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LEGISLATION, REGULATIONS & STANDARDS

"Miracle Gel" Not a Salon Gel Manicure, Ad Board Says

In an appeal from a ruling by the National Advertising Division (NAD), the National Advertising Review Board (NARB) upheld a recommendation that Coty discontinue advertising claims that its Sally Hansen "Miracle Gel" nail polish can provide up to "14 days of color & shine," finding that the company could not provide support for the statements. NARB also upheld NAD's recommendation that Coty avoid claims that convey the product provides results similar to a salon gel manicure that uses UV-light curing. The board rejected an appeal of NAD's ruling that the words "miracle gel" were not false or misleading, saying the product has the consistency and ingredients of a gel and consumers would "reasonably" consider the product to be a gel nail polish.

FDA Issues Warning Letters to Blissoma, UMA Oils

The U.S. Food and Drug Administration (FDA) has issued warning letters to two owners of websites selling skin care products, asserting that the sites' marketing claims establish the products as new drugs requiring agency approval. Blissoma Holistic Skincare and Apothecary was warned regarding five of its products, which were advertised as anti-inflammatory, capable of synthesizing collagen and helpful in treating eczema, psoriasis, dermatitis and acne. UMA Oils was warned about four products

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that the company marketed as “anti-inflammatory” or effective in reducing redness. Each company has 15 days to notify FDA of how it plans to correct the alleged violations.

Study Reports Increased Calls to Poison Control Centers About Dietary Supplements

Researchers have used the National Poison Data System to reportedly determine that calls to poison control centers about dietary supplements rose significantly between 2000 and 2012. Rao et al., "An Increase in Dietary Supplement Exposures Reported to US Poison Control Centers," *Journal of Medical Toxicology*, July 24, 2017. The rate of exposures per 100,000 people rose by 46.1 percent from 2000 to 2002, the researchers assert, although it dropped by 8.8 percent after the U.S. Food and Drug Administration (FDA) banned ma huang (ephedra) products in 2002. In 2005, exposure rates increased again by 49.3 percent.

The majority of exposures occurred among children younger than 6, prompting the researchers to encourage adults to store the products away from the reach of children. The study’s authors also urged FDA to strengthen regulation of certain supplements apparently found to have especially high toxicity levels, such as yohimbe and caffeine-based energy products. Study author Henry Spiller, director of the Central Ohio Poison Control, reportedly said that people think of dietary supplements as natural because they’re not medications prescribed by a doctor. “Just because it’s a natural supplement doesn’t mean it’s safe,” Spiller told CNN. “I often use the example, technically, that cocaine is also natural. But that doesn’t mean it’s safe.” *See CNN*, July 24, 2017.

NAD Refers Supplement Rating Company's Claims to FTC

The National Advertising Division (NAD) has referred advertising claims made by Labdoor LLC, a dietary supplement testing company, to the Federal Trade Commission because the company advised NAD that it would not participate in the self-regulatory advertising review process. Dietary supplement manufacturer Jarrow Formulas challenged Labdoor’s advertisements, which assert that it “enables consumers to identify and purchase the ‘best supplements’” based on “real science.” Labdoor rates and ranks products for its findings on label accuracy, product purity, nutritional value, ingredient safety and projected efficacy. Jarrow

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ABOUT SHOOK

Shook, Hardy & Bacon attorneys counsel consumer product manufacturers on FDA, USDA and FTC regulatory compliance and risk management issues, ranging from recalls and antitrust matters to facility inspections, labeling, marketing, advertising, and consumer safety. We help these industries develop early legal risk assessments to evaluate potential liability and develop appropriate policies and responses to threats of litigation or product disparagement.

The firm’s lawyers also counsel manufacturers on labeling audits and a full range of legal matters such as U.S. and foreign patent procurement; licensing and technology transfer; venture capital and private financing arrangements; joint venture agreements; patent portfolio management; research and development; risk assessment and management; records and information management issues and regulations; and employment matters, including confidentiality and non-compete agreements.

asked NAD to review the company's ability to present accurate information to consumers and its representations as to its ability to determine and rank the safety and efficacy of dietary supplements.

GLOBAL

ECJ Opinion Says Luxury Brands Can Block Online Third-Party Sales

A European Court of Justice adviser has concluded that luxury brands can set up "selective distribution systems" preventing authorized retailers from selling their products on third-party online platforms such as Amazon or eBay. *Coty Ger. GmbH v. Parfümerie Akzente GmbH*, No. C-230/16 (Opinion of Advocate General Wahl, issued July 26, 2017). Coty sued in a German court to enforce a contract provision that bars distributor Parfümerie Akzente from allowing third-party internet sales of its brands, which include Marc Jacobs, Calvin Klein and Chloe.

Makers must establish that the properties of the product—whether its quality or technical nature—necessitate the selective system, the opinion stated, finding that Coty had done so. "Brands, and in particular luxury brands, derive their added value from a stable consumer perception of their high quality and exclusivity," the opinion said. As long as resellers are chosen on "the basis of objective criteria of a qualitative nature which are determined uniformly for all and applied in a non-discriminatory manner," the opinion concluded, selective systems intended to preserve luxury brand images are compatible with Article 101(1) TFEU.

UK to Ban Microbeads in "Rinse-Off" Products

Following a year-long consultation process, the U.K. Department for Environment, Food & Rural Affairs has indicated that it will introduce legislation to ban the manufacture of "rinse-off" products containing microbeads. The ban will not apply to "leave-on" products such as makeup and sunscreen due to a lack of evidence of environmental impact and the difficulty of reformulating the products.

LITIGATION

Proposed Glutamine Class Action Survives Motion to Dismiss

A Florida federal court has denied GNC's motion to dismiss a putative class action alleging its glutamine supplement products are ineffective. *Wagner v. Gen. Nutrition Corp.*, No. 16-10961 (N.D. Ill., entered July 19, 2017). The plaintiff argues that despite GNC's marketing for four of its glutamine products, studies have shown that glutamine has no effect on recovery from exercise, recovery of muscle tissue or muscle wasting. "Plaintiff's allegations boil down to a claim that glutamine in supplement form does not have the benefits listed on the Products' labels. As alleged, the studies support his claim," the court said.

The court also rejected GNC's argument that because the plaintiff purchased only one of the four products, he lacked standing to assert claims on behalf of putative class members who purchased the other three. Standing can be established if the products and allegations are "substantially similar," the court found, and while the products have some differences in forms and dosages, "nothing in the complaint or the parties' briefs suggests that these differences are material." Finally, the court declined to rule on the issue of class certification, finding it was premature to do so at the motion to dismiss stage.

Suit Claims "Natural" Soaps and Body Lotions Mislabeled

A California plaintiff has filed a putative class action against Beaumont Products, maker of Clearly Natural Essentials soaps and body lotions, alleging the products are mislabeled as "natural" because they contain synthetic ingredients. *Paul v. Beaumont Prods.*, No. 17-1225 (C.D. Cal., filed July 18, 2017). The complaint asserts that 20 of the company's products are labeled "clearly natural" or "pure and natural" despite containing a variety of synthetic materials, including glycerine, sodium citrate, sodium chloride or cetearyl alcohol. The plaintiff argues that she would not have paid a premium for the products if she had known of the allegedly synthetic ingredients; further, she asserts, "the reasonable consumer is not expected or required to scour the ingredients list on the back of the Products in order to confirm or debunk Defendant's prominent front-of-the-Products claims, representations and warranties." Claiming violations of state consumer-protection laws, breach of express warranty, and a violation of the Magnuson-Moss Act, the plaintiff seeks class certification, injunctive relief, punitive and treble damages and attorney's fees.

Plaintiff Claims Anti-Cellulite Cream is Ineffective

Clarins faces a putative class action alleging that its anti-cellulite cream contains "no ingredients that are capable of changing the shape of, or firming and lifting, a person's skin." *Blackwell v. Clarins USA*, No. 17-5287 (N.D. Ill., filed July 18, 2017). According to the complaint, the product label claims that Clarins Paris Body Fit Anti-Cellulite Contouring Expert "visibly smoothes, firms, lifts" skin, but the plaintiff argues that those claims are false and misleading because the "only way to firm, lift or reshape loose and/or sagging skin is to have surgery." The plaintiff alleges she paid $70 for a 6.9-ounce bottle of the product, which she would not have purchased had she known the product would not provide the advertised benefits. Alleging violations of state consumer-protection laws and unjust enrichment, the plaintiff seeks class certification, restitution, disgorgement, injunctive relief, damages and attorney's fees.

Makeup Artist Files Trademark Suit Against Kim Kardashian

Kirsten Kjaer Weis, a makeup artist who markets her business and line of cosmetics under the names "KW" and "KKW," has filed a lawsuit alleging Kim Kardashian West's "KKW Beauty" products infringe her trademarks. *Weis v. Kimsaprincess Inc.*, No. 17-5471 (N.D. Ill., filed July 25, 2017). Weis alleges she has used a stylized "KW" mark and has owned trademarks on her cosmetics and beauty products since 2012. Her products are well-known in the industry, Weis asserts, and they have been selected as "best of" beauty products by multiple magazines. The complaint alleges that Weis notified West of her prior rights to the KW mark on June 5, 2017, two weeks before West launched her "KKW" and "KKW Beauty" products. Claiming trademark infringement, unfair competition and deceptive trade practices, the plaintiff seeks injunctive relief, accounting and payment of actual damages, punitive damages and attorney's fees.

The choice of a lawyer is an important decision and should not be based solely upon advertisements.