Consumer Products Marketing

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ARNOLD & PORTER LLP

Court decisions, new and pending laws, and regulations arise every day affecting companies that produce and market consumer products. Our *Consumer Products Marketing* newsletter summarizes notable policy and regulatory developments, as well as court decisions, in the areas of consumer protection, Lanham Act, privacy, EU, and consumer product safety. Our aim is to keep you informed of these issues with a concise overview of selected developments. Attorneys in all practice areas listed are available to answer any questions you may have in regard to any of these issues. To reach the editor for any reason, contact Randal_Shaheen@aporter.com.

CONSUMER PROTECTION[1]

More Industries Adopting Voluntary Marketing Guidelines

The alcohol and entertainment industries have operated under voluntary marketing guidelines for many years, spurred in part by public and government criticism of certain marketing practices. Now they are about to have company. Recently the American Beverage Industry board announced a proposal for a voluntary ban on the sale of soft drinks in elementary and middle schools. Additionally, companies would voluntarily agree to reduce the number of slots in high school vending machines allotted for sodas, replacing them with healthier choices such as water and juice.

Similarly, the Pharmaceutical Manufacturers of America (PhRMA) recently released a proposed set of principles for direct-to-consumer advertising ("DTC"). The proposed DTC principles relate to issues such as inclusion of risk information, submission of certain television advertising to the FDA, and limiting the television advertising of certain drugs to predominantly adult audiences.

The FTC in recent years has been a strong proponent of industry self-regulation in lieu of possible government regulation. In the 1990s, the FTC's reports on alcohol advertising and the marketing of violent entertainment to youth both strongly endorsed industry self-regulation. More recently, in announcing the joint FTC/HHS workshop on food marketing and childhood obesity, the FTC Chairman stated that self-regulation, rather than government regulation, was the FTC's goal. In analyzing the lawfulness of any industry marketing guidelines, the FTC will first consider whether the guidelines are meant to help reduce consumer uncertainty and confusion. Second, the FTC will determine whether the marketing limitations are overly restrictive. Third, the FTC will consider the economic ramifications for imposing the restrictions. If industry members are acting in opposition to their own self-interest but in response to external pressure, it is more likely that the FTC will accept any pro-competitive justifications. Finally, the FTC will question whether the standards are voluntary or mandatory, as a possible measure of the legality of the marketing restrictions. However, reasonably designed enforcement mechanisms are likely to avoid antitrust problems. In fact, the FTC has stated that even more stringent enforcement mechanisms are problematic from an antitrust standpoint only if they "substantially impair

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the disciplined member's ability to compete, and … the market has so few competitors that the loss of one competitor would significantly lessen competition."

FTC/HHS Workshop: "Perspectives on Marketing, Self-regulation, & Childhood Obesity" Held July 14-15

The goal of this workshop was to identify ways in which industry, government, health experts, consumer advocates and parents can work together to solve the growing problem of childhood obesity.

The FTC Chairman stated at the outset of the workshop that while the status quo was unacceptable, self-regulation was the preferred alternative. Senator Tom Harkin (D-IA), who has introduced legislation dealing with this issue, delivered remarks regarding the mounting concern over the childhood obesity epidemic and the increasing amount of advertising of unhealthy foods directed at children. Senator Harkin criticized the current self-regulatory approach as "captive of the industry," but said he hoped a truly independent self-regulatory approach could be designed.

Key industry figures participated on panels and noted ways in which they have responded to the growing concern over childhood obesity. Members of the media also spoke about some of their leading initiatives to combat childhood obesity, including developing an understanding of the role food plays in culture, examining the use of characters in advertising, increasing public education, encouraging physical activity and reaching out to minorities and urban populations.

The comment period closed on August 12. The FTC has said that it intends to prepare a report summarizing what it has learned from the workshop.

LANHAM ACT[2]

Eighth Circuit Rules that Challenged FDA Approval Claims Do Not Require Exhaustion or Stay of Proceedings

In June, the Eighth Circuit ruled in *Alpharma, Inc.* v. *Pennfield Oil Company* that plaintiffs bringing lawsuits under the Lanham Act involving drug claims were not required to exhaust any FDA remedy prior to filing suit. 411 F.3d 934 (8th Cir. 2005). Further, the court held that allegedly false claims of "FDA approval" did not fall within FDA's area of special expertise such that the court should stay or dismiss the action. In the case, Alpharma, a manufacturer of antibiotic animal feed additive, brought an action against Pennfield for allegedly advertising that one of its additives was approved by the FDA, when in fact the claim was false. Alpharma brought suit in the U.S. District Court for the District of Nebraska under the Lanham Act and Nebraska Uniform Deceptive Trade Practices Act.

The district court granted a motion to dismiss filed by Pennfield and the Eighth Circuit subsequently reversed. The appellate court found that, because the Lanham Act provides remedies such as damages that FDA cannot provide, there was no exhaustion requirement. Further, because the issue to be addressed was whether FDA had approved the additive rather than whether FDA would have approved the additive, the challenged claim did not fall within FDA's "primary jurisdiction" and a stay or dismissal of the case was not merited.

Razor Manufacturer Wins PI in Case Alleging False Claims

Recently, the U.S. District Court for the District of Connecticut granted in part and denied in part a motion for a preliminary injunction in the case of *Schick Manufacturing, Inc.* v. *The Gillette Company,* 372 F. Supp.2d 273 (D. Conn. 2005). Schick brought the case after successfully litigating the same issues in Germany.

[1] Arnold & Porter's Antitrust & Trade Regulation Group has extensive experience in consumer protection matters before the Federal Trade Commission (FTC), State Attorneys General, and the National Advertising Division. Members of our group include Bob Pitofsky, former FTC Chairman and Director of the Bureau of Consumer Protection; Mike Sohn, former FTC General Counsel; Bill Baer, former FTC Bureau of Competition Director; Debbie Feinstein, former Assistant to the FTC Bureau of Competition Director and Attorney Advisor; Randy Shaheen and Amy Mudge who collectively have practiced in this area for over 25 years. In our EU offices, Tim Frazer and Susan Hinchliffe have advised clients on numerous consumer protection matters.

[2] Arnold & Porter LLP attorneys have significant experience with Lanham Act deceptive advertising counseling and representing both plaintiffs and defendants in deceptive advertising litigation. The firm has represented companies and advertising agencies in diverse product areas (including some seminal cases in the pharmaceutical sector) and has handled both literal-falsehood cases and implied-falsehood cases, which require scientifically designed surveys. Attorneys in the firm with Lanham Act experience include Joel Freed, Chuck Ossola, Helene Madonick, Suzy Wilson, Randy Shaheen, Roberta Horton, and Randy Miller.

In 2003, Schick launched its Quattro razor system, spending millions of dollars in advertising. In response, Gillette launched the M3 Power razor, advertising that the "micro pulses raise[d] hair up and away from the skin," allowing the customer to achieve a closer shave.

Schick challenged two claims: (1) that the M3 changed the angle of hair and (2) that the M3 extended the length of the hair. Gillette conceded that the M3 did not change the hair angle and conceded that the advertisement exaggerated the degree of hair extension, but argued that such exaggeration did not make the claim literally false.

The court disagreed, finding that the depiction of hair extension was not even a "reasonable approximation." However, with respect to whether the M3 causes any hair extension, the court found that, while Schick had successfully attacked Gillette's testing, it had failed to meet its burden of demonstrating that the claim was false as opposed to unproven by the studies put forward by Gillette.

PRIVACY[3]

Privacy: Congress Moves Forward with Data Security Protection Legislation

Both the House and the Senate are continuing to work on legislation designed to prevent harm to consumers from breaches of security protection for individual financial and other sensitive personal information.

In the Senate, two bills are in the forefront: S. 1408, the "Identity Theft Protection Act," sponsored by Senate Commerce Committee Chairman Ted Stevens (R-AK) and ranking Committee Member Daniel Inouye (D-HI), and S. 1332, the "Personal Data Privacy and Security Act," sponsored by Senate Judiciary Chairman Arlen Spector (R-PA) and ranking Committee Member Patrick Leahy (D-VT).

The Senate Commerce, Science and Transportation Committee approved S. 1408 in late July; the Senate Judiciary Committee plans to act soon on its Chairman's bill.

The Stevens-Inouye bill has garnered particular interest, and is likely to have broad bipartisan support in the Senate. The bill would create national standards for consumer notification regarding possible data breaches, limit the sale of social security numbers, allow consumers to freeze their credit reports and require specific safeguards to protect consumer information within businesses.

Specifically, S. 1408 would require notification to the Federal Trade Commission, and, in serious cases, to consumers when a possible security breach has taken place and there is a "reasonable risk of identity theft." The "reasonable risk" standard is defined to mean that a "preponderance of the evidence" available to the business shows that identity theft is likely. If the business determines that there is such a "reasonable risk" of identity theft, it must make every effort to notify each affected individual. If more than 1,000 consumers are affected, the entity would be required to inform consumer reporting agencies as well individual consumers and the FTC. If the breach affects fewer than 1,000 consumers and does not create a "reasonable risk" of identity theft, only the FTC would have to be notified, and the notification would simply have to describe the breach in general terms.

The bill also allows consumers to place security freezes on their credit reports by making requests to credit reporting agencies. The freeze would prohibit consumer reporting agencies from releasing information contained in the consumer's credit report to any third party without authorization. A separate amendment was also added to limit the circumstances in which consumer social security numbers may be sold commercially.

Under the proposed legislation, the FTC would be charged to create rules establishing procedures for authenticating the information provided by third parties that request sensitive consumer information. In addition, the legislation would require the FTC to create an Information Working Group to develop new strategies for addressing issues of consumer protection. Enforcement options under the bill would include fines imposed by both state attorneys general as well as the FTC.

[3] Arnold & Porter's Privacy Team provides legal and strategic counsel to help clients meet their privacy obligations in a demanding, evolving, and competitive marketplace. Our attorneys have held significant senior government positions, including Jeff Smith, former General Counsel of the CIA; Bob Pitofsky, former Chairman of the FTC; Ron Lee, former General Counsel of the National Security Agency; and Rick Firestone, Chief of the Common Carrier Bureau of the FCC. Others with extensive experience in this area include Nancy Perkins and Scott Feira in our DC office; Gregory Fant in our LA office; and Sarah Kirk in our London office.

Business groups have raised concerns regarding over-notification to consumers and the seemingly intangible definition of "reasonable risk" when addressing possible identity theft. The U.S. Chamber of Commerce is currently refusing to support the bill as drafted due to several last-minute changes in the restrictions on the sale of social security numbers and the parameters in place for mandatory consumer notification. Industry leaders are said to more fully support a bill that would require businesses to consult with outside parties when examining possible data and security breaches.

The leading Senate Judiciary Committee bill, S. 1332, would require companies to notify consumers of any breach that "impacts sensitive personally identifiable information" unless an investigation by law enforcement officials concludes that there is minimal risk of harm to the individual. The Committee postponed action on S. 1332 and two other identity theft bills (S. 1326 and S. 751) on July 28, when approximately 40 amendments were filed by both Democrats and Republicans dealing with enforcement, private rights of action, and FTC authority to issue regulations. The Committee reportedly is in the process of addressing each suggested amendment and working toward consensus.

The debate over the bills was highlighted at a Senate Banking Committee hearing on September 22. Industry representatives stressed the need for an overarching federal guideline and a preference for limiting instances in which consumers would be notified as to possible security breaches. Consumer groups testified that federal legislation should be a floor upon which states could expand and urged for heightened reporting requirements to consumers.

In the House, a draft bill entitled the "Data Accountability and Trust Data Act," backed by House Energy and Commerce Committee Chairman Joe Barton (R-TX) and ranking Committee Member John Dingell (D-MI), is expected to be introduced in the near future. Under that bill, companies would be required to report data security breaches when there is a "significant risk" to consumers of identity theft. The FTC supports such a standard, as do many industry groups.

Recent statements by FTC Staff suggest that any FTC rulemaking will include a reasonableness standard. At a September 20 teleconference sponsored by the International Association of Privacy Professionals, Jessica Rich, Assistant Director of the FTC Division of Financial Practices, said that in a series of cases against companies like Eli Lilly & Co. and others, the FTC has established that it will pursue, under a deceptive trade practices theory, companies that make misleading statements or give false assurances to the public about data security. Still, this "does not mean that the FTC is setting a strict liability data security standard for companies," Rich emphasized. The FTC understands that there is no such thing as perfect security and that breaches may occur despite reasonable data security measures, she said.

EU[4]

Phtalates Ban

The European Parliament has reached an agreement on new legislation that will permanently prohibit the use of phthalates in children's toys. These chemicals are used to soften PVC, but some studies showed that phthalates could be released when children suck or chew on toys containing such chemicals. Under the proposed legislation, three phthalates: DEHP, DBP and BBP, which have been identified as being reprotoxic, will be banned in all toys and childcare articles. DINP, DIDP and DNOP will be banned from use in toys and childcare articles if those articles can be put in the mouth by children. A temporary ban on these products has been in place since 1999, however, the scope of the ban varied from country to country. The new EU legislation will introduce a harmonized approach across all 25 EU Member States. "Our action … shows that, when a risk has been identified, the EU can act effectively to insure children's security," highlighted Günter Verheugen, Vice-President of the Commission in charge of enterprise and industry policy.

Now that the European Parliament has approved the legislation, it is likely to be formally adopted in the Autumn. Member States will then be given a period of time in which to adopt national implementing legislation, although it is not yet clear how long that period will be.

[4] The practice areas of our London and Brussels offices, Arnold & Porter (UK) LLP, and Arnold & Porter (Brussels) LLP, include competition and EU law, litigation, telecommunications, information technology, intellectual property, corporate, biotechnology, pharmaceutical regulatory, product liability, and health care. The offices' clients include multinationals and European concerns ranging from start-ups to *Fortune 500* firms.

CONSUMER PRODUCTS SAFETY COMMISSION[5]

CPSC Works with China to Create International Consumer Product Safety Program

In May, the Office of International Programs and Intergovernmental Affairs at CPSC released the International Consumer Product Safety Program Plan—China for review and comment. CPSC developed the program to improve compliance of consumer products imported into the United States from China. The plan suggests ways to maintain and improve consumer safety, and will culminate in fall 2005 with the first Biennial Sino-American Consumer Product Safety Summit in which officials from the U.S. and China will meet for a global dialogue in Beijing.

China is the largest source of consumer products imported into the U.S. It is also the largest foreign source for CPSC-directed recalls and port seizures. In order to improve the safety of these imported products, CPSC has developed 10 specific activities to help identify and improve imported Chinese products that pose a risk to consumer safety. These activities include:

1. A Comparative Standards Study between the U.S. and China—CPSC plans to compare the standards of imported products that have been recalled or seized with U.S. product standards. The hope is that the differences between standards will become apparent and adjustments can be made in response.

2. Stressing the Importance of Using Both Mandatory and Voluntary Standards—CPSC hopes to impress upon Chinese officials the essential role both types of safety standards play in consumer protection and stress to appropriate governmental officials the need to comply with both types of standards.

3. Cooperation between both U.S. and Chinese Staff —The Chinese counterpart to the CPSC is the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ). CPSC and AQSIQ have signed a Memorandum of Understanding to cooperate in the exchange of scientific, technological and safety information.

4. Testing and Certification Program—CPSC hopes to work with Chinese officials to examine current testing and certification methods in China. The hope is to improve these procedures so that compliance with U.S. standards is achieved and distribution in U.S. markets can take place.

5. Pilot Compliance Program—CPSC will ask AQSIQ staff to implement current U.S. voluntary and mandatory standards for Chinese manufacturers in three to five types of consumer products sought to be imported into the U.S.

6. Professional Staff Exchange—CPSC seeks to train Chinese personnel in U.S. consumer product safety guidelines.

7. Open Dialogue on Chinese Imports—CPSC will have several open dialogues with Chinese officials on improving compliance for distribution of Chinese products in U.S. markets.

8. Biennial Sino-American Consumer Product Safety Summit —a time for American and Chinese officials to meet and discuss the progress being made in the implementation of the mutual goal of consumer product safety. The first summit will take place in Beijing in fall of 2005.

9. Development of Horizontal Working Relationships—CPSC hopes to cultivate close relationships with staff members at AQSIQ.

10. Interagency Relationships—CPSC hopes to develop close working relationships with other federal agencies including U.S. Customs and Border Patrol, NIST, ITA, China Standards Attaché in Beijing, U.S. Embassy in Beijing, USTR and the State Department.

[5] Arnold & Porter has several attorneys with broad experience on matters involving the U.S. Consumer Product Safety Commission, including two former General Counsels of the agency—Eric Rubel and Jeff Bromme—and Blake Biles, formerly with the Environmental Protection Agency. We take a proactive approach to product safety issues, helping clients establish and audit internal controls. We represent clients in CPSC enforcement actions, as well as in private litigation that can result from CPSC matters.