

# CLIENT ALERT

## Recent Happenings in Advertising & Product Risk Management – May 2017

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*This news bulletin is provided by the Advertising & Product Risk Management Group of Crowell & Moring. If you have questions or need assistance, please contact Chris Cole, Cheryl Falvey, or any member of the APRM Group.*

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## **FEATURED ARTICLE**

### **Navigating Legal Challenges When Privacy, Security and Safety Meet on the Internet of Things**

*By Cheryl Falvey*

The internet of things has been described as the “extension of the internet to the physical world” – sensors and actuators embedded in everyday devices to collect and share data via wireless connections. Almost everyone marketing products to consumers is investing in the IoT, allowing consumer products to get smart by taking advantage of the virtual world of information technology. These interconnected products communicate with one another, with or without the internet, providing tremendous opportunity for innovation and driving fierce market competition.

When consumer products meet the IoT’s cognitive computing capability, the products start to recognize data correlations that enable them to personalize the consumer’s experience. These smart products learn from each user’s interactions with the product and, for that reason, they hold great promise for consumers, from improving wellness by the use of wearable fitness monitors to reducing energy bills by installing smart thermostats.

To tap into the full potential of these products, users share information which necessarily implicates the security of that data. These rapidly evolving technologies pose challenges for regulators, manufacturers and retailers as the worlds of high tech communication and interconnectivity collide with product safety and data security.

Both the Food & Drug Administration and the National Highway Traffic Safety Administration have issued guidance to address the health and safety aspects of potentially hackable medical devices and automobiles respectively. The Federal Trade Commission has been very active in ensuring the adequacy of data security of IoT devices bringing enforcement cases against IoT products in the home, such as cameras and routers, alleging that they were not adequately secured from data breach. The FTC’s IoT guidance outlines their expectations with regard to the security of these products. Lawyers can play a role in mitigating potential security and safety risks with these and other types of products and help get the business prepared for mass adoption.

Mitigating IoT risks involves the intersection of legal disciplines involving, among other things, privacy, cybersecurity, intellectual property and product liability. Here are several ways lawyers can help launch these products and get the company prepared for any potential security or safety risk.

#### **1. Compliance Program Implementation**

Lawyers can help inform the development of compliance programs to substantiate the company’s reasonable consideration of potential risks from unauthorized access or misuse of private or sensitive data and from attacks on the system that may compromise data security, safety or even lead to the theft of intellectual property. All of the federal regulatory guidance in this area requires companies to anticipate these risks, address them, and continually monitor for threats to these connected products in order to keep data secure and to ensure the safety of the device.

Developing a compliance program specific to IoT products can ensure sufficient effort has been given to anticipating risks in the design phase and imbedding security into IoT products from their inception. Moreover, with the government demanding monitoring of these products for new vulnerabilities that could lead to safety and security risks throughout the products' life-cycle, lawyers can play a role in ensuring that the compliance program identifies these post-sale safety, security, and privacy risks. Lawyers can help the compliance team decide whether and how to engage with regulators at both the state and federal level, if and when a safety or security issue arises.

## 2. Product Disclosures and Advertising

In analyzing the product liability cases involving IoT devices that have survived motions to dismiss, a critical issue for risk mitigation is how the product has been advertised, what representations have been made about its security, and what disclosures have been about potential risks. One important aspect of disclosure is just how long the company plans to support a product with software security upgrades. These updates are an important means by which companies can address risks once the product is out in the field. As the U.S. Government Accountability Office Center for Science, Technology and Engineering noted in their May 2017 Technology Assessment on the Internet of Things, Tesla addressed a recall of a defective charger through an over-the-air software update in much the same way our phones now receive software updates. Will those over-the-air updates continue indefinitely for as long as a consumer owns the product?

A public-private sector working group convened by the National Telecommunications and Information Administration recently recommended that manufacturers make security disclosures with regard to IoT devices in much the same way other product warnings and information are conveyed to consumers. They recommended that manufacturers consider disclosing to consumers prior to purchase whether and how a device can receive security updates and describe the anticipated timeline for the end of security update support. Consumers also need to understand their role in securing both their sensitive information as well as maintaining the safety and security of their device.

Often IoT-enabled products enable companies to push out security messages direct to the consumer on the device allowing for creativity in ensuring these critical disclosures are made in a timely and distinctive manner. On-product labels or display messages can inform consumers when software updates critical to security are available, how to ensure they are downloaded, and even how long the company plans to support the product with software updates.

The emerging case law on IoT products also suggests that failures to disclose potential vulnerabilities to hacking may be problematic when a hack occurs and the product was advertised as safe and secure. Many state unfair competition laws allow for claims when the evidence suggests that an affirmative misrepresentation or fraudulent omission is made about a product defect. Lawyers can help ensure that the company makes the right decisions regarding product labeling and advertising and send the right messages when it is on notice of a new potential vulnerability or is investigating a potential intrusion. Whether and what communications to consumers can be viewed as reasonable and accurate can change from the time when the company first learns of a vulnerability to when a patch has been developed and implemented. The same is true during the course of an investigation during an intrusion. One false step in messaging could create significant liability for misrepresentations or omissions.

Disclosures also may be needed with regard to the data IoT devices are collecting for privacy purposes. Lawyers should ask product developers what data is being collected by the product and why, in order to determine whether disclosures should be

made regarding data collection and whether consent needs to be obtained. The same creativity these products offer in pushing out security updates can be utilized for privacy messaging as well.

### **3. Legal Liability Analysis**

Lawyers can also assist in sorting out the liability profile of IoT devices and ensure that contract provisions meet the expectations of all the parties. These products tend to be an amalgam of hardware, software and firmware often supplied by different vendors. The security of the final product may depend on the security of any one of those components. IoT devices also change over time as new functionalities are added and others subtracted. The express warranties may or may not fit the actual use application at any given time or in a potential breach scenario. Lawyers can help work through how the technology operates to ensure that otherwise standard warranties, limitations on liability, consequential damages provisions and indemnifications all make sense at the time of product launch and as its use evolves over time.

Lawyers can also help protect the company from potential litigation and regulatory enforcement actions. Both courts and federal regulators are looking for companies to have adopted reasonable cybersecurity measures to protect IoT products. Defining “reasonableness” can be challenging when both the product functionality and the security threat landscape is constantly evolving. By studying the federal enforcement actions, lawyers can take lessons learned and build them into risk mitigation advice for the business. These FTC, NHTSA and FDA guidances all provide similar considerations around what might be considered insufficient security to address vulnerabilities and resulting harm. Regulators are insisting that companies take advantage of readily available security tools and build products that take advantage of what experts have already learned about security, including protecting interfaces between products, monitoring vendor access to systems, and considering tools such as authentication, encryption and limits on permissions. The lawyer on the product development team can also assist in assessing risk. The corruption or exfiltration of data collected on a medical device may present more significant risk and therefore require more oversight to meet the reasonableness standard. Products marketed to children present another set of risk factors to be considered in minimizing risk.

The states too are active in this area proposing laws and guidance on the reasonableness of a security program for liability purposes. For example, in 2016, the California state AG released a report outlining expectations for reasonable expectations for security to protect the personal information from unauthorized access, destruction, use, modification, or disclosure. The case law involving IoT devices is also instructive as to what allegations have formed the foundation of those complaints even if many of those cases have been dismissed on standing because no injury or damage had yet occurred.

Finally, IoT products run on intellectual property, the rights to which must be secured, and they generate data which raises significant issues with regard to data ownership. Who owns or has other rights to machine generated data depends on the facts and application of a combination of contract, trade secret and IP law. These issues become even more complicated when these IoT devices are used in industrial, business and public services applications. Lawyers can assist the business in understanding their data ownership rights and develop licensing and other creative solutions to maximize the business opportunities for that data.

#### 4. Incident Response Planning

Because the security and safety of these products and their data rely so heavily on appropriate and timely remediation, patches and other corrective actions, having the infrastructure to handle those situations up and running at product launch is critical. Just as a company prepares for cyber threats generally, those same best practices for proactive incident response planning should be undertaken in connection with IoT devices.

Companies should consider joining relevant industry trade organizations or developing other means of sharing threat detection information. Companies should also develop crisis plans for handling IoT threats to their devices. As a part of incident response planning, lawyers can play an important role in ensuring that preparation for a security breach anticipates all legal requirements for disclosure to regulators, law enforcement and customers, whether by statute, regulation or contracts with third parties. Public companies need to consider investor expectations and potential SEC implications in the event of a hack.

A safety threat could require reporting to a myriad of agencies depending on the type of product. The U.S. Consumer Product Safety Commission has reporting requirements if a product contains a defect that could present a safety risk and has recalled products when a failure in their wireless technology presents a safety risk. Likewise, NHTSA required a recall involving a vulnerability to hacking in at least one instance and the FDA may play a significant role in any medical device hack. Knowing who and when to contact and assigning that responsibility in advance of any product safety crisis will ensure timely regulatory compliance.

#### Conclusion

Lawyers play a key role in defending the reasonableness of corporate action in light of foreseeable risks, and the lawyer's role in protecting a company from the risks of IoT devices is no different. By ensuring legal involvement as these emerging technologies proliferate, not only will the business be in a better position to defend itself in the event a problem arises, but it will also be in the best position to capitalize on the magnitude of the opportunities presented by IoT devices.

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#### ARTICLE

### **Long Live the King (Bio): Ninth Circuit Follows *King Bio* Decision in Confirming Private Plaintiffs May Not Challenge “Lack of Substantiation” Under California Law**

*By Josh Foust*

When it comes to prosecuting false advertising, what is the appropriate division of labor between government authorities acting on behalf of the public, on the one hand, and members of the public themselves?

Most states have answered this question by enacting consumer protection laws that allow private plaintiffs to step into the shoes of government prosecutors to challenge allegedly false advertising. These private enforcement mechanisms supplement the roles played not only by state agencies and prosecutors but also by the Federal Trade Commission and Food and Drug Administration at the federal level. At the same time, most of these states have reserved exclusively to government actors the

power to demand that advertisers produce evidentiary support, or “substantiation,” for their advertising claims—especially when they are not definitively “false,” but rather relate to new technologies undergoing testing, or to areas of scientific controversy.

Even in California—which has an especially robust statutory scheme allowing consumer “attorneys general” to bring suit for false advertising—courts have long held that the state legislature deliberately entrusted the power to demand substantiation only to “prosecuting authorities,” not private plaintiffs. As one California Court of Appeal explained in the seminal decision in *National Council Against Health Fraud v. King Bio Pharmaceuticals*, the policy rationale is that this division of labor is “the least burdensome method of obtaining substantiation for advertising claims” and limits “undue harassment of advertisers.” Yet that has not stopped the plaintiffs’ bar from filing suit after suit—often class actions—alleging that companies lack sufficient scientific support for their advertising claims.

On April 21, 2017, the Ninth Circuit weighed in with a published opinion firmly upholding the division of labor under California law that *King Bio* articulated. That decision, *Kwan v. SanMedica International*, affirmed that “*King Bio*’s holding is firmly established law in California”: “Private plaintiffs, unlike prosecuting authorities, do not have the power to require defendants to substantiate their advertising claims” under California’s consumer-protection statutes. In so ruling, the Court issued a warning to the cottage industry of class actions challenging only a “lack of substantiation”: immediate dismissal is appropriate if a plaintiff cannot in good faith allege “facts that would support a finding that [an advertiser’s] claims regarding its product . . . were actually false.”

### **Background to the Decision**

The dispute arose from SanMedica International’s advertising of SeroVital, an over-the-counter supplement marketed to boost human growth hormone levels. SanMedica’s marketing campaign allegedly claimed that SeroVital provided a “682% mean increase in HGH levels,” that the product was “clinically tested,” and that “peak [HGH] levels” are associated with health benefits like “youthful skin” and “elevated energy.”

On July 21, 2014, Serena Kwan filed suit in federal court challenging SanMedica’s advertising of SeroVital as false and misleading. Invoking California’s Unfair Competition Law and Consumer Legal Remedies Act, Kwan alleged that SanMedica’s marketing was false and misleading because the company did not have adequate scientific support proving that SeroVital boosted HGH levels or provided the health benefits advertised.

On October 30, 2014, the district court dismissed the complaint, agreeing with SanMedica that Kwan had alleged only a “lack of substantiation.” Citing the *King Bio* decision, the court explained that consumers “may not bring suit under the UCL or the CLRA alleging only that advertising claims lack substantiation”—in other words, that they “merely lack evidentiary support.” “Instead, that right is reserved to the Director of Consumer Affairs, the Attorney General, any city attorney, or any district attorney.” A private plaintiff like Kwan, on the other hand, “must allege facts from which the Court can conclude that [the defendant’s] advertising representations were false”—in other words, “evidence that directly conflicts with the [challenged] claim[s].”

It was not enough, therefore, for Kwan to criticize the “sole study upon which [SanMedica] base[d]” its claims as “not methodologically sound,” or to allege that “no other study supports the growth hormone benefit representations.” Nor was it enough to cite public statements from the FTC and FDA finding “no reliable evidence” to indicate that over-the-counter HGH supplements like SeroVital yield the same health benefits as prescription HGH.

Rather, as a private plaintiff, Kwan’s burden was to allege actual facts refuting SanMedica’s claim that SeroVital increased HGH levels by 682%—“by, for example, alleging studies showing that [this] statement [was] false.” By contrast, Kwan’s actual “argument that [San Medica] claims support for its representations, when there in fact is no such support, perfectly describes a substantiation claim”—which, again, she had no authority to raise.

Not to be deterred, the plaintiff filed an amended complaint that tried to fix these problems by alleging, in further detail, that SeroVital’s health-benefit claims were not “based upon any reliable scientific evidence.” For example, the amended complaint asserted that “there are no studies demonstrating that the SeroVital ingredients, alone or in combination, provide any of the fountain-of-youth represented benefits.” Kwan also challenged SanMedica’s use of the phrase “clinically tested,” arguing that this claim implied to reasonable consumers that SeroVital was “clinically *proven*” to provide health benefits when, in reality, the company relied only on a single study “riddled with flaws.”

But the second time was not the charm; these new allegations did not change the district court’s original analysis that Kwan was challenging only the dearth of scientific evidence behind SanMedica’s claims, without pointing to any studies or other evidence affirmatively showing that its claims were false. Critically, Kwan “still [did] not allege that a study exists showing that these benefits are categorically impossible to achieve, or that one or more authorities [like the FTC or FDA] studied or tested SeroVital’s formula and found that it does not produce the results [SanMedica] claims.” Noting that the *King Bio* rule remains “both settled and fundamental, the Court decline[d] to overrule the Legislature’s explicit exception for cases where advertising is allegedly misleading or deceptive due to lack of substantiation.”

### What the Ninth Circuit Held

On appeal, the Ninth Circuit agreed with the court below that Kwan had not done enough in either complaint to fix the central flaw in her claims: she had “failed to allege facts that would support a finding that SanMedica International’s claims regarding its product, SeroVital, were *actually false*.” And *King Bio*, the Court emphasized, remained the touchstone for this analysis:

In the fourteen years since *King Bio* was decided, courts, including several federal district courts, have cited it to require that private citizens bringing suit under the UCL or the CLRA properly allege proof that plaintiffs sustained injury from relying on marketing statements that were actually false. These courts have precluded private citizens from bringing actions that allege that the challenged advertising language lacked proper scientific substantiation. [And t]he California State Legislature has not amended the statutory language on which the *King Bio* holding relied.

To the Ninth Circuit, it was “readily apparent that *King Bio*’s holding [remains] firmly established law in California.” And because Kwan had consistently declined to allege anything beyond an *absence* of scientific evidence behind SanMedica’s claims, *King Bio* compelled the dismissal of her complaint.

The Court also rejected Kwan’s attempt to import a different standard from the Lanham Act, a federal statute. Under the Lanham Act, companies can bring a false advertising claim against their competitors on the basis that the advertising company does not have sufficient proof to substantiate an “establishment claim”—that is, a claim that the advertiser has clinical or other proof that its products delivers an advertised benefit. Kwan contended that SanMedica had brought upon itself the burden of bringing forward clinical proof when it made the establishment claim that SeroVital was “clinically tested.” The Ninth Circuit rejected this argument, relying once again on *King Bio*:

[N]o authority exists under California law for using the Lanham Act distinction between ‘establishment’ and ‘non-establishment’ claims as a means of shifting the burden of proof in California consumer protection law actions. . . . Reading a requirement that Lanham Act distinctions apply would clearly violate recognized California law on the burden of proof placed on the plaintiff.

Because Kwan had already had “ample opportunity to amend her complaint,” the Ninth Circuit instructed that the case should be dismissed with prejudice.

### **What the Decision Means Going Forward**

The *Kwan* decision is good news for companies doing business in California, especially supplement manufacturers, that often find themselves sued in class actions attacking the studies on which they base their claims. In following *King Bio*, the Ninth Circuit confirmed that false-advertising plaintiffs must do more than allege that a company’s advertising claims are “unfounded,” or that the studies supporting its claims are “flawed” or “not peer-reviewed.” Rather, under California law, they must point to some affirmative evidence—such as “testing, scientific literature, or anecdotal evidence”—that suggests these claims are “actually false.”

The Ninth Circuit’s full-throated defense of *King Bio* is thus important, even though most district courts had previously held that the decision remained good law. To date, notwithstanding *King Bio*’s extensive influence, the California Supreme Court has not yet signed off on the Court of Appeal’s reasoning—and so has not yet made this precedent fully binding on federal courts applying California law. *Kwan*’s confirmation that *King Bio* “is firmly established law in California” makes the decision an even more potent weapon in the arsenal of companies defending false-advertising complaints premised on California law.

From a national perspective, the *Kwan* decision is also notable for how it positions the Ninth Circuit on one side of a nascent circuit split. On one end of the spectrum, the Fourth Circuit recently held in *In re GNC Corp.* (2015) that a plaintiff may not allege that an advertising claim is “false” if at least one “reasonable and duly qualified scientific expert” supports the claim. In other words, plaintiffs cannot establish that a claim is “actually false” on subjects where a “reasonable difference of scientific opinion exists.”

Many federal courts, including several district courts in the Ninth Circuit, have declined to follow *In re GNC Corp.*, and the Fourth Circuit itself cautioned that its holding only applied to claims that an advertisement was “literally false,” as opposed to “literally true but still misleading.” While *Kwan* does not go quite as far as *In re GNC Corp.*, it is a step closer along the spectrum: the decision instructs that district courts should scrutinize false-advertising complaints under California law to determine whether they are based on legitimate scientific evidence, as opposed to an alleged “lack of substantiation.”

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### **LITIGATION ROUNDUP**

The litigation arena for the consumer products industry is as active as ever. Each newsletter we bring you a summary of the most important litigation developments from the past two months, from complaint filings and key court decisions to trial results and settlements. For more information about these and other developments, please visit our [Food & Beverage Industry Tracking Report](#).



## Filed

### **Lawsuit Challenges “Cold Pressed” and “Fresh Pressed” Claims on Lakewood Organic Juices**

On March 21, 2017, a putative class action was filed against Florida Bottling Inc. on behalf of California consumers who purchased Lakewood Organic Juices bearing the phrases “cold pressed” and “fresh pressed” on their labels. The lawsuit alleges that the “cold pressed” and “fresh pressed” claims are false and misleading because Lakewood Juices are heat processed (pasteurized). Plaintiffs seek declaratory and injunctive relief to have all representations describing the juices as either “cold pressed” or “fresh pressed” removed. [Shane v. Florida Bottling, Inc., No. 17-cv-2197 \(C.D. Cal\)](#)

### **Coca-Cola and Odwalla, Inc. Hit with Lawsuit Challenging its “No Added Sugar” Claim**

On March 24, 2017, a proposed class action lawsuit was filed against Odwalla, Inc., a subsidiary of the Coca-Cola Company, and the Coca-Cola Company alleging that defendants are misleading consumers about the nature of the ingredients in its “100% Juice” products as compared to similar products. At issue is the “No Added Sugar” claim which appears on the product labels of the Odwalla Juice products. According to the lawsuit, such labeling creates the impression amongst consumers that the products are healthier and of a superior quality than similar juices due to their lack of added sugar when, in reality, similar juice products do not contain added sugar either. Plaintiff alleged that she and class members paid a premium for the defendants’ products due to this alleged deceptive and misleading claim. [Casey v. Odwalla, Inc. et al., No. 7:17-cv-2148 \(S.D.NY\)](#)

### **Jelly Belly Candy Company Hit with ECJ Lawsuit**

In February 2017, a false advertising class action lawsuit was filed against Jelly Belly Candy Company. The complaint alleges that the company lists “evaporated cane juice” as an ingredient in Jelly Bean Sports Beans when the jelly beans actually contain sugar. The lawsuit was transferred to federal court in March 2017. Plaintiffs seek to enjoin the listing of “evaporated cane juice” and damages. [Gomez v. Jelly Belly Candy Company, No. 5-17-cv-0575 \(E.D.Cal\)](#)

## Settled

### **Johnson & Johnson Reaches Settlement over Aveeno “Natural” Claims**

In 2013, Johnson & Johnson was faced with a proposed class action in New York federal court where the plaintiff alleged that the company misleadingly advertised its Aveeno product as “natural” when, in reality, the product contain unnatural ingredients (glycerin, cetyl alcohol, and sodium hydroxide). On February 23, 2017, the parties filed a notice with the court that they have reached an agreement in principle, but no motion for approval of the class settlement has been filed to date. [Goldemberg v. Johnson & Johnson, No. 13-cv-03073 \(S.D.NY\)](#)

## Dismissed/Stayed

### **Campbell’s Healthy Soup Labeling Suit Gets Tossed**

On March 21, 2017, U.S. District Judge Robert T. Benitez of the Southern District of California dismissed a proposed class action against Campbell Soup Co., which alleged that the soup maker advertises its grilled chicken and sausage gumbo as healthy

despite its trans-fat content. The consumers argued that despite containing unhealthy artificial trans fats, Campbell's mislabels its gumbo to rebrand itself as a provider of healthy and nutritious foods, which caused consumers to pay extra for what they thought was a healthy product. The suit also alleged that Campbell's failed to disclose that it paid for American Heart Association certification in violation of a USDA policy requiring companies to inform consumers when they compensate an organization or individual for an endorsement. The Judge ruled against the class, finding that the consumers' claims imposed additional or different requirements from the USDA's Poultry Products Inspection Act and the Federal Meat Inspection Act, and were therefore preempted. Bower et al. v. Campbell Soup Co., No. 3:16-cv-01005 (S.D. Cal.)

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## **REGULATORY ROUNDUP**

With a new administration getting its bearings in Washington, the regulatory landscape is in a state of flux—with important changes on the horizon. Each newsletter we bring you a rundown of key developments in the consumer products industry from each of the three main regulatory agencies, as well as the NAD.

### **CPSC**

- At the end of March, CPSC approved a new Federal Safety Standard for infant bathtubs intended to improve their safety and prevent drownings. This standard incorporates the most recent voluntary ASTM standard and includes requirements for (1) latching and locking mechanisms, (2) static load testing, and (3) drowning and fall warnings, markings, and instructions.
- Viking paid a civil penalty of \$4.65 million to resolve charges that it knowingly failed to immediately report allegedly defective gas ranges to the Commission under Section 15(b) of the Consumer Product Safety Act. Viking Range also agreed to enhanced internal controls and procedures.
- Following a fatal house fire, CPSC warned consumers to stop using Layz Board self-balancing scooters (commonly known as "hoverboards") and is encouraging consumers to bring the hoverboards to recycling centers for safe disposal.

### **FDA**

- FDA will hold a public meeting on May 25 from 2:00 p.m. to 4:00 p.m. at the Harvey W. Wiley Federal Building, 5001 Campus Drive, Auditorium (first floor), College Park, MD 20740 to receive input regarding cosmetics regulations. Specifically, the meeting will help prepare the administration for the July International Cooperation on Cosmetics Regulation-11 meeting in Brazil.
- On May 9, 2017, the Senate confirmed Dr. Scott Gottlieb as the new commissioner of the FDA. Dr. Gottlieb served as deputy commission of the agency under President George W. Bush and has an extensive background in the pharmaceutical and healthcare industries.

## FTC

- Chairwoman Olhausen welcomed FCC Chairman Pai’s announcement to reverse the 2015 decision to classify internet service providers as Title II Common Carriers, placing internet service providers back within the FTC’s jurisdiction.
- FTC sent out ninety letters to brand influencers and marketers reminding those influencers and marketers to clearly and conspicuously disclose their relationship to brands. Specifically, FTC targeted Instagram posts and noted that because users must click “more” when scrolling through posts to see the end of a post, disclosures at the end of a post are not sufficient. FTC also stated that disclosures like “#sp,” “Thanks [Brand],” and “#partner” were not sufficiently clear.
- FTC charged a group of online marketers for deceptively claiming customers could participate in “free” or “risk free” trials for cooking gadgets, golf equipment, and access to related online subscription services. In fact, consumers were eventually charged for these services without their consent and any disclaimers that customers needed to cancel the services were buried in fine print.
- FTC approved two consent orders related to misleading “Made in the USA” claims. These claims are proving to be an area of focus for the Commission in the new administration.
- FTC approved a consent order with a Redwood City company over charges that the company continued to track its users’ data even after those users opted out of such tracking.

## NAD

- BP Corporation challenged claims made by Shell Oil Co. for its V-Power NiTRO+ Premium Gasoline. NAD recommended discontinuance of superiority claims to provide the “best total engine protection,” because of the gasoline’s ability to protect against corrosion, “gunk,” and wear. Specifically, NAD found that Shell’s testing was insufficient to support its claims. NAD’s issues with Shell’s testing provide a useful map of pitfalls to avoid when conducting competitive testing. Among other issues, NAD noted that:
  - Shell’s corrosion test did not test a relevant segment of the market. Testing three competitors was insufficient.
  - Shell deviated from approved SAE industry testing.
  - Shell’s “wear” test, a modified version of ASTM D6079, a test for lubricity, did not test for a meaningful consumer benefit. Specifically, the test did not measure “the extent to which gasoline will wear on pistons and cylinders in the normal use of vehicle engine.”
  - NAD also noted that ASTM D6079 was designed for diesel, not gasoline engines.
  - Shell did not perform any head-to-head testing for its “gunk” test and instead relied on statistical analysis.
  - Shell only “gunk tested” one type of port-injected engine and not on direct-injection engine, which makes up a significant portion of the consumer vehicles in the U.S.

Press Release. Shell Oil Company, Shell V-Power NiTRO+Premium Gasoline, NAD Case # 6065 (March 2017)

- Capital One Bank challenged claims made by Discover Financial Services in a comparison “check mark” chart, a popular tool used by advertisers to tout the benefits of their brand over a competitor. In the chart, Discover made claims and placed a check mark or an “X” under a column titled with the name of its card, “Discover it Cash Card,” and/or in the column titled with Capital One’s “Quicksilver” card. Following well known precedent, NAD found that Discover was responsible for all reasonable interpretations of its claims, whether intended or not. On each claim, NAD found as follows:

- “1% or more of cash back on all purchases” [both columns have a check] – NAD found that this express claim implied that both cards provided 1% cash back on all purchases. However, Capital One’s card provided 1.5% cash back on all purchases. Discover voluntarily discontinued this claim.
- “Freeze your account in seconds with an on/off switch on either mobile app or website to prevent new purchases.” [Capital One has an “X”] – NAD found that this express claim implied that users can only freeze their accounts on both mobile and online with the Discover card. However, Capital One users could switch their accounts off online or through a mobile device. Discover voluntarily discontinued this claim.
- “Redeem your rewards for cash at any time.” [Capital One has an “X”] – NAD found that this express claim implied that Capital One users could not redeem their rewards at any time. Capital One users could not redeem their rewards if their accounts were delinquent and their rewards were not automatically credited to their accounts if those accounts were closed. Conversely, Discover users could redeem rewards even if their accounts were delinquent and automatically received rewards upon closing their accounts. NAD permitted Discover to continue this claim.
- “Track FICO Credit Scores for free on monthly statements and online.” [Capital One has an “X”] – NAD found that this express claim implied that Capital One users could not track their credit scores for free. Although literally true, because Capital One users could not receive a free FICO score, NAD recommended that Discover discontinue this claim. NAD found that a reasonable consumer would not differentiate between a FICO score and another type of credit score.

Press Release. Discover Financial Services, Discover it Cash Credit Card, NAD Case # 6069 (March 2017).

- Gerber challenged Beech-Nut Nutrition for a series of claims that Beech-Nut made about the processing, content, and sustainability of its baby foods. While upholding some of Beech-Nut’s claims, NAD recommended that Beech-Nut discontinue or modify several of its claims. Each of these types of claims is discussed below:
  - Beech-Nut made a series of claims about the content of its baby food, such as, “This is not baby food. This is real food for babies.” NAD found that Beech-Nut supported these claims and could continue them. Importantly, NAD found that these claims did not imply that Beech-Nut did not thermally process its foods, like all canned food manufacturers.
  - Beech-Nut labelled some of its products “COLDPUREE” and used that descriptor in print advertising. NAD found that this label implied that Beech-Nut did not use thermal processing and recommended that Beech-Nut discontinue the use.
  - Beech-Nut claimed that its glass containers were “the ultimate in sustainability.” NAD found that this claim was unsupported and recommended that Beech-Nut discontinue it. As an initial matter, NAD found that this was a superiority claim and an unqualified claim about Beech-Nut’s containers. NAD noted that the description “ultimate” conveyed to consumers that its containers provided more sustainability than any of its competitors. NAD then compared Beech-Nut’s lifecycle analysis of its container to Gerber’s and found that it was not sufficient to show Beech-Nut’s superior sustainability.
  - Beech-Nut also claimed that glass was “nature’s safest container” followed by a long descriptor of why. NAD also recommended that Beech-Nut discontinue this claim. Beech-Nut did not provide any competitive testing to suggest that its glass containers did not interact with baby food and that competitors’ plastic containers did. It also did not provide any evidence that regulatory bodies were concerned about food contamination for plastic containers. Thus, it could not support the claim.

- Beech-Nut claimed that “no one but us makes baby food this way.” NAD recommended that Beech-Nut discontinue this claim. Although Beech-Nut submitted a patent for its three-step method, it could not establish that others, such as Gerber did not employ its three steps. Further, Beech-Nut could not establish that it did not use additional steps in its manufacturing process. NAD also found that this claim implied that Beech-Nut’s process provided some benefit that its competitors’ processes did not. Beech-Nut could not establish this.
- Beech-Nut claimed that its baby food products contained “just real whole fruits and vegetables ... and nothing else.” NAD recommended that Beech-Nut modify this claim. Although this claim applies to two of Beech-Nut’s types of baby food products, it does not apply to the entire line and NAD found that this could reasonably be interpreted as a line claim. Therefore, NAD recommended that Beech-Nut modify the claim to reflect that it applies to only two lines and not Beech-Nut’s entire line of baby food.

[Press Release](#). Beech-Nut Nutrition Company, Beech-Nut Baby Foods, NAD Case # 6070 (April 2017).

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### **Crowell & Moring’s Retail & Consumer Products Law Observer**

Each week, Crowell & Moring’s Advertising & Product Risk Management Group brings you the top stories in retail and consumer products law. Our recent posts focus on changes in false advertising law in both the U.S. and Canada and the latest CPSC civil penalty cases.

### **CPSC Withdraws Material Misrepresentation Claim against Michaels Stores in Shattered Vases Case**

[Matthew Cohen](#), [Rukiya Mohamed](#), and [Stephanie Crawford](#) discuss the government’s withdrawal of its “material misrepresentation” claim against Michaels’ and its remaining focus on the imposition of civil penalties and injunctive relief over Michaels’ failure to timely report a potential product safety hazard.

### **New Private Right of Action in Canada for False or Misleading Electronic Advertising**

Prepared in collaboration with [Tony Di Domenico](#) of Canada’s Fasken Matineau law firm. Mr. Di Domenico and [Chris Cole](#) detail Canada’s new private right of action arising from false or misleading representations made in electronic messages and the law’s broad definition of “electronic message.”

### **A New Twist on a Familiar Theme: NJ Lawsuit Targets Retailer’s Savings Claims, Seeking Damages Under Once Obscure Statute**

[Robbie Rogart](#) and [Lauren Aronson](#) discuss the risks to New Jersey retailers using “up to \_\_\_% off” promotional messaging following a suit against Jos. A. Bank under the New Jersey Truth in Consumer Contract, Warranty and Notice Act (TCCWNA), N.J. Stat. § 56:12-15, alleging violation of the state’s consumer protection laws.

### **CPSC Announces Second Civil Penalty Of Year**

CPSC reached a civil penalty agreement of \$4.65 Million with Viking Range and Middleby Corporation to resolve late reporting allegations over defective gas ranges. [Cheri Falvey](#) and [Matthew Cohen](#) explain the substantial civil penalties risk for failure to fulfill Section 15(b) reporting obligations.

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## CROWELL & MORING SPEAKS

### Upcoming Engagements

On May 23-25, [John Fuson](#) will be speaking on a panel about “GMO Labeling: Analysis of the New Law and Strategies for Practical Implementation” at the [American Conference Institute’s Food Law and Regulation Forum](#).

On June 13, [Michelle Gillette](#) will be co-chairing the ABA Food & Supplements Workshop in Hershey, PA. John Fuson will be presenting an update on FSMA. More information on the workshop and registration can be found on the ABA website.

### Previous Engagements

On May 11, [Cheri Falvey](#), [Cliff Zatz](#), and [Kristin Madigan](#) participated in the Internet of Things National Institute’s mock trial and panel discussion entitled “*IoT Litigation and Liability Wake-Up Call*.”

On May 11, [Michelle Gillette](#) spoke at the [CLE International 2nd Food Law Conference](#) on a panel entitled “*Class Actions - Part I: Merits Update: Trends and Developments (Substantive Claims and Slackfill)*.”

On May 10, [April Ross](#) spoke on the upward trend in cosmetic product litigation in light of growing “anti-chemical” rhetoric at the [Personal Care Product Council’s 2017 Legal & Regulatory Conference](#).

On May 4, [John Fuson](#) spoke at the Center for Food Safety and Applied Nutrition breakout session at the Food and Drug Law Institute’s Annual Conference.

On April 18-20, [Chris Cole](#) and [Lauren Aronson](#) presented at [The Institute for Perception’s](#) 2017 Advertising Claims Support: Case Histories and Principles workshop.

On March 30, the Advertising & Product Risk Management Group hosted a webinar entitled “*The Safety Agencies in Transition – What to Expect at FDA, CPSC and NHTSA in the First 100 Days*.” [Access the on-demand recording of this webinar here](#) (note: you must complete the registration form for access).

On March 30, [Chris Cole](#) chaired the Advertising Mock Trial at the [ABA 2017 Section of Antitrust Law Spring Meeting](#) which focused on a cat food maker suing a competitor for falsely claiming the absence of impurities, seeking a preliminary injunction for false advertising.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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