

CONSUMER PROTECTION LAW UPDATE

SEPTEMBER 2010



Kevin Underhill
Shook, Hardy & Bacon L.L.P.
415-544-1900
kunderhill@shb.com



Laurie Novion
Shook, Hardy & Bacon L.L.P.
816-559-2352
lnovion@shb.com



James Eiszner
Shook, Hardy & Bacon L.L.P.
816-559-2140
jeiszner@shb.com

AGENDA

I. Private Litigation Update

II. FTC Update

III. State Attorneys General Update

IV. And One NAD Development

I. Private Litigation Update

Lanham Act

POM v. Tropicana

- C.D. Cal. Sept. 7, 2010
- Court held POM's false-advertising claim was not preempted by the FDCA because interpretation of FDA regulations was not required in order to resolve the claim.
- POM is 3-1 in California courts on this issue: won against Welch and Ocean Spray, lost on preemption against The Coca-Cola Company.



Jurin v. Google

The screenshot shows a Google search for "styrotrim". The search bar contains "styrotrim" and a search button. Below the search bar, it says "About 1,220 results (0.29 seconds)" and "Advanced search". The results are divided into "Sponsored links" and "Organic results".

Sponsored links:

- www.StyroTrim.com E-Z Install Sills, Windows, Arches Nationwide shipping, Order Today! Shop our Showroom - Columns - Arches - Flat Trim
- [Home Supplies](http://www.Home.best-price.com) Buy Home Supplies up to 50% cheaper on best-price.com

Organic results:

- [Newport Architecture Foam](http://www.newportfoam.com/) Low Prices/Fast Delivery-All Shapes Columns-Casings-Crowns-Parapets [Show map of 1526 W Embassy St, Anaheim, CA 92802](#)
- [Styrotrim](http://www.styrotrim.com/) Ask.com Get Styrotrim Find Styrotrim
- [Styro Trim® "The Original" Stucco Trim | Stucco Foam Trim](http://www.styrotrim.com/) Decorative exterior trim that transforms your house into a beautiful home. Available are easy to install stucco trim, door window trim, exterior house trim, ... www.styrotrim.com/ - Cached - Similar
 - Gallery of Samples
 - Easy Install
 - Flat Trims
 - Columns
 - Customer Service
 - Quatrefoils
 - Shutters
 - KeystonesMore results from styrotrim.com »
- [Styro Trim® "The Original" Door Window Trim - Gallery](http://www.styrotrim.com/gallery.asp) Stucco, Stucco Trim StyroTrim is Made in USA ... "StyroTrim stucco accents transformed the house into something unique and beautiful." ... www.styrotrim.com/gallery.asp - Cached - Similar
- [STYROTRIM Products, 3D CAD, Specs, Catalogs – Sweets](http://products.construction.com/Manufacturer/STYROTRIM..lovenview) Find STYROTRIM products, 3D CAD drawings/details, 3 part specs for StyroTrim stucco and cement-coated foam treatments on Sweets. products.construction.com/Manufacturer/STYROTRIM..lovenview - Cached

- E.D. Cal. Sept. 8, 2010
- Jurin sells trademarked building material. Competitors could bid on that keyword and possibly show up as “sponsored links.”
- Court held that did not make Google a “direct competitor.”

Tiffany Inc. v. eBay, Inc.

- S.D.N.Y. Sept. 13, 2010
- Tiffany alleged eBay knew that many of the Tiffany items sold on its website were counterfeit, but advertised Tiffany items anyway.
- “Likely-to-mislead” claim “almost always” requires extrinsic evidence, usually a survey.
- Tiffany produced only evidence that people had in fact bought counterfeits, not that any of them had been misled by any eBay ad.

Innovation Ventures

- E.D. Mich. Sept. 15, 2010
- 5-hour ENERGY sued for infringement
- 6 Hour Power sued for false advertising
- 5-hour had previously obtained an injunction against “6 Hour Energy,” but its legal notice to retailers referred only to “6 Hour.”
- Court held that 6 Hour Power had not proven a substantial number of retailers were tricked by the notice into returning its product.



IBWA v. Eco Canteen

- W.D.N.C. Sept. 17, 2010
- IBWA members sell plastic water bottles, which may contain phthalates and Bisphenol-A.
- Defendant made reusable stainless-steel bottles, and claimed in ads that the plastic ones carried health risks.
- Court held that IBWA did not have “organizational standing,” but did have “associational standing” to sue on behalf of its members.

Stayart v. Yahoo!

- 7th Cir. Sept. 30, 2010
- “Like many, Beverly Stayart was curious about what she would find when she put her name into a search engine.” And like many, she was not happy with what she found.
- Unlike anyone else, she sued the search engine.
- Stayart alleged violation of 43(a) because the results “improperly gave her endorsement to pornography and online pharmaceuticals.”
- Held: no “commercial interest” in her name.

Consumer Litigation



held not responsible

- *Reit v. Yelp!* (N.Y. Super. Sept. 2, 2010).
- Dentist sued Yelp (a recommendation site that allows users to post reviews) because of an anonymous negative comment.
- He asked Yelp to remove it, but alleged it removed all the positive ones instead. Sued under GBL 349/350, saying Yelp falsely represented a lack of human involvement.
- Court held this fell within scope of Communications Decency Act immunity.

A Bottle of Broken Promises

- *Lee v. Carter-Reed Co.*, (N.J. Sept. 30, 2010).
- Alleged false advertising of Relacore.
- Trial court denied certification, App. Div. affirmed, N.J. Supreme Court reversed.
- Under N.J. law, court must construe allegations in favor of plaintiff at certification stage.
- If plaintiff was right that Relacore had no benefits at all, then reliance posed no individual issues.
- “Under plaintiff’s scenario, the ascertainable loss here is the price of a bottle of broken promises.”

Two Preemption Cases

- *Turek v. General Mills* (N.D. Ill. Sept. 1, 2010).
 - Does the Nutrition Labeling and Education Act preempt claims alleging failure to disclose use of “non-natural fiber”?
 - Yes: plaintiff challenging the science, not fraud.
- *In re Aurora Dairy* (8th Cir. Sept. 15, 2010)
 - Does the Organic Foods Production Act preempt state consumer-protection claims?
 - Yes, if the claims attack the certification (*i.e.*, alleging defendant sold milk as “organic” that wasn’t).
 - No, if the claims attack underlying facts (*i.e.*, alleging defendant misrepresented how cows were fed).

Many Trans Fat Cases



- *Rosen v. Unilever* (ICBINB) (dismissed w/o leave [appeal?])
- *Red v. Unilever* (ICBINB) (MTD hearing vacated b/c of settlement)
- *Yumul v. Smart Balance* (margarine) (MTD granted in part)
- *Chacanaca v. Quaker* (granola bars) (MJP under submission)
- *Red v. Kroger* (margarine, crackers, etc.) (MTD under submission)
- *Red v. Kraft* (Saltines, Teddy Grahams, etc.) (MTD granted in part)
- *Bahn v. Nestle* (Hot Pockets) (voluntarily dismissed w/o prejudice)
- *Lee v. Conagra* (margarine) (same)
- *Henderson v. Smucker* (Crisco) (no activity)
- *Henderson v. Gruma* (guacamole, bean dip) (OSC issued)
- *Higginbotham v. Kellogg* (yogurt bars, etc.) (voluntarily dismissed)
- *Guttmann v. Hostess* (Twinkies) (MTD granted)
- Above cases all filed by the same plaintiffs' firms -- overlapping plaintiffs
- Handful of similar cases elsewhere

Attorney Accused of Promising Kickbacks

By Sara Randazzo
Daily Journal Staff Writer

A fight has heated up this week between San Diego plaintiffs' attorney Gregory Weston and Florida law firm Beck & Lee, whose attorneys are accusing Weston of promising kickbacks to a paralegal and named plaintiff in a consumer class action in exchange for their involvement in the case, according to court papers filed Wednesday in federal court in the Northern District of California.

The allegations by Florida-based husband-and-wife duo Jared Beck, 33, and Elizabeth Lee Beck, 35, come five days after Weston, 29, filed a lawsuit in San Diego federal court to void a series of contracts between the two firms, which detail agreements to share fees on several proposed consumer class actions the firms are working on together as co-counsel. *The Weston Firm v. Beck & Lee, CV-1694.* Beck & Lee also received termination letters late last week from Weston, who started his career at the firm then

known as Lerach Coughlin Stoia Geller Rudman & Robbins, on behalf of clients in 12 joint matters, 11 of which have been filed in California federal court.

"This is a devastating situation for us," Jared Beck, who met Weston when they were both first-years at Harvard Law School, said Wednesday. "He's someone Elizabeth and I considered a friend, somebody we trusted, somebody we believed to be an ethical person and ethical lawyer."

In a declaration filed Wednesday opposing Beck & Lee's termination in a case filed against Unilever, Beck said the problem arose about three weeks ago, when he and Lee Beck learned from Weston's paralegal, Roz Sutton, that she had been promised a "bonus" from Weston for convincing a roommate to serve as a named plaintiff in one of the cases, and that the roommate was also promised a fee outside of any award granted by the court. The couple, who are licensed to practice in California, said when they tried to independently investigate

the truth of Sutton's comments, Weston and his partner Jack Fitzgerald stopped answering calls and e-mails, then abruptly served them with the lawsuit and termination letters.

Weston said in an e-mail Wednesday that, "The Becks' allegations are completely false, and amount to sour grapes from attorneys after they were fired by a large number of unhappy clients."

Legal ethics expert Diane Karpman said the allegations, if true, touch on an issue that's received considerable attention since Milberg Weiss partners were indicted in 2006 for paying plaintiffs to participate in class actions. "It's categorically illegal to make side payments not disclosed to court," Karpman said, adding that incentives can be provided to lead plaintiffs with court approval.

The partnership between Beck & Lee and Weston's firm began in mid-2009 in the Unilever case, in which plaintiffs claim the consumer product conglomerate

engaged in unfair food labeling practices. *Red et al. v. Unilever United States Inc. et al, CV-00387.* It quickly spawned into joint work on other food-labeling litigation, as well as a proposed class action against Yelp Inc. for deceptive advertising practices and against Apple Inc. for false advertising related to the iPhone. New York law firm Reese Richman also entered into a joint prosecution agreement with the two firms and is a named defendant in Weston's lawsuit filed last week. Reese Richman did not return a call for comment.

Beck said he and his wife are prepared to take over all the class actions but first have to wait and see how the courts respond to the declarations they've filed and continue to file in all the pending matters.

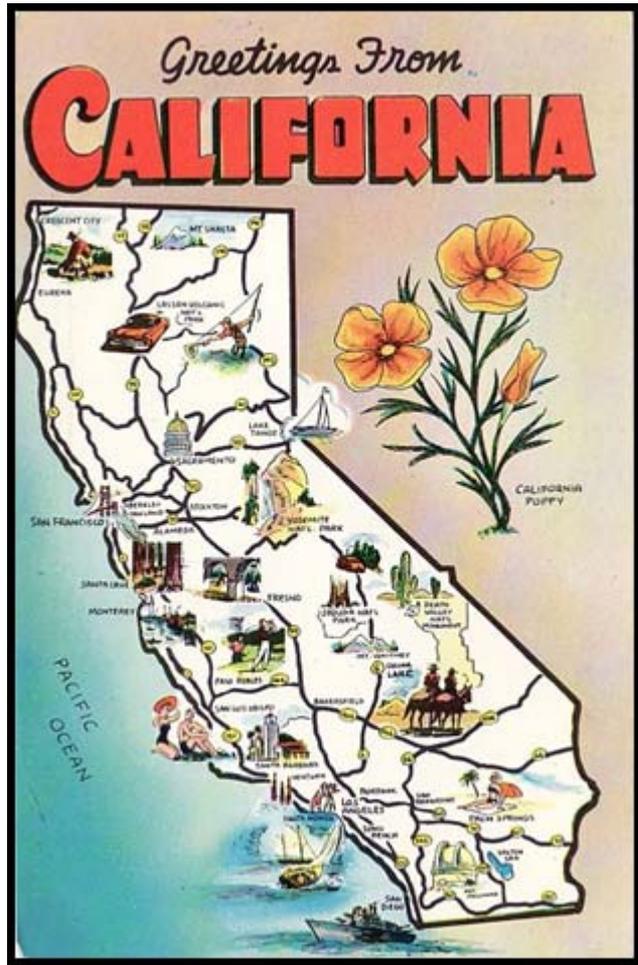
"We think it would be an absolute shame for the defendants in those cases to get off scot-free because one of the lawyers or law firms didn't play by the rules," Beck said.

sara_randazzo@dailyjournal.com

Red v. Unilever

- N.D. Cal. Sept. 14, 2010
- Weston moves to terminate Beck & Lee and Reese Richman as counsel of record.
- Court denies motion on the grounds that it might jeopardize a pending settlement.
- Also suggests it is not the best idea to put Weston in charge of the account where any fees recovered might be kept.
- Lesson: worth investigating how named plaintiffs got to be named plaintiffs, adequacy of counsel.

The Continuing California Crisis



- *In re Tobacco II Cases* has settled nothing.
- Standing requirement means plaintiff must allege and prove actual reliance (or causation).
- But “exposure to a long-term ad campaign” may be enough.
- Standing requirement does not apply to absent class members at all.

Actimmune III

- *Act I*: no “fraud on the market” claims (explicit or implicit)
- *Act II*: “saturating the market” claim is the same thing; also, seven years and 207,000 individuals “pales in comparison” to *Tobacco II* facts.
- *Act III*: mere “exposure” isn’t enough
 - no allegations that harm was caused by doctors’ “exposure” to marketing
- Also: off-label marketing claims did not “sound in fraud” so Rule 9(b) didn’t apply

UFCW v. Eli Lilly

- 2d Cir. Sept. 10, 2010
- Formerly *Zyprexa* case – civil RICO claim.
- “Excess price theory” not susceptible to generalized proof, so no class certified.
- *McLaughlin* rejected claim that light cigarettes were more expensive than they would have been if manufacturers had not “distorted the body of public information.”
- Court held this defeated a third-party reliance claim as well.

Philip Morris USA v. Scott

- Medical-monitoring case against tobacco companies in Louisiana - \$241.5 million verdict.
- Scalia granted a stay of execution on 9/27.
- Identified “distortion of public knowledge” theory as possible ground for *certiorari*, based on concern about due-process implications.
- Should not be too hard to get 4 votes to grant.
- Ruling could potentially affect litigation in any state with relaxed reliance or causation standards.

II. Federal Trade Commission Update



FTC Casts Light on LED Bulb Marketing

- First FTC case challenging LED-bulb marketing.
- Case initiated following an FTC investigation.
- FTC alleges that Lights of America:
 - Misrepresented bulb light output and life expectancy
 - Included misleading claims about wattage equivalency on product packaging
- FTC seeks a permanent injunction and monetary relief for consumers.

TRO Against Allegedly Deceptive Envelope-Stuffing Operation

- Alleges defendants falsely promised consumers they could make substantial \$\$ stuffing envelopes at home:
 - Misled consumers through false claims of earning potential
 - Unfairly persuaded consumers to pay upfront participation fees
 - Failed to send materials needed for envelope stuffing
 - Failed to provide promised refunds
- TRO granted Sept. 13, 2010; forbids practices and freezes assets while FTC seeks restitution.
- FTC assisted by CT state AG and U.S. Attorney, postal inspectors and state BBB.

FTC Proposes Rule to Ban Deceptive Mortgage Ads

- Rule would ban 19 common mortgage-related misreps, allow civil penalties.
- Currently, FTC can get only injunctive relief under the FTC Act.
- Proposed rule would apply to mortgage lenders, brokers & servicers; real estate agents & brokers; advertising agencies; home builders; lead generators and rate aggregators.
- Would not apply to banks, S&Ls, federal credit unions, and non-profits.
- Comment period runs through November 15.

Settlement September: FTC Settles Charges in Various Actions

- **Credit Repair Operation**
 - Defendants allegedly represented they would remove any negative information (even if accurate) from consumers' credit reports upon receipt of upfront fees.
 - Stipulated judgment of \$14.4M, contingent on asset surrender.
 - Defendants barred from charging up-front fees for credit repair services, misrepresenting goods and services, or disclosing, benefitting from, or failing to properly dispose of consumer information.
- **Payday Loan Owner Settles Debt-Collection Charges**
 - FTC alleged defendants conducted various illegal debt collection practices and illegally tried to garnish borrowers' wages.
 - Settlement order imposes a \$38,000 suspended judgment, bars defendant from violating the Credit Practice Rule and the FDCPA, benefitting from customers' personal information, or failing to properly dispose of such information.

Settlement September: FTC Settles Charges in Various Actions (cont'd)

- **Company Settles Allegations by FTC & 7 States that It Debited Consumers \$200 Million in Bogus Charges**
 - Allegedly processed unauthorized debits on behalf of deceptive telemarketers and Internet-based schemes, violating Telemarketing Sales Rule and other consumer laws.
 - Settlement order imposes a stayed \$625,000 judgment and bars defendant from processing payments debited from consumers' bank accounts or knowingly aiding violators of the Rule.
- **Lender to Pay \$1.5 Million to Resolve FTC Claims that it Discriminated Against Hispanic Borrowers**
 - Allegedly charged Hispanic consumers higher prices for mortgage loans than non-Hispanic white consumers in violation of the Equal Credit Opportunity Act.
 - Settlement order imposes a \$5.5M judgment, suspended upon \$1.5M payment, and enjoins defendants from failing to comply with the Act.

Settlement September: FTC Settles Charges in Various Actions (cont'd)

- **Credit Card Marketers Settle Charges Re: Bogus Cards, Illegal Fees**
 - Defendants allegedly claimed card could be used to fully finance purchases and failed to disclose that fees, shipping and 30% of purchase price would be debited from consumers' bank accounts.
 - Consent decree permanently enjoins six defendants from engaging in various marketing practices and imposes a \$28.5M judgment, suspended upon surrendering of assets.
- **Online Data Broker Settles Privacy-Pledge Charges**
 - FTC charged defendant with falsely promising it could lock consumers' online data records so that others could not see or buy them upon receipt of \$10 advance payment.
 - Under consent order, defendant must refund fees charged to 5,000 consumers and stop misrepresenting its services.

POM Wonderful v. FTC, Part I: **POM Sues FTC for Declaratory Judgment**

- On Sept. 13, POM filed a complaint alleging that the FTC
 - Exceeded its statutory authority by requiring FDA pre-approval of disease-related health claims on food products and substantiation of two well-controlled clinical studies for non-disease health claims;
 - Violated advertisers' 1st and 5th Amendment rights by requiring compliance with the new standards; and
 - Failed to comply with notice and comment rulemaking procedures.
- POM asserts that the FTC advised it that it must comply with standards for health-related claims recently announced in consent orders against other companies.
- POM alleges that the new standards violate its free speech rights by barring it from discussing or disclosing the results of its product research.

FTC v. POM Wonderful, Part II: **FTC Charges POM with Making False and Unsubstantiated Product Claims**

- FTC filed an administrative complaint against POM on Sept. 27, claiming that POM's pomegranate juice advertisements made deceptive health claims.
- Complaint alleges that POM ignored evidence that contradicted its claims that its juice could help or prevent heart disease, prostate cancer and erectile dysfunction.
- FTC seeks order requiring future health claims to be non-misleading and to comply with FDA regulations.
- Hearing set for May 24, 2011.



Surveys, Studies & Speeches

- **FTC Seeks Comment on Proposed Consumer Fraud Survey**
 - Comments to the proposed survey are due by November 1, 2010.
 - Survey will assist FTC in determining the incidence of consumer fraud as well as whether the type and frequency of consumer fraud has changed.
- **FTC Subpoenas Food Companies in Youth-Marketing Study**
 - Companies have 90 days to file a “Special Report” on youth-marketing practices.
 - FTC plans to measure the effect of self-regulation over the last 3 years.
 - Will eventually publish follow-up to “Marketing Food to Children and Adolescents: A Review of Industry Expenditures, Activities and Self-Regulations” (2008).
- **FTC Testifies on Data Security Legislation**
 - FTC supports legislation requiring companies to use reasonable data security policies and to notify consumers where there is a security breach.
- **Chairman Speaks at Fordham Int’l Antitrust Law Conference**
 - Comments included (a) increased use of Section 5 to protect consumers and (b) new approaches to the protection of personal and data privacy.

III. State Attorney General Update

33 States Settle With Publishers Clearinghouse

- Publishers Clearinghouse allegedly led consumers to believe that buying would increase chances of winning.
- Prior settlements have required changes in mail-solicitation practices. States opened a new investigation after complaints (often by or on behalf of seniors) of buying merchandise expecting to improve chances.
- Settlement requires PCH to:
 - Identify consumers over 65 who spend \$500 or more in a quarter and remove them from lists if they misunderstand sweepstakes.
 - Advise consumers who spend more than \$1000/yr that buying does not increase chances of winning.
 - Hire an ombudsman to review mailings.
 - Pay \$3.5 million to reimburse investigative costs.

Allergan Settles Off-Label Marketing Charges

- Allegedly led a national campaign to market Botox for unapproved uses (treating headaches, pain, overactive bladder, spasticity).
- Allegedly offered doctors free training & support to obtain reimbursement for off-label prescriptions, and sponsored continuing education programs and grants to promote off-label uses for Botox.
- To settle the claims, Allergan agreed to:
 - pay the 50 states and the federal government \$225 million (including \$33 million in Medicaid reimbursement)
 - enter into a Corporate Integrity Agreement with HHS to scrutinize future marketing practices
 - enter a guilty plea & pay \$350 million in criminal fines & \$25 million in forfeiture to settle DOJ charges alleging misdemeanor FDCA violations

AGs Urge Ban on On-Line “Adult Services” Advertising

- **craigslist** suspends “adult services” section after 18 state AGs alleged ads promoted prostitution, human trafficking and child exploitation and that craigslist does not adequately screen them.
 - This followed a 2008 pledge by craigslist to better police its site.
 - After craigslist replaced link with a “censored” tag, CT AG asked it to confirm that this would be “permanent and complete” and that it would implement effective screening measures to prevent the ads from migrating to other parts of its site. Craigslist obliged.
- **Backpage.com**, an online classified ad site owned by Village Voice Media, asked by 21 state AGs immediately to take down the “adult services” portion of its site and to conduct manual reviews of ads on other sections before posting.
- AGs say that these two sites account for some \$47.5 million of an estimated \$63 million in online prostitution ads expected this year.
- Will AGs seek to hold other messengers liable for the message?

NY AG Nets \$8.5M From Discount Clubs

- NY AG settled with discount club marketer Webloyalty.com, Inc. for \$5.2 million (+ refunds to consumers) and its cooperating retailers (Orbitz, Shutterfly, MovieTickets.com, Ticketmaster, and Pizza Hut) for a total of more than \$3.3 million
- According to NY AG, online purchasers from the retailers received discount offers from Webloyalty – acceptance gave Webloyalty access to customer’s credit/debit card info, and hidden discount club fees were charged against the cards – without adequate disclosure.
- Webloyalty must (among other things):(1) refund fees to customers who unknowingly enrolled or didn’t authorize billing, (2) stop obtaining consumer billing info from online retailers, (3) ensure consumers understand they will be billed for a Webloyalty program.
- Retailers must: (1) permanently cease providing customer billing info to companies that market discount clubs online and (2) reform their marketing practices.

Maker of Child-Safety Software Was Selling Kids' Information

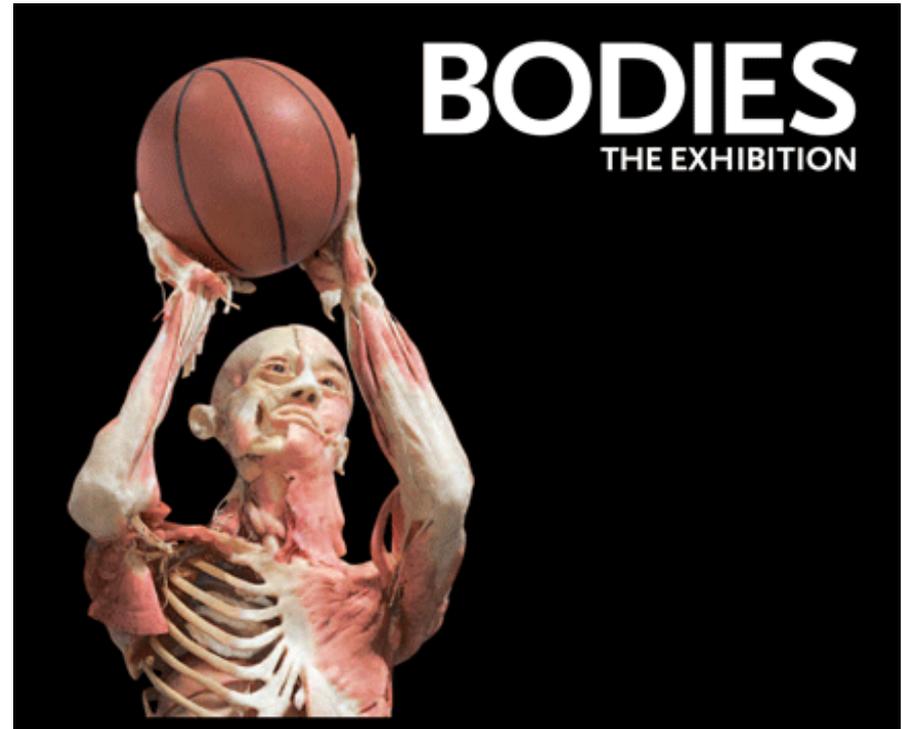
- Echometrix, which sells software that allows parents to monitor a child's Internet use, agreed in a settlement with NYAG to stop secretly collecting and selling information from children's instant messaging conversations for marketing purposes.
 - Since June 2009, Echometrix had offered companies a program called "Pulse" that used its Internet monitoring software to collect information on children's reactions to products and services .
 - Echometrix did not tell parents about the data collection.
- Echometrix has stopped selling "Pulse" and has agreed:
 - to pay a \$100,000 fine and
 - not to analyze or share with third parties any private communication, info or online activity to which it has access.

Seller of Do-It-Yourself Legal Forms Must Clearly Disclose It's Not a Firm

- LegalZoom, an online seller of do-it-yourself legal documents, settled claims by Washington AG that it was advertising comparisons of its costs to attorneys' fees without clearly disclosing that it is not a law firm and is no substitute for one.
- Other relief includes prohibition on unauthorized practice of law, mandatory disclosure that communications with LegalZoom are not privileged, and requirement that LegalZoom forms comply with WA law.

“Sunlight is the Best Disinfectant”

Sponsor of a cadaver exhibit agreed with Missouri AG to disclose at the exhibit and in ads that it “cannot independently verify the provenance of the human remains in this exhibit,” and that “there is no written documentation that any of the persons consented to the plastination and/or exhibition of their bodies.”



Coming Attractions

- CT AG will investigate defective foreclosure filings by GMAC and its parent, Ally Financial. A GMAC/Ally employee admitted signing thousands of foreclosure affidavits per month in various states without verifying their accuracy or having them notarized, allegedly “to increase the volume and pace of foreclosures.”
- CT AG is seeking from GMAC/Ally:
 - A freeze on foreclosures in CT
 - Case names & docket numbers of CT foreclosure cases where defective affidavits were filed
 - Explanation of when/how it will notify defendants & courts
 - Identification of persons reviewing/signing CT foreclosure docs
 - Description of steps it will take to ensure integrity of future docs
- CT AG says it will investigate other banks for similar violations.

IV. And One NAD Development

Pharmavite LLC

Nature Made Prenatal + DHA Liquid Softgel Vitamins

- **Challenger:** Perrigo Company (competitor)
- **First Challenged Claim:** Nature Made “offers the first OTC supplement that combines a prenatal multivitamin with DHA” to address health needs of pregnant and nursing mothers, and is “formulated for easy absorption.”
 - Bioavailability of folic acid disputed. NAD: *in vitro* tests were sufficient to establish availability, but failed to support the “easy absorption” claim – Pharmavite should discontinue absent further testing.
- **Second Challenged Claim:** Product testing exceeds FDA and USP requirements & shows that folic acid is available for absorption at levels exceeding USP standards.
 - NAD: the implied claims “overstate the evidence and reasonably imply that [the product is] superior to other folic acid supplements.” Express claims similarly unsupported, and advertiser should stop making them.