the safety benefits of the newer version, and to participate in efforts to inform consumers about protecting against inadvertent sharing of information and sensitive documents

FTC Warns Websites Offering Free Credit Reports

- FTC issued 18 warning letters to websites offering “free” credit reports, warning that they must comply with the recently amended Free Credit Reports Rule and clearly disclose that a free report is available under federal law.

- Section 610.4(b)(4) of the Free Credit Reports Rule requires that websites offering free credit reports must prominently disclose the availability of a free credit report, with links to AnnualCreditReport.com and FTC.gov across the top of each page that mentions free credit reports

- Disclosures are meant to help consumers distinguish between services offering free credit reports in connection with the purchase of credit monitoring or other services and the availability of free credit reports at AnnualCreditReport.com

- Violators are subject to a penalty of up to $3,500 per violation

II. State Attorneys General

AGs Advise FDA on Front-of-Package Labeling Initiative

- Attorneys General from 12 states – CT, OR, AZ, DE, ME, MD, NV, NH, NJ, OH, TN, and VT – submitted a comment in response to the FDA's April 2010 request for comments on front-of-package ("FOP") labeling and "ways to make nutrition information more useful to consumers."

- The AGs discuss the 2009 multi-state investigation into the "Smart Choices" program (a voluntary program that allowed products that met certain nutritional criteria to feature a green check mark on the front label), which revealed that certain products met the Smart Choices criteria for some important nutrients but nevertheless contained other ingredients, such as sugar, in unhealthy amounts. For example, certain cereals qualified for the "Smart Choices" check mark but contained 12 grams of sugar per one-cup serving. Thus, the AGs conclude that the designation of certain products as "Smart Choices" is misleading, confusing, and ultimately deceptive to consumers.

AGs Advise FDA on Front-of-Package Labeling Initiative (cont.)

- The AGs advise that a meaningful labeling program must provide complete nutritional information – both good and bad – because only full disclosure of nutrition information will provide clear and non-misleading guidance to consumers. Thus, the FDA's FOP labeling program should be guided by six principles:
  - Any FOP labeling system should be based on publicly available standards, i.e. an updated version of the 2005 Dietary guidelines for Americans.
  - FOP labels should apply to as many foods as possible and approval of certain FOP labeling should not be dependent upon payment by food manufacturers.
  - FOP labels should be easily understood by people of varying education levels.
  - FOP labels should be designed to actually affect buying decisions in favor of healthy foods, i.e., the label should change consumer behavior in a positive way.
  - A national FOP label should be the only nutritional label permitted on the front of food packages.
  - Any other health and nutritional claims should be confined to other parts of the product package.

35 AGs Issue Joint Statement With Forum Website

- Attorneys General from CT, NE, AK, FL, HI, KY, AZ, CO, Guam, ID, IL, IA, LA, MD, MO, NH, ND, IN, KA, ME, MS, NV, NM, N. Mariana Is., OH, PR, SD, UT, VA, WV, OK, RI, TN, VT, and WA issued a joint statement on measures to "imrpov[e] public safety and deter[] inappropriate activity" on Topix.com, a popular website that allows consumers to post comments, polls, and surveys in local forums in order to facilitate discussion.

- The investigation centered on consumer complaints about the amount of time Topix took to respond to reports of false, obscene or derogatory posts, as well as Topix's policy of charging a $19.99 fee for "Priority Review" of such posts.
  - At times, these obscene, derogatory or inappropriate posts related to minors and constituted, in the Attorneys General opinion, cyber-bullying.

- According to the Joint Statement, Topix will:
  - eliminate "Priority Review" and all reviews shall be free of charge;
  - no longer require multiple users to report a post before it is reviewed;
  - review and remove inappropriate posts as promptly as possible, with the goal being a response time of 3 working days; and
  - advise consumers to contact their local law enforcement agency if they believe a particular posts threatens violence or constitutes unlawful harassment.

NJ Court Holds Websites Selling Concert Tickets Entitled to CDA Immunity

***Milgram v. Orbitz Worldwide, LLC et al.* (N.J. Super. Ct. Aug. 26, 2010)**

- A NJ state court held that defendants Orbitz, TripNetwork, and Cheaptickets.com are entitled to immunity under the Communications Decency Act ("CDA") from liability under the NJ Consumer Frauds Act. Plaintiffs alleged that defendants offered more tickets from individual sellers than were available to certain Bruce Springsteen concerts and even sold tickets with section and row numbers that did not exist at the concert venue.
- The court held that defendants were entitled to immunity under the CDA because:
  - They are interactive computer services.
  - The plaintiffs' allegations sought to treat the defendants as the publisher or speaker of the third-party deceptive content. The court explained: "Labeling defendants' conduct as 'commercial,' rather than as performed by 'publishers or speakers,' because defendants charge a 'service' or 'administrative' fee for third-party ticket sellers, does not remove defendants' conduct from the reach of the CDA."
  - The defendants are not "information content providers" and thus are entitled to protection under the CDA. Even though defendants created, developed, and operated the website where the tickets were sold, the "critical inquiry is whether the 'essential published content' was provided by 'another information content provider.'" In this case, the defendants were not responsible for the creation or development of the allegedly inaccurate and misleading ticket listings.

Connecticut Investigates Rite Aid

- Connecticut Attorney General Richard Blumenthal announced that he will investigate Rite Aid to determine whether the company illegally blamed its recent increase in prescription drug charges on a new law that requires the chain to extend the same discounts to the state's Medicaid program that it offers to all consumer.

- Blumenthal stated: "Rite Aid should not attempt to increase drug prices charged to Connecticut consumers – and cloak its own financial decisions as being required by state law."

Pennsylvania Settles with CVS

- The Pennsylvania AG reached a $250,000 settlement with CVS in relation to complaints that the chain sold expired over the counter drugs, infant formula, baby food, dairy products, and other food items.
  - $150,000 will be distributed by the AG's Office to organizations that provide PA families with baby food, infant formula, dairy products and over the counter drugs.
  - $100,000 will go to the AG's Office for future consumer protection and education activities.

- CVS will also be required to provide $2 coupons off any future purchase to consumers who find expired products offered for sale at a CVS store and take a number of measures to ensure that expired products are not sold, such as:
  - daily inspection of all dairy products;
  - regular inspections of other products and removal of items that are within 60 days of their expiration date;
  - prominent notices in all stores reminding customers to check "sell by" and "expiration" dates;
  - automatic prompts in store cash register systems requiring cashiers to verify expiration dates before items can be sold;
  - training and certification for all store managers and employees involved in stocking baby food, infant formula, dairy products, and over the counter drugs; and
  - regular audits of CVS stores to verify compliance with the settlement.

NY AG Settles with Membership Program Seller

- As part of a large scale investigation into the discount club industry, the NY AG announced an $8 million settlement with Affinion, a discount membership club that partners with online retailers to offer consumers discounts or other incentives for joining fee-based membership programs.
  - The typical scenario: When the consumer completes an online purchase, she is presented with a cash-back or discount offer from a third-party advertiser. In order to accept the offer, the consumer must enroll in a free-trial for a membership program, for which she will incur monthly charges if she does not cancel the membership during the free-trial period.
  - Affinion also mailed checks to consumers that looked like rebates or rewards from retailers. If the checks were cashed, the consumer was deemed to have signed up for a fee-based program.
- The NY AG contends that material information about accepting the offer – most importantly that the consumer was agreeing to transfer his/her credit or debit card account information and was joining a fee-based program for which he/she would incur monthly charges after a free-trial period – were buried in fine print and cluttered text.

NY AG Settles with Membership Program Seller (cont.)

- Of the $8 million settlement, $5 million will be used to establish a restitution fund to provide refunds to consumers who were billed for discount programs without their knowing consent. Affinion will pay the additional $3 million in penalties and fees.

- Under the settlement's injunctive terms, Affinion must:
  - fully refund fees charged to consumers who unknowingly enrolled in a program.
  - permanently end its practice of marketing discount clubs and programs by mailing checks to NY consumers
  - permanently end its role in data-pass, i.e., the practice of obtaining consumers' billing information from its online retailer partners
  - reform its marketing practices to ensure that consumers understand they are enrolling in a program offered by Affinion (and not the retailer) for which they will be billed
  - make redemption forms for rebates immediately available to consumers online

NY AG Settles with Retailers

- In January, Attorney General Andrew Cuomo announced his office was investigating 22 online retailers that present its customers with discount offers from third party vendors, such as Affinion.

- Together with the Affinion announcement, the NY AG recently announced settlements with several retailers – Classmates Online, FTD, Budget, GameStop, and Avon - that have partnered with Affinion or similar marketing companies, such as Webloyalty and Vertrue.

- Under the settlements, the retailers will reform their marketing practices, permanently end any mailed check solicitations, end data pass (providing consumers' billing information to companies that market discount clubs online), and collectively contribute more then $2 to a fund that will pay for consumer education, refunds, and the costs of the investigation.

  - The retailer settlement amounts are:
    - Classmates Online, Inc.: $960,000
    - FTD, Inc.: $640,000
    - Budget: $207,000
    - GameStop: $195,000
    - Avon: $68,000

Washington Enters Consent Decree with Retailer

- The Washington AG entered into a consent decree on behalf of the State with Intelius, an online retailer, that partnered with Adaptive Marketing, a membership program seller.
  - Consumers use Intelius to look up phone numbers, addresses, and other information about people. After agreeing to purchase search results, consumers were shown a page with an offer to get $10 back on their purchase in exchange for taking a two-question survey. Consumers were presented with two choices: i) Click on a a "YES, and show my report" button, or ii) a tiny black link reading "No, see my report."
  - Consumers who accepted the $10 discount by taking the survey and clicking YES! were enrolled in one of Adaptive Marketing's fee-based membership programs.
  - Neither Intelius or Adaptive tracked the survey results.

- Under the consent decree, Intelius will pay a total of $1.3 million ($1 million in restitution plus $300,000 to the Washington AG).

Washington Enters Consent Decree with Retailer (cont.)

- Under the consent decree, any discount offer made to Intelius customers that requires enrolment in a membership program involving a free-to-pay conversion must comply with the following:
  - The consumer must be required to provide the complete account information for the account that will be charged for the membership (No data pass).
  - The offer must clearly and conspicuously disclose the full name of the entity offering the program and not misrepresent Intelius' affiliation with the membership program seller.
  - All material terms to the offer must be clearly and conspicuously disclosed, and material disclosures may not be made in fine print or in text available only through a hyperlink.
  - The offer must require the consumer's express verifiable consent.
  - The offer must disclose the mechanism for declining the offer in a font and size as prominent as the mechanism for accepting the offer.
  - Any offer using the term "free" or similar language must disclose any condition on the "free" offer.
  - The offer must state clearly and conspicuously that by accepting it, the consumer is enrolling in a paid membership program and will be automatically charged to his or her account at the end of the trial period if the consumer does not cancel during the trial period.
  - Any offer or solicitation may not misrepresent the nature of a survey.
  - The offer must disclose how consumers can cancel a membership, and cancellation procedures must be honored.

Maryland AG Settles with Prepaid Calling Card Seller

- Telmex sells telephone calling cards for users to make international calls to more than 100 different cities outside the US, including major cities in Latin and South America. In MD, Telmex sold its cards (through distributors and retailers) largely to Latino consumers with relatives living outside of the US.

- Telmex's posters and point-of-sale advertisements promised that the cards would deliver alarge number of minutes to specified countries, *i.e.,* 1250 minutes to Mexico City, Guadalajara or Monterrey. The AG alleged, however, that the card delivered substantially fewer minutes.

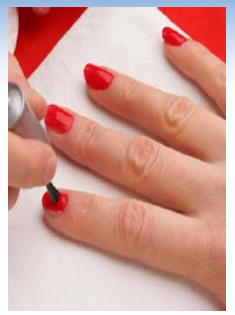
- Under the terms of the settlement, Telmex has agreed not to sell any prepaid calling cards to MD consumers unless the purchaser can utilize all of the number of minutes advertised. Additionally, Telmex will pay $60k in restitution, $90k in civil penalties, and $45 for costs.

III. National Advertising Division

P&G's Charmin Ultra Strong

- Challenger: Kimberly Clark (Cottonelle Ultra)
- Claims at issue
  - *Charmin Ultra Strong leaves fewer pieces behind than the Ultra Ripple Brand [Cottonelle Ultra]*
  - *Charmin Ultra Strong holds up better [than the Ultra Ripple Brand] ... with fewer pieces left behind than the Ultra Ripple Brand*
- Advertiser provided a reasonable basis for the claim that Charmin Ultra Strong "holds up better"… with "fewer pieces behind" than Cottonelle
- Testing
  - Wet tensile strength testing demonstrated that Charmin was two and a half times stronger than Cottonelle, which NAD found provided a reasonable basis for "holds up better" (is stronger) claim
  - Rub testing and consumer-use testing supported "leaves fewer pieces behind" claim
- NAD recommended that P&G discontinue a product demonstration and modify future advertising to avoid conveying the message that Charmin leaves no pieces behind
  - Sled demonstration overstated extent of product superiority and did not accurately reflect consumer results. NAD standard is that comparable demonstrations must fairly and accurately reflect results consumers would experience.
  - Animated bear television commercial: Although voiceover stated "fewer" pieces behind, NAD found this language was directly contradicted by the visual, which depicted *no* pieces behind, and thereby conveyed the absolute message that Charmin Ultra Strong leave *no* pieces behind and exaggerated the respective performance of the parties' products

Coty's Sally Hansen Complete Manicure



- Challenger: OPI (nail polish manufacturer of primarily professional lacquer products)
- Claims at issue
  - **Express**
    - 9 *out of 10 Salon professionals preferred our formula to the leading salon brand*
    - *All 5 Steps of a Salon Manicure in 1 Bottle*
  - **Implied**
    - Complete Manicure is widely used in salons by salon professionals

- Advertiser's Position
  - Preference claim supported by blinded study amongst 25 salon professionals from 8 cities
  - The 5 steps in "5 steps in 1 bottle" claim were clearly defined in ads and/or puffery
  - Reasonable to infer customers use product at salons given market penetration

- NAD recommended advertiser discontinue its preference claim, but that it had a reasonable basis for its claim that Complete has "all five steps of a salon manicure in one bottle"
  - Preference Claim
    - Methodological flaws with advertiser's study: comparison of a nail polish with base, color, and top coats in one bottle to challenger's professional polish intended for use with base and top coat; duration of study and potential blinding flaws. NAD stressed that performance studies are fatally flawed if products are not tested according to their usage instructions.
    - Study failed to correct for "order effect" by randomly rotating which product used first
    - Study's sample size (25) too small to support claim and may not have been representative of salon universe
  - Implied claim moot given recommendation to discontinue underlying preference claim
  - 5 Steps Claim: Fanciful

Heartland Sweeteners' Nevella® with Probiotics

- McNeil Nutritionals (manufacturer of Splenda® No-Calorie Sweetener) challenged Heartland's claims for Nevella with Probiotics, a no-calorie sweetener supplemented by probiotics derived from Ganeden Biotech's patented GanedenBC30 strain

- NAD examined claims such as:
  - **Health benefit claims**: *Nevella no calorie sweetener now comes with all the health benefits of probiotics; Nevella with probiotics provides you with a health, tasty way to cut calories from your diet while gaining the added benefits of probiotics; Provides digestive and immune system health benefits in every packet*
  - **Comparative claims**: *GanedenBC30 is 10 times more effective than yogurt in delivering live cells* (* in an independent lab study of a simulated gastric environment with a pH of 2.0 for two hours, GanedenBC30 delivered more than ten times the live cells than a leading probiotic yogurt)*
  - **Implied claim**: consumers will receive health benefits (digestive health and immune system support) by using Nevella

- NAD noted that product performance claims should be supported by competent and reliable evidence, the gold standard being studies on the product itself
- Claims must be expressed as ingredient claims when substantiation solely consists of efficacy of ingredients

- NAD recommended that the challenged efficacy claims for Nevella with probiotics, including that the product provides all the immune system and digestive health benefits of probiotics, be discontinued given the absence of any product testing or relevant ingredient testing
- NAD also recommended that the comparative superiority claims against yogurt be discontinued given the lack of substantiation
  - Advertiser's reliance on one study examining one probiotic yogurt
  - *Consumer Reports* article, which did not even evaluate the GanedenBC30 strain of probiotics

Ocean Spray's 100% Juice Fruit & Veggie

- Campbell Soup Company (competing manufacturer of fruit and vegetable juices) challenged Ocean Spray's claims concerning the relative amount of vegetable juice in 100% Juice Fruit & Veggie, including statements such as
  - *2 servings of fruit and vegetables*; the fruits you love mixed with the veggies you need; a farm stand in every bottle; the tastiest way to drink your veggies; the extra nutrition of vegetables! Every 8 oz glass has 2 full servings of fruits and vegetables plus the antioxidant vitamins A, C, and E"*

- NAD also examined the implied claim that the product contains equal amounts of fruits & veggies, or, 1 serving of fruits and 1 serving of vegetables

- Challenger argued claims convey the false message that product contains approximately equal amounts of fruit and vegetable juice whereas advertiser maintained that the overall impression does not convey anything to consumers about the relative proportions of fruits and vegetables in the product

- Neither party submitted consumer perception evidence

- NAD recommended modifying product labels, television commercial and in store displays to provide clear and conspicuous disclosures about vegetable content

Ocean Spray (cont.)

- 2 servings of fruit and vegetables* claim
  - Advertiser argued that combined means “in total” rather than equality
  - NAD found it to be unclear what percentage of the product contains vegetable juice
  - Possible that consumers would take away an unsupported message regarding vegetables and at least one reasonable interpretation of the phrase was that the product contained equal proportions of fruit and vegetables

- Label
  - 2 servings* emblem problematic
  - NAD recommended making “combined” more prominent and providing vegetable content in clear and conspicuous manner somewhere on the label
  - Modify “every 8 oz glass has 2 full servings of fruits and vegetables”

- TV Commercial
  - “One glass equals two servings of fruits and vegetables” problematic
  - Remaining claims (“like a farm stand in every bottle” and “the fruits you love mixed with the veggies you need”) were not problematic

- In store displays and promotions
  - Clear and conspicuous disclosure regarding vegetable content
  - Recommended advertiser modify or discontinue use of the slogan “discover the tastiest way to DRINK YOUR VEGGIES”, as consumers may reasonably be led to believe product contains a higher proportion of vegetable juice than in reality

Heartland's Ideal® Sweetener

- Merisant (maker of Equal brand sweeteners) challenged claims made by Hearltand regarding the sweetness of Ideal as being "natural"

- Underlying NAD proceeding
  - Ideal comprised of xylito (natural sweetening agent), unidex and sucralose (artificial high-intensity sweetening agent) and approximately 80% of Ideal's sweetness is from the presence of sucralose
  - Recommended that Heartland discontinue claims that Ideal is "natural", "more than 99% natural" or different from other no calorie sweeteners because it is "more than 99% natural"

- Heartland discontinued claims that Ideal was a natural sweetener and appealed recommendation to discontinue claims that Ideal is "more than 99% natural", arguing the claim is literally true with respect to Ideal's formulation of ingredients by weight

- NARB found that the claim reasonably conveys that Ideal's sweetness comes from natural ingredient and not its formulation by weight, and recommended that Heartland discontinue claims that Ideal sweetener is "more than 99% natural" or different because it is more than 99% natural
  - Swiss Research/Shugr sweetener (Case #4442, 1/20/2006)

- Panel further recommended that Heartland avoid conveying the express or implied message that Ideal's sweetness comes from natural ingredients or is different because it is more natural

- Panel cautioned against use of the word "natural" in any context, including a carefully qualified manner, that implies that most or all of the Ideal's sweetening comes from natural ingredients

Summit Vetpharm's Vectra and Vectra3D

- Sample of claims initially challenged by Bayer Healthcare
  - Monadic Claims regarding Vectra's kill rate of fleas at various time intervals
  - Graphs depicting Vectra3D's flea kill rates at different times for Vectra 3D, K-9 Advantix and Advantage

- Underlying NAD Proceeding
  - Reasonable basis for most non-monadic claims, but NAD recommended that Summit discontinue claims based on test results that were not statistically significant
    - Summit appealed to the extent they were not permitted to include statistically insignificant results in properly labeled charts for distribution to veterinarians
  - Recommended Summit discontinue challenged comparative superiority claim (appealed)
  - Bayer cross-appealed the NAD finding that Summit provided a reasonable basis in support of its statistically significant monadic claims

- NARB
  - Recommended that Summit discontinue **monadic** claims of various flea killing percentages based on concerns with the test methodology
    - "Comb, count and return" methodology flawed
    - Widely divergent results for Vectra at the 2-hour mark
  - Recommended that Summit discontinue **comparative** superiority claims based on statistically insignificant findings that were noted by disclaimers or footnotes
    - Footnotes cannot contradict the message conveyed by the primary claims, even to a sophisticated audience
  - Recommended that Summit discontinue any advertising or promotional charts that imply results come from the same or comparable tests when that is not the case

Animal Health Division of Bayer Healthcare, LLC's Advantage® & K9Advantix®

- Elanco Animal Health (manufacturer of Comfortis®) challenged claims such as
  - **Express**: *That Advantage & K9 Advantix "stop biting fleas in 3 to 5 minutes"; Kills over 99% of flea larvae within 20 minutes" With Advantage, "fleas do not need to bite to die"; "Don't give fleas a biting chance"*
  - **Implied**: Fleas will not bite a dog following application of Advantage

- Advertiser voluntarily discontinued certain claims (flea larvae) and modified its "3 to 5 minute" claim to state, "Once Advantage has been applied and given time to spread through your pet's skin, it will stop re-infesting fleas from biting and feeding upon your pet within just 3 to 5 minutes"

- **"3 to 5 minute" claim** – NAD recommended discontinuing claim in consumer-directed advertising, but that a modified claim could be used in veterinarian-directed advertising, accompanied by a complete description of supporting evidence (i.e., the laboratory studies)

- **"Fleas do not have to bite to die" claim**
  - NAD determined that the claim reflected the products' mode of action, as the active ingredient does not require a blood meal to kill the fleas. NAD noted that an advertiser has a right to tout a distinguishing product characteristic.
  - NAD determined that challenger's consumer perception evidence was insufficiently reliable

- **"Don't Give Fleas a Biting Chance" claim** – puffery

- **Waterproof Claims** – NAD determined that advertiser provided a reasonable basis for challenged claims, as modified (i.e., no need to reapply Advantage after weekly swimming, or, after a bath)
  - NAD assumes consumers follow product use directions and use the product as intended
  - NAD recommended advertiser inform consumers that, for best results, pets should be bathed with a non-detergent shampoo

Smart Technologies Inc.'s SMARTBoard Interactive Whiteboard

- Epson America, manufacturer of interactive projectors (e.g., BrightLink) challenged performance and cost claims made by Smart in a memorandum to its internal sales staff and third party sellers
- As an initial matter, NAD determined that such claims fell within its jurisdiction

- NAD determined that the claims – *"Why the SMARTBoard…is the best choice for classrooms…No hotspots; No eyestrain…High image quality and resolution for easy viewing"* – were not puffery, but comparative claims that required substantiation

- NAD recommended advertiser discontinue or modify certain performance claims
  - NAD requires claims conveying that use of a competitive product can impact health be supported by competent and reliable scientific evidence. NAD recommended advertiser discontinue claims that using BrightLink on an "unoptimized" surface would cause hot spots, eyestrain and provide poor image quality
  - Advertiser provided a reasonable basis to support claim that SMARTBoard provides "high image quality and a resolution for easy viewing." NAD recommended modifying claims that SMARTBoard has no hot spots, no eyestrain to more accurately reflect evidence that SMARTBoard has reduced such
  - "SMARTBoard…is optimized for durability and interactivity…the BrightLink 450Wi compromises functionality, image quality and ability to write naturally." NAD determined that advertiser provided a reasonable basis for first half of claim, but recommended discontinuing the second half of the claim

- Total Cost of Ownership (TCO) and Return on Investment (ROI) claims
  - NAD determined that advertiser's use of cheaper SMARTBoard model fine, but was troubled by advertiser's use of BrightLink's full retail price rather than its educational price to support claims
  - NAD recommended that advertiser modify claims regarding cost of BrightLink pen replacement
  - NAD recommended that advertiser discontinue claims regarding cost of filter replacement, filter cleaning and total color "decay" for BrightLink; clearly disclose that SMART projectors requiring cleaning when using the claim 'filter free design" in a comparative context
  - With respect to advertiser's claim that consumers likely will require a dry erase whiteboard or optimized surface with the BrightLink, NAD considered that BrightLink is marketed for use on "any wall" and recommended that advertiser modify claim to reflect that optimized surface (whiteboard) is not required

Seventh Generation Household Cleaning & Laundry Products

- Challenger: The Procter & Gamble Company

- *Advertiser's products do not contain "hazardous" chemicals* claim
  - NAD determined that television commercial (*"People everywhere are saying 'no' to hazardous chemicals and 'yes' to a safe and naturally effective way to clean"*) as a whole conveyed a comparative safety claim
  - Recommended that advertiser discontinue any express or implied claims that its products do not contain hazardous chemicals

- *Claims that advertiser's products are safe and competing products: (1) are not safe, (2) are not as safe as [advertiser's] products, (3) require consumers to hold their breath during use, and (4) are leading to a rapid increase in childhood illnesses such as autism, ADHD, asthma, allergies, cancer and diabetes*
  - Advertiser voluntarily discontinued certain claims, including references to childhood illnesses
  - NAD recommended advertiser discontinue comparative safety claims at issue, as no evidence indicated that advertiser's products were safer than competing products
  - NAD recommended advertiser limit references to consumers holding their breath
  - NAD noted that nothing prevents advertiser from touting its efforts to minimize the use of hazardous chemicals in its products or promote disclosure of the ingredients in its products

- Natural Claims
  - No regulatory definition or industry consensus as to what constitutes "natural"
  - NAD recommended that the use of "natural" on certain products should be qualified to make it clear that claim is based on the surfactants being plant-derived. NAD concerned that key ingredients were only partially natural contradicted unqualified "natural" in the product name
  - References to "naturally" in the television commercial should be discontinued and advertiser should avoid conveying the unsupported message that the product is all-natural

CARU

- CARU launches first public service announcements concerning children's Internet activities

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KRAFT FOODS GLOBAL, INC.'S Macaroni & Cheese

- Television commercial depicts a young girl eating macaroni and cheese

- CARU Guidelines require advertisements for food products to clearly depict or describe the appropriate role of the product within the framework of the eating occasion being depicted
  - Advertisements representing a mealtime should depict the food product within the framework of a nutritionally balanced meal
  - Advertisements representing snack foods should clearly be depicted as such and not as substitutes for meals

- CARU concerned with whether the shot of the eating occasion in the commercial required the depiction of a "nutritionally balanced meal"

- CARU determined, based on the advertiser's position and a review of the commercial, that the overall net impression of the commercial was the depiction of a snack and, therefore, it did not necessitate the depiction of Macaroni & Cheese within the framework of a nutritionally balanced meal

CARU
CEC ENTERTAINMENT'S Chuck E. Cheese

- Television commercial depicts a young boy having a birthday party at Chuck E. Cheese. One shot shows a birthday cake and food platter, with a small disclosure on the bottom of the screen reads, "Additional purchase required for some items, including birthday cake and food platters"

- CARU addressed whether the commercial adequately informs children that the birthday cake and food platters shown in the commercial must be purchased separately

- Relevant CARU Guidelines provide that, "all disclosures and disclaimers that are material to a child should be understandable to the children in the intended audience, taking into account their limited vocabularies and level of language skills."
  - "These disclosures should be conspicuous in the advertising format and media used . . . in television, advertisers should use audio disclosures, unless disclosures in other formats are likely to be seen and understood by the intended audience"

- CARU determined that the commercial fell within its scope and that the small, written, original disclosure was not adequate to inform young children that items like birthday cakes and food platters were not part of the birthday package and must be purchased separately

IV. Lanham Act Activity

Schering-Plough v. Neutrogena (D. Del. Aug. 20, 2010)

- Schering's claim stems from Neutrogena's varying use of the term Helioplex in its advertising and failure to notify consumers of a change in active ingredients.
  - The court had previously found that for a certain period of time Neutrogena's 100+ Product did not contain DEHN, a component of Helioplex, yet continued to use the Helioplex mark on its product
- Schering asserted that the court's finding of literal falsity entitled it to a permanent injunction without any showing of harm.
- **The Court disagreed with Schering and explicitly applied the Supreme Court's reasoning in *eBay v. MercExchange* to Lanham Act false advertising litigation, holding that there was no presumption and that Schering must satisfy each of the four traditional injunctive relief factors in order to obtain a permanent injunction.**
- The Court remanded the case to allow the opportunity for discovery to establish the four *eBay* factors:
  - Irreparable injury
  - No adequate remedy at law
  - Balance of hardships in favor of movant
  - Public interest
- *But see Nat'l Prods., Inc. v. Gamber-Johnson LLC,* 2010 WL 3230921 (W.D. Wash. Aug. 13, 2010) ("In Lanham Act cases, the Ninth Circuit has held that this [*eBay v. MercExchange*] test is satisfied and injunctive relief can be granted upon proof that a false statement of fact in a commercial advertisement is material and has a tendency to deceive the relevant purchasing public.")

Pom Wonderful v. Welch Foods

(C.D. Cal. Aug. 25, 2010)

- Pom's Lanham Act claim is based exclusively on Welch's use of the word "pomegranate" in its 100% White Grape Pomegranate ("WGP") product.
- On July 9, 2010, the Court denied Welch's motion for summary judgment, and the recent order addressed only Welch's summary judgment on its unclean hands defense.
  - Welch's unclean hands claim asserted that Pom engaged in similar false advertising.
- "[T]he misconduct that forms the basis for the unclean hands defense [must be] **directly related** to plaintiff's use or acquisition of the right in suit."
  - Thus, Welch had to demonstrate that Pom misleads consumers into believing its juice products contain more pomegranate juice than they actually do, or that its products misrepresent the amount of juices in them.
- Some of Welch's allegations of Pom's misconduct did not sufficiently relate to the same conduct of which Pom accused Welch:
  - That Pom deceives consumers by obscuring the term "from concentrate" on its bottles and in advertisements
  - That Pom's juice blends contain water, an ingredient not disclosed in the ingredient list
  - That Pom uses an advertisement that shows Pom's juice going straight from the whole fruit into its bottles
- Two of Welch's claims bore a closer relationship to the claims Pom asserted against Welch, but Welch failed to persuade the Court that they were sufficiently egregious, *i.e.* that consumers were in fact misled, that it would be inequitable to permit Pom to proceed on its claims against Welch:
  - That Pom's 100% Pomegranate Juice product contains undisclosed trace amounts of elderberry
    - Court found no evidence that claim harmed consumers.
  - That Pom's "Pom Blueberry," "Pom Cherry," and "Pom Tangerine" products contain juices not disclosed in the label
    - Pom does not challenge similar conduct by Welch.
    - No evidence that consumers were misled by Pom's inclusion of orange juice in its "Pom Tangerine" product.

Osmose v. Viance (11th Cir. Jul. 30, 2010)

- One wood preservative manufacturer alleged false advertising against a competitor wood preservative manufacturer with respect to press releases questioning the wood's structural integrity and safety, seeking a preliminary injunction.

- The U.S. District Court for the Northern District of Georgia granted Osmose's preliminary injunction.

- The Court of Appeals held that the lower court did not clearly err in finding that Viance's statements in press releases were **literally false.**

  - The tests relied upon by defendants did not support the broadly stated conclusions.

- The Court held that the lower court did not clearly err in finding that Viance's statements had a **material effect** on purchasing decisions.

  - Press releases indicated that an independent inspection company had verified defendant's concerns regarding safety, and reliance on an independent company enhanced the likelihood that the misrepresentation would influence purchasing decisions.

- **The Court upholds the preliminary injunction but does not do so based upon any presumption, indicating that *eBay* should be considered applicable to preliminary injunctions as well as permanent:**

  - "[E]ven in the absence of a presumption, the district court's conclusion as to the likelihood of irreparable harm was not an abuse of discretion."

  - Implication: Courts applying *eBay* to Lanham Act injunction cases indicate that the judicially created presumptions may no longer be available even where a literally false claim is established.

Deston Therapeutics v. Trigen Laboratories

(D. Del. Jul. 12, 2010)

- Patent owner and licensee brought action against competitors alleging infringement of patents for polycosanol used in prescription ear drop solution, false advertising under the Lanham Act, unfair competition and deceptive trade practices. Defendant's Treagan ear drop solution challenged as infringing plaintiff's patents or Defendant falsely advertised the product as being pharmaceutically equivalent.

- The Court found that Plaintiffs had adequately pled a Lanham Act violation by alleging that either competitors' product contained the same chemical composition as their product such that competitors were infringing on their patents, or that competitors' product was not the same chemical composition as their product, such that competitors were falsely stating an equivalence.

- The Court found that Plaintiffs sufficiently alleged facts suggesting the marketplace was actually confused or misled.

  – Drug databases listed competitors' product as a generic equivalent of the patent owner's product, so drug wholesalers, distributors, pharmacies and pharmacists have been mislead to purchase the product as pharmaceutically equivalent to Plaintiff's product.

- The Court found that the label and product insert on the ear drop solution disclosed ingredient list and that the product was purchased based on the label contents. Plaintiffs alleged that Treagan label stated that it contained same ingredients as brand name drug and therefore constituted commercial advertising.

V. Private Litigation

Evan Weiner v. Snapple Beverage (DNJ Aug. 12, 2010)

- Plaintiffs sought class certification based on claims for violation of N.Y. Gen. Bus. L. § 349, alleging that Snapple's labeling of its juice drinks as "All Natural" was deceptive because the drinks contained high fructose corn syrup, and as a result consumers paid a price premium for the product.

- Plaintiffs could not establish the critical elements of causation and injury on a class-wide basis:
  - One plaintiff testified that he bought drinks at various price points.
  - Another plaintiff testified that he bought drinks for a variety of reasons; that the "All Natural" claim was not the deciding factor in his purchase decision, and that he would have bought Snapple regardless of whether it was labeled "All Natural."

- Plaintiffs tried to sidestep their difficulty in satisfying the causation requirement on a class-wide basis by alleging that the use of the "All Natural" labeling allowed Snapple to charge a premium for its product, essentially attempting to use the "fraud on the market" theory to satisfy causation.

- The Court did not directly address the availability of the "fraud on the market" theory in GBL 349 cases. Instead, the Court focused on Plaintiff's failure to establish a suitable methodology for proving causation and injury. Plaintiffs solely relied on an expert report that the Court excluded, finding it inadequate to determine on a class-wide basis whether there was a price premium as a result of Snapple's "All Natural" labeling and, if so, how such a premium could be quantified:
  - The expert admitted that there may be factors other than the "All Natural" labeling that affected pricing.
  - Snapple's expert report undermined the validity of Evan's expert, finding that the price any class member paid for Snapple during the class period varied depending on numerous factors, including the type of retailer, the location and date of purchase, the quantity of bottles purchased, and whether there was a sale or other discount available.

- *See also Fine v. Conagra Foods Inc.* (C.D. Cal. Aug. 26, 2010) (denying class certification premised on false advertising claims under California Unfair Competition Law that Orville Redenbacher's popcorn misleadingly claimed "no diacetyl added," holding that the plaintiff had not asserted that the class included only those who purchased popcorn *as a result of* defendant's allegedly false statements and that many likely made purchases based on flavor or brand).

Franulovic v. Coca Cola (3rd Cir. Jul. 15, 2010)

- Plaintiff appealed from the District Court of New Jersey's grant of summary judgment dismissing her claim charging Coca Cola with violating the New Jersey Consumer Fraud Act with respect to falsely marketing its Enviga green tea soft drink as a "calorie-burning" product.

- The Court affirmed summary judgment, finding that Plaintiff had not proved that she suffered an ascertainable loss -- that she failed to lose weight while drinking Enviga and that it was Enviga's alleged lack of efficacy that **caused** that failure.

  - "Although Franulovic argues that she gained weight as a result of drinking Enviga, she did not monitor her weight before she began the Enviga program and never kept track of how many calories she consumed or how much she weighed during the relevant time period. Her only supporting evidence was testimony that her pants felt tighter."

- Plaintiff argued that Coca Cola was required to adequately substantiate its advertising claims prior to marketing Enviga, but the Third Circuit declined to recognize a prior substantiation requirement under the NJ CFA.

- The Center for Science in the Public Interest announced on August 17, 2010 that it would not pursue an appeal of the Court's decision blocking the lawsuit.

- In February 2009, the attorneys general from 26 states announced a settlement that Coca-Cola and Nestle would pay $650,000 and add conspicuous disclosures that Enviga would not produce weight loss without diet and exercise.

  - The companies' marketing claims purported that drinking three cans of Enviga a day would burn up to 60 to 100 extra calories per day, leading to weight loss, but a study showed that weight loss only occurred in conjunction with diet and exercise.

Siegel v. Shell Oil (7th Cir. Jul. 30, 2010)

- Plaintiff sued five of the eight largest oil companies, alleging that the defendants manipulated refinery margins and capacity to reduce the nation's gas supply, causing him to purchase defendants' gas at artificially inflated prices. Plaintiff moved for class certification and sought relief under the Illinois Consumer Fraud and Deceptive Business Practices Act.

- The Court affirmed the U.S. District Court for the Northern District of Illinois' holding that a class should not be certified because individual issues regarding causation predominated over common ones.

- Plaintiff failed to establish causation because he did not present evidence to create a genuine issue of material fact as to whether plaintiffs would not have been damaged "but for" Defendants' conduct.

- Plaintiff failed to establish that the proposed class members purchased gas for the same reasons:

  - Without proof as to why each class member purchased the gas, Plaintiff could not establish that Defendants' conduct caused the alleged harm.

  - In fact, Plaintiff himself provided several factors he considered when purchasing gas and listed convenience, not price, as the primary factor.

- The Court would not presume injury from the mere fact that Plaintiff purchased gas during the relevant time period.

Bott v. Vistaprint **(**5th Cir. Aug. 23, 2010)

- Plaintiffs sued under the Electronic Funds Transfer Act, the Electronic Communications Privacy Act, the Massachusetts Unfair Trade Practices Act, and the common law, alleging that they were tricked into enrolling in certain membership programs when they used Defendants' websites.

- The U.S. District Court of the Southern District of Texas granted Defendants' motion to dismiss, holding that VistaPrint/Adaptive webpages were **not deceptive as a matter of law because they contained sufficient disclosures such that no reasonable person could be deceived.**

- Plaintiffs alleged that the website deceived consumers into believing that they could not complete their VistaPrint transaction without first filling out a survey that would enroll them in an Adaptive "rewards" program. The *VistaPrint Rewards* webpage made it **clear that the purchase was already made** by the time Plaintiffs were asked to fill out the survey or enroll in the membership program:

  - The site thanked consumers for their "purchase for VistaPrint today."
  - The site instructed consumers to complete the survey in order to claim the $10 cash back "on the VistaPrint.com purchase you made today."
  - The Offer Details for *VistaPrint Rewards* provides clearly that the offer of the membership program is a "thank you" for the purchase already "made today."

- The terms of the VistaPrint Rewards program adequately disclosed the free trial period followed by monthly membership fees.

- The 5th Circuit affirmed the district court decision, noting that the lower court had properly observed that:

  - "[a] consumer cannot decline to read clear and easily understandable terms that are provided on the same webpage in close proximity to the location where the consumer indicates his agreement to those terms and then claim that the webpage, which the consumer has failed to read, is deceptive."

White v. Clearspring Technologies

(C.D. Cal.)

- Plaintiffs filed a complaint on August 10, 2010 against multiple media-focused brands that have partnered with Clearspring for Flash cookies programs (including Walt Disney Internet Group and Warner Bros. Records Inc.) asserting claims under the Computer Fraud and Abuse Act, California's Computer Crime Law, California's Invasion of Privacy Act, California's Consumer Legal Remedies Act and California's Unfair Competition Law

- Plaintiffs had configured their internet browsers to block third-party tracking cookies and claim that the defendant companies authorized a third-party company to covertly install Flash cookies on website visitors' computers in order to track the consumers' online activities

- The complaint alleges that Defendants have misleading privacy policies that fail to clearly and adequately disclose the cookie installation

  - The privacy policies only vaguely disclose data-sharing among the companies

  - "Defendants' privacy documents' verbiage was deceptive by design. . . Their privacy documents [through parsed definitions] are more nuanced than such categorized analysis allows for, omitting any direct reference to Flash cookies, embedding surveillance technology into the user's computer hardware, use o fuser's computer hardware to store data, use of technology to allow the perpetual online tracking and surveillance of any and all online Internet activity of the Clearspring Flash Cookie Affiliate user."