

ACI CONFERENCE:  
A FOLLOW-UPDISCUSSIONS OF KEY ADVERTISING LAW TOPICS

On Tuesday, December 5, 2006 and Wednesday, December 6, 2006, American Conference Institute presented the The 18th National Advanced Corporate Counsel Forum on Advertising Law at the Marriott East Side in New York City. This important conference had an ambitious agenda that included materials that discussed such key advertising law topics as:

- What's on the FTC Radar Screen: A Staff Perspective, by Lesley Fair, Senior Attorney, Division of Advertising Practices, Federal Trade Commission.
- Advertising and Promotion Liability, by Rick Kurnit, Partner, Frankfurt Kurnit Klein & Selz (New York, NY).
- Beyond the Lanham Act—A Practical Guide to a Lawyer's Role in Developing Marketing Campaigns, by Steven Zalesin, Partner, Patterson Belknap Webb & Tyler LLP (New York, NY).

This article reports on numerous developments that have occurred in several of the areas that were discussed at the conference—or that were examined in accompanying materials—in the weeks following the end of this conference. Specifically, this article examines developments that occurred in these areas—

- Effective Enforcement
- Weight-Loss
- Guidance on "New" Products
- Lanham Act
- Telemarketing

EFFECTIVE ENFORCEMENT

One of the areas examined in Lesley Fair's conference materials, What's on the FTC Radar Screen: A Staff Perspective, was "Effective Enforcement." Under this heading, she listed the following actions, among others:

- DirecTV (stipulated order) - \$5.3 million civil penalty.
- U.S. v. Prochnow (final judgment) - \$7 million civil penalty and disgorgement.
- FTC v. Davison & Associates (final judgment) - \$26 million redress.

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**UPDATE:** Since the conference ended on December 6, 2006, there is at least one new development to report in the DirecTV matter: On December 14, 2006, FTC entered into court settlements with the final defendants charged with violating the Do Not Call (DNC) provisions of the Telemarketing Sales Rule (TSR) by calling consumers whose numbers were on the DNC Registry in an attempt to sell them DIRECTV satellite television subscriptions. Under the settlements, the defendants agreed to pay a total of \$100,000 in penalties and are barred from future TSR violations.

These final court orders settle FTC's charges against the following defendants: D.R.D., Inc., also d/b/a Power Direct; Daniel R. Delfino, individually and as an officer of D.R.D.; Global Satellite, LLC., also d/b/a Mavcomm; William King, individually and as an officer of Global Satellite; and Michael Gleason, individually and as an officer of Global Satellite.

The stipulated final judgments and orders against the D.R.D. and Global Satellite defendants contain both monetary penalties and conduct provisions. They require D.R.D. to pay a \$35,000 civil penalty and impose a \$653,013 civil penalty on the Global Satellite defendants. Defendant King, who ran Global Satellite, will pay \$65,000 of the \$653,013 penalty, with the remainder suspended based on the Global Satellite defendants' inability to pay.

**NOTE:** Stipulated final judgments are for settlement purposes only and do not necessarily constitute an admission by the defendants of a law violation. Stipulated judgments have the force of law when signed by the judge.

(U.S.A. (for FTC) v. DirecTV, et al., United States District Court for the Central District of California, Western Division, FTC File No. 042 3039; Civil Action No. SACV05 1211, December 14, 2006; see **Advertising Compliance Service**, Tab #2, General Articles, Article #555.)

#### MAJOR FTC WEIGHT-LOSS DECISION

One of the areas mentioned in Rick Kurnit's accompanying conference materials, (i.e., Advertising and Promotion Liability), was FTC's "great interest in weight loss products." In his presentation, he cited three FTC cases involving weight loss that resulted in companies paying consumer redress (or otherwise giving up cash or assets):

FTC v. Enforma Natural Prods., Inc., No. 04376JSL (C.D. Cal. 4/26/00) (\$10 million consumer redress).

FTC v. Window Rock Enterpr., Inc. (C.D. Cal. 9/21/05) (\$4.5 million).

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FTC v. SlimAmerica, Inc., No. 97-6072 (S.D. Fla. 1999) (\$8.2 million consumer redress).

**UPDATE:** Since the conference ended on December 6, 2006, there is one major development in the weight-loss area: On January 4, 2007, FTC filed complaints in four separate cases alleging that weight-loss and weight-control claims were not backed up by competent and reliable scientific evidence. Marketers of the four products—Xenadrine EFX, CortiSlim, TrimSpa, and One-A-Day WeightSmart—have settled with FTC, surrendered cash and other assets worth at least \$25 million, and agreed to limit their future advertising claims.

**NOTE:** The marketing of CortiSlim was also at issue in the FTC v. Window Rock Enterpr., Inc. case mentioned by Mr. Kurnit in his conference materials.

(For much more information about this key development, see the article in **Advertising Compliance Service**, "Weight-Control Advertisers Hit With \$25 Million in Penalties, Consumer Redress," in Tab #17, Food, Drugs, Cosmetics, Article #138, that appears in this issue.)

#### FTC STAFF ADVISORY OPINION OFFERS GUIDANCE ON "NEW" PRODUCTS

Another area mentioned in Rick Kurnit's Advertising and Promotion Liability, was how FTC handles the term, "new" to describe a product. In his materials, Kurnit pointed to an FTC advisory opinion that suggested that "new", "introducing" and similar terms ought to be used only if the product was generally available in the particular market where the advertising appears for less than six months. (See 16 C.F.R. Sections 15.20, 15.146(c).)

**UPDATE:** On December 20, 2006—two weeks after the conclusion of the conference—FTC's Division of Enforcement Bureau of Consumer Protection issued a staff advisory opinion concerning a Sony Electronics Inc. proposal involving the term, "new". Under that proposal, Sony would like to resell, as "new," returned consumer electronics products when the company or its authorized vendor can reliably determine that the products have never been turned on and other particular conditions are met.

(For much more information about this key development, see the article in **Advertising Compliance Service**, "FTC Staff Advisory Opinion Offers Guidance on 'New' Products", in Tab #4, False, Unfair, Deceptive, Article #239, that appears in this issue.)

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RECENT LANHAM ACT RULING INVOLVES INTERNET KEYWORD ADVERTISING

A variety of issues involving the Lanham Act were examined at the American Conference Institute's December 5-6, 2006 conference. In particular, Steven Zalesin's conference materials, Beyond the Lanham Act—A Practical Guide to a Lawyer's Role in Developing Marketing Campaigns, looked at a number of key issues involving this important area.

**UPDATE:** On January 4, 2007, a federal district court granted defendant's motion to dismiss plaintiff's complaint in a Lanham Act case involving Google's AdWords program and keyword meta tags. The defendant in this recent case successfully argued that:

- (1) plaintiff cannot demonstrate that defendant made use of plaintiff's marks to identify the source of goods or services, and
- (2) no likelihood of confusion exists as a matter of law.

While the federal district court in this case found that "defendant made trademark use of plaintiff's marks," since "this use creates no likelihood of confusion as a matter of law" the Court granted defendant's motion to dismiss.

(For much more information about this key development, see the article in **Advertising Compliance Service**, "Lanham Act Case Involved Google's Adwords Program and Keyword Meta Tags", in Tab #8, Remedies (Private), Article #111, that appears in this issue.)

TELEMARKETING

Another area examined in Rick Kurnit's comprehensive materials—Advertising and Promotion Liability—was telemarketing. Kurnit noted, for example, that, "The FTC actively regulates telemarketing."

**UPDATE:** Here are several actions involving FTC's active regulation of telemarketing that were discussed in **Advertising Compliance Service** and that occurred since the end of the conference:

- DIRECTV TELEMARETERS TO PAY \$100,000 FOR ALLEGED DO NOT CALL VIOLATIONS—These court settlements entered December 14, 2006 (discussed above) also involved charges of violations of the TSR.

(See **Advertising Compliance Service**, "Washington Roundup," Tab #2, General Articles, Article #555.)

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• FTC STOPS PAYMENT PROCESSOR WHO ALLEGEDLY AIDED CROSS-BORDER TELEMARKETING FRAUD—At FTC's request, on December 20, 2006, a federal court shut down a payment processing operation that allegedly helped fraudulent telemarketers take millions of dollars from consumers' bank accounts. (FTC v. Global Marketing Group, Inc., et al., United States District Court for the Middle District of Florida Tampa Division, Civil Action No.: 8:06-CV-02272 JSM-TGW; FTC File No. 062-3186, December 20, 2006.)

(See **Advertising Compliance Service**, "Washington Roundup," Tab #2, General Articles, Article #557.)

• FTC OK'S FEDERAL REGISTER NOTICE ON ENFORCEMENT OF CALL ABANDONMENT PROVISIONS OF TELEMARKETING SALES RULE—On December 18, 2006, FTC approved the publication of a Federal Register notice granting four petitions seeking an extension of its previously announced policy of forbearing from enforcement of the call abandonment provisions of the Telemarketing Sales Rule (TSR) against telemarketers that deliver prerecorded messages. (Telemarketing Sales Rule: Extension Beyond January 2, 2007 of Forbearance Policy With Respect to Enforcement of the Prohibition of Prerecorded Calls in the Rule, December 18, 2006.)

(See **Advertising Compliance Service**, "Washington Roundup," Tab #2, General Articles, Article #557.)

\* NATIONAL DEBT CONSOLIDATION BUSINESS MISLEADS CONSUMERS:FTC—A nationwide debt consolidation business violated federal law by misleading and illegally telemarketing millions of consumers, according to FTC. The Commission is seeking consumer redress in federal district court, a freeze of the operation's assets, and an end to its allegedly illegal practices.

(FTC v. Randall L. Leshin, et al., United States District Court, Southern District of Florida, Civil Action No.: 0:06-CV-61851-WJZ, File No. 052-3146, January 8, 2007; see **Advertising Compliance Service**, "Brief News of Note," Tab #1, Bulletins, Bulletin #611, appearing in this issue.)

#### LAWYER'S REFERENCE SERVICE

The 18th National Advanced Corporate Counsel Forum on Advertising Law at the Marriott East Side in New York City, December 5-6, 2006.

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*Presentations and/or Materials Prepared for The 18th National Advanced Corporate Counsel Forum on Advertising Law, December 5-6, 2006*

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*FTC Cases*

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*Advertising Compliance Service Articles*

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