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Bylined Article

Targeting Audiences: Marketing Practices May Open New Front in Energy Drink Litigation

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Although energy drinks make up only one percent of non-alcoholic beverage sales in the United States, no other food product has felt more intense scrutiny from Congress and the FDA during the past year. While some energy drink manufacturers currently face lawsuits alleging that their products directly caused deaths or serious injuries, the most significant interest of lawmakers appears to center on the potential harmful effects of marketing these products to children. It is in this area that new laws or regulations affecting energy drink manufactures are most likely emerge in 2014, accompanied by a potential new wave of lawsuits focusing on marketing practices.

To some extent, energy drink makers have become victims of their own success. While sales of most other beverage categories have declined, energy drink sales increased 19% last year. One study concluded that energy drinks make up 8.8% of beverages consumed by high school students. With increased market share comes increased scrutiny, and since late 2012 legislators such as Senator Richard Blumenthal have been calling on energy drink manufacturers to cease marketing their products to children under 12 years of age.

However, legislative action may be only one vulnerability for this fast-growing segment, especially as plaintiffs' firms interested in filing suits against energy drink manufacturers over their marketing practices may possess a blueprint for such litigation.

Product Association

Remember the "Joe Camel" campaign by R. J. Reynolds Nabisco? In 1991, the *Journal of the American Medical Association* published a study showing that by age six, many children were able to associate the Joe Camel logo with Camel cigarettes.

Subsequently, a San Francisco-based attorney filed a lawsuit alleging that the campaign was an impermissible attempt to gear tobacco marketing to minors. While the FTC refused to declare Joe Camel an unfair advertising practice, in 1997 they voted that the character did attract

underage smokers. In July 1997, under pressure from the impending trial, as well as from Congress and anti-smoking groups, R.J. Reynolds settled the case and voluntarily ended the Joe Camel campaign.

The first case involving similar litigation against energy drink manufacturers is already under way. In May 2013, Monster Energy was sued by the San Francisco City Attorney over its marketing practices, including the allegation that Monster drinks were impermissibly marketed to children. The complaint invoked California's unfair competition law, which prohibits "unlawful, unfair or fraudulent business acts or practices," and argued that marketing energy drinks to minors violated this law because minors are inherently unable to understand the significant health risks attendant to these products. The outcome of the dispute between Monster and San Francisco could have a major impact on how energy drinks are marketed, and whether additional lawsuits are brought by city and state governments, or by private individuals where allowed.

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Smart Marketing

For energy drink manufacturers doing business in California or other states with similar unfair competition laws, caution should be the watchword in marketing. It would be wise to avoid any appearance that marketing efforts are directed towards an audience younger than 12 years old.

Practically speaking, that means operating with vigilance, and likely seeking the advice of counsel prior to beginning new marketing initiatives, particularly those that rely on internet and social media platforms that are popular with young adults, but where it is difficult to exclude consumers below a certain age. Sponsorships—often a particularly valuable marketing tool for beverage manufacturers—are potentially troublesome if the event or activity involved is likely to have a substantial youth following.

Interestingly, the American Beverage Association prohibits marketing energy drinks to children, and Monster defends its products in part by arguing that its marketing does not target minors. This highlights another issue: namely, that it is surprisingly difficult to discern what courts, juries and regulatory bodies may view as youth-directed marketing.

Imagine that an energy drink manufacturer sponsors a NASCAR racing team, emblazoning its name and logo all over the sponsored driver's car. There may be a justifiable basis to argue that this is not marketing directly to children. However, imagine that a replica of that car is licensed

to be sold as a toy, including the energy drink logo on the hood. In that case, is the energy drink maker now impermissibly marketing towards children? The answer is far from obvious.

On December 16, 2013, Senator Blumenthal held a press conference during which he accused several major energy drink manufacturers, including Monster and Rockstar, of marketing to children by producing toys bearing energy drink logos.

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For an energy drink manufacturer, it is important to be thinking about these issues, and to seek advice from counsel where appropriate. Counsel should possess imagination and experience in consumer issues, and understand how marketing initiatives could be received by those interested in litigation.

Determining what is and is not permissible, or what may or may not trigger a lawsuit, is not always as obvious as it might otherwise seem. Proceeding with caution, and with as much information and professional guidance as possible, is the safest course.

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