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2007 Compendium of Legislative, Regulatory, and Legal Issues



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Introduction

ANA faced a number of unprecedented challenges in 2007. On the federal level, we confronted attempts to seriously restrict or burden direct-to-consumer prescription drug advertising, significant challenges to food and beverage advertising, and threats to restrict programming and advertising content on the broadcast media. There also were serious challenges to tobacco product advertising and email marketing (under the guise of child protection) in the courts. Finally, at the local level, we faced advertising tax threats in a number of states.

The following is a summary of the major governmental issues affecting advertising in 2007:

1. Prescription Drug Advertising: The Congress considered drastic new restrictions on direct-to-consumer (DTC) prescription drug advertising in conjunction with drug safety legislation and the reauthorization of the Prescription Drug User Fee Act (PDUFA). ANA, working with our drug company members and allied associations, was able to defeat these onerous and burdensome restrictions. Instead, the industry worked to provide the FDA more appropriate tools to regulate the marketplace through the development of new civil penalties authority for false and misleading advertisements. Congress wrapped up the final drug safety and PDUFA reauthorization bill in September without imposing any further restrictions on DTC advertising and sent it to President George W. Bush for his signature. New legislation to extend the FDA's authority over non-prescription drug advertising was introduced in November.
2. Food and Beverage Advertising: ANA is the leader of a subgroup of the FCC's Task Force on Media and Childhood Obesity. The task force's report is still being developed. The industry also announced new marketing pledges in regard to food advertising directed to children as part of the industry's Food and Beverage Advertising Initiative under the auspices of the Council of Better Business Bureaus at an FTC/DHHS forum in July.
3. Media Content and Child Protection: The FCC released its long-awaited report on media violence in April. The FCC first issued its Notice of Inquiry asking for comment in 2004. The report concluded that violence can cause a short-term increase in aggressive behavior in children, and that Congress could constitutionally limit the depiction of violence on television. Senator Jay Rockefeller (D-WV) has long promised to introduce legislation in this area. ANA has provided detailed analysis in opposition to these proposals.

4. Advertising Tax Deductibility: With Congress committing to spending millions on children's healthcare, changing the Alternative Minimum tax, and the war in Iraq, advertising deductibility once again is being viewed as an attractive potential revenue source. Congress has also instituted new "paygo" rules that require any new spending to be offset by cuts in other areas or by new taxes.
5. State Advertising Taxes: Advertising taxes were considered in four states during 2007: Florida, Michigan, Iowa, Illinois, and Maryland. Michigan considered a 2% tax on business services which included advertising agencies fees but not ad time and space. Iowa considered removing the deduction for advertising in conjunction with a proposal to tax political advertising. In Illinois, Governor Rod Blagojevich proposed a gross receipts tax on all business activity, which would include advertising. Maryland considered imposing the state sales tax on services, including advertising. Florida may consider a constitutional amendment instituting a tax on business services in 2008.
6. Privacy Issues: The House of Representatives considered legislation on spyware and the Senate on data security in 2007. Neither proposal has yet to emerge from the full Congress. The FTC held a major townhall meeting on privacy and online behavioral advertising in November. At this meeting, consumer groups and lawmakers, including Representative Ed Markey (D-MA), urged the Commission to consider a "do-not-track" list similar to the FTC's "do-not-call" list.
7. Tobacco Product Advertising: The Senate Health, Education, Labor and Pensions (HELP) Committee approved legislation granting the FDA authority over tobacco products and advertising in August. The bill would impose drastic new content restrictions on advertising that have been criticized as unconstitutional from across the legal spectrum. ANA has provided detailed analysis demonstrating that these proposals are unconstitutional.
8. FTC Testimonial and Endorsement Guidelines: ANA submitted comments to the FTC regarding its announced revisions to the guidelines covering testimonials and endorsements in advertisements. Our comments argued that the current guidelines struck an appropriate balance between consumer protection and the interest of marketers. We also asserted that the revisions, which would require marketers to provide detailed information concerning what consumers were likely to experience would raise serious methodological and First Amendment concerns.
9. Legal Issues: The California Supreme Court ruled in favor of the advertising industry in a case involving tobacco product advertising and minors. ANA had submitted a friend-of-the-court brief in the case. However, the industry suffered a setback in our attempt to invalidate Utah's child protection registry in federal court. There is also an important pending false advertising case in California involving claims made in ads for Listerine.

10. Product Placement: Representatives Ed Markey (D-MA) and Henry Waxman (D-CA) have sent a letter to the FCC requesting an investigation and possibly a rulemaking concerning product placement practices on television. The FCC initially put discussion of a notice of proposed rulemaking (NPRM) on product placement on the agenda for its December commission meeting but later withdrew its consideration. ANA responded in 2003 to a similar petition by Commercial Alert to both the FCC and FTC, arguing that current disclosure requirements were sufficient and that the government had sufficient power to go after false or deceptive product placements.
11. ANA Advertising Law and Business Affairs Conference: ANA held its third annual Advertising Law and Business Affairs conference in January. Among the speakers were Deborah Majoras, Chairman of the FTC and Kevin Martin, Chairman of the FCC. Planning is nearly complete for our next conference, which will be held February 12-13, 2008. More information can be viewed at <http://www.ana.net/law2008>.
12. SAG/AFTRA and AFofM contracts: ANA, through the ANA/AAAA Joint Policy Committee, completed contract discussions with the American Federation of Musicians leading to a renewal of their contract at the end of October. Details of the contract can be found on ANA's website, at <http://www.ana.net/sagaftra/content/992>. Also, we are ramping up preparations for negotiations with the actors' unions in 2008. As part of this effort, SAG/AFTRA and the JPC are carrying out the most extensive review of the contract and potential options in conjunction with Booz Allen Hamilton. The current SAG/AFTRA contract was extended in 2006 for two years until October 2008.
13. Comments to FEC on "Electioneering Communications" rulemaking: ANA and the AAF and AAAA have filed comments with the Federal Election Commission regarding a proposed rulemaking on "electioneering communications," which are defined as electronic ads that refer to a candidate for federal office that appear within 60 days of a general election or 30 days before a primary election. Corporations and labor unions are prohibited from making these types of communications. Our comments argued that the rulemaking may prohibit a candidate that owns a car dealership or other local business from appearing in the ad, even though the advertisement did not expressly promote the candidate. We also noted that the FEC proposal failed to meet the constitutional tests laid down by the Supreme Court for advertising. The FEC's new rules adopted a broad safe harbor for commercial speech.

More in-depth coverage of ANA's activities on each of these issues appears in the pages that follow. Also, ANA's recently redesigned website (<http://www.ana.net>) includes the advertising industry's only legislative, regulatory and legal tracking system, where we provide regular updates of legislative and judicial activity. The Advocacy @ ANA section of our website contains periodic updates on ANA activities as well. Finally, Dan Jaffe,

Executive Vice President of Government Relations, pens a “Regulatory Rumbblings” blog at <http://ana.blogs.com/jaffe>.

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Advertising Tax Deductibility

Background

Advertising, throughout the history of the Internal Revenue code, has been deductible as an ordinary and necessary business expense. Nevertheless, there have been numerous attempts to end or limit this deduction. An across the board advertising tax proposal was last considered at the federal level in 1991. Yet advertising's tax deductibility remains a big target, whether on an across-the-board or on a product-specific basis. In the past few years, there have been proposals aimed at certain advertising categories in an attempt to limit or eliminate advertising deductions for "disfavored" products. The most frequent of these have been directed at direct-to-consumer prescription drug advertising.

These proposals ignore the fact that advertising, a more than \$300 billion a year industry in the United States, provides enormous societal benefits through job creation and accelerated economic activity. In 2004, Global Insight, a highly respected economic think tank, carried out a wide-ranging and systematic analysis of advertising's impact on the U.S. economy. This study concluded that advertising creates more than \$5 trillion in economic activity, both directly and indirectly, and is responsible for the creation of 21 million jobs, or 15.2% of the total U.S. workforce. A successful attempt to ban or impose other burdens on advertising tax deductibility undoubtedly would dramatically adversely affect the U.S. economy.

Congressional Activity

There have been proposals in the 110th Congress to deny the federal tax deduction for advertising in two category-specific areas: direct-to-consumer (DTC) prescription drug advertising and the advertising of tobacco products.

Direct-to-Consumer Prescription Drug Advertising

In January, Senator Ron Wyden (D-OR) introduced the Healthy Americans Act (S. 334), a bill dealing with private health insurance coverage. The bill disallows the tax deduction for direct to consumer prescription drug advertising expenses unless the drug manufacturer submits a study comparing the effectiveness of the advertised drug to other drugs, including over-the-counter medications, or includes a statement indicating a lower cost alternative may soon be available.

In the House, Representative Pete Stark (D-CA), Chairman of the Health Subcommittee of the House Ways and Means Committee, again introduced legislation to deny the tax deductibility of prescription drug advertising unless it presents a "fair balance" between benefit and risk information. Stark's bill, the Fair Balance Prescription Drug Advertisement Act of 2007 (H.R. 2823), also prohibits the deductibility of new prescription drug advertising for the first two years after the drug is introduced into the marketplace.

Tobacco Advertising

In May, Senator Tom Harkin (D-IA) reintroduced his Healthy Lifestyles and Prevention America Act (or the HeLP America Act, S.1342) which would disallow the tax deductibility of advertising for tobacco products. Representative Tom Udall (D-NM) introduced companion legislation in the House of Representatives.

Rangel Tax Reform Bill

In October, House Ways and Means Committee Chairman Charlie Rangel (D-NY) introduced his long-awaited \$1 trillion tax overhaul bill (H.R. 3970). Calling it the “Mother of all Tax Bills,” Chairman Rangel’s bill would increase the standard deduction, lower the corporate tax rate in exchange for an end to some corporate deductions, and repeal the controversial Alternative Minimum Tax (AMT). Republican critics immediately denounced the bill as the “Mother of all Tax Hikes.”

Outlook for 2008

The federal government faces a budget deficit, the ongoing costs of the war in Iraq, increased anti-terrorism measures, and rising health care costs. Congress has also committed to spending billions of dollars to pay for the State Children’s Health Insurance Program (S-CHIP) and to changing the Alternative Minimum Tax (AMT), which threatens to increase the tax bills of upper and middle-income families. Additionally, Congress has adopted new “paygo” rules for budget and spending bills, which require any new spending on programs to be paid for by cuts in existing programs or by raising new taxes. Advertising deductibility in the past was perceived as a potential untapped revenue source and could become an attractive political target once again. ANA, as a member of The Advertising Coalition, actively educates policymakers about the tremendous value the advertising industry provides to the economy and how removing or limiting the tax deduction for advertising undermines the health of the economy. We will also fight to oppose efforts to punish “controversial” areas of advertising through the use of the tax code.

State Advertising Tax Deductibility

Background

The threat to advertising tax deductibility at the state level is one of the issues ANA deals with that has the potential to affect all of our members. Each year, we deal with a number of these proposals in states across the nation. In the last 20 years, more than 40 states have considered an advertising tax. With most states doing fairly well economically (as opposed to the early part of this decade), there were fewer ad tax proposals in 2007 than in the recent past. States are always looking for ways to increase revenues, however, so ad tax initiatives continually remain a possibility. Despite this fact, nearly all of the states that have passed advertising taxes in the past eventually repealed them as the administrative burdens and economic disadvantages came fully to light.

ANA is part of the State Advertising Coalition (SAC), which works with federal and state industry groups and marketers to oppose ad tax proposals wherever they occur. Our membership in The Advertising Coalition has also been instrumental in helping defeat state ad tax proposals in the past as well.

State Ad Tax Proposals

Florida

Former Florida Senate President John McKay, now a member of the Florida Taxation and Budget Reform Commission, proposed a constitutional amendment requiring the legislature to reduce property taxes by extending sales taxes to most business services. The Commission, established by an amendment to the state constitution, can make recommendations to the legislature on tax and budget issues. It also can take proposals directly to the voters in the form of proposed constitutional amendments on a two-thirds vote of the Commission's members. To get the proposal on the November ballot, the Commission must approve it by May 4, 2008. The proposal can be viewed at <http://www.floridatbrc.org>.

Illinois

In his March "State of the State" speech, Illinois Governor Rod Blagojevich (D) proposed a new gross receipts tax (GRT) on all business activity in the state. Under his plan, "goods-producing" companies, including manufacturers, wholesalers and retailers would pay a .5% tax rate on their total revenue. All other businesses, including primarily service-based companies, would pay a 1.8% tax rate on their total revenues. Unlike a sales tax, a gross receipts tax would be levied on the full value of all transactions between companies as well as on the receipts on the ultimate sale to a consumer, thus potentially including media advertising sales. The tax was estimated to generate more than \$6 billion per year in net revenues for the state, but was rejected overwhelmingly by the Illinois legislature.

Iowa

Iowa considered legislation (House Study Bill 105) that would have imposed a 1% tax on political advertising. During consideration of the bill in subcommittee, a representative of the Revenue Department argued that singling out political speech for taxation would be discriminatory. Thus, there was some discussion about extending the tax to all commercial advertising, possibly at a rate of 5%. The successor legislation (House File 805), however, did not include a tax on advertising.

Maryland

House Bill 448 would have imposed the sales tax on a number of business services including direct mail advertising, public relations, business consulting and commercial photographic services. The Ways and Means Committee held a hearing on the proposal on March 14th with no further action.

Michigan

Michigan faces a \$1.75 billion budget deficit for the 2008 fiscal year. To make up the difference, Governor Jennifer Granholm (D) proposed a new 2% tax on business services. Agency fees, but not advertising time and space, would be covered. The legislature passed a budget compromise on October 1 that extends the sales tax to a number of new services, but advertising was not included.

Outlook for 2008

If additional states experience budget difficulties, as is possible due to the crisis in the subprime lending market and the substantial slowdown in the real estate sector, the chances are good that more serious advertising tax proposals will appear in other state legislatures. In November, the U.S. Conference of Mayors estimated there will be a \$6.6 billion drop in tax revenues in 2008 as a result of the foreclosure crisis. As on the federal level, advertising is seen as an untapped revenue source for state coffers. It is important that state legislators be aware of the benefits of advertising to their state economies. ANA will continue to use the data gathered by the Global Insight study, which includes data on every state and Congressional district in the country and which demonstrates the vast economic benefit of advertising to both job creation and consumer activity.

Direct-to-Consumer Prescription Drug Advertising

Background

ANA confronted a number of serious challenges to Direct-to-Consumer (DTC) prescription drug advertising in 2007. DTC prescription drug advertising has been attacked by critics who are seeking a convenient target to blame for the high price of medications in the U.S. Also, as problems with specific prescription drugs have led to product recalls, there have been attempts to place major additional restrictions on advertising.

These proposals ignore the substantial benefits of DTC advertising. DTC ads often provide consumers with critical health information. Additionally, the industry has made major strides in assuring that ads are more informative and authoritative since the issuance of PhRMA's self-regulatory guidelines (http://www.phrma.org/direct_to_consumer_advertising) in 2006.

ANA has been instrumental in educating members of Congress and other policy makers about the benefits of DTC prescription drug advertising. We are a founding member of The Advertising Coalition, which made numerous visits to Capitol Hill in 2007 to meet with members of Congress and staff of the key health committees.

Congressional Activity

In 2007, Congress considered by far the most sweeping and potentially damaging restrictions to DTC prescription drug advertising since the FDA relaxed its restrictions on these ads ten years ago. Congress pursued two main vehicles for potential restrictions on DTC prescription drug advertising: drug safety legislation, in response to the problems that occurred with drugs such as Vioxx and Bextra, and the reauthorization of the "user fees" that fund the FDA's drug approval system, also known as the Prescription Drug User Fee Act (PDUFA).

There was a flurry of drug safety bills to start the new Congress. These included the Enhancing Drug Safety and Innovation Act of 2007 (S. 484/H.R.1561), sponsored by Senators Mike Enzi (R-WY) and Ted Kennedy (D-MA) and Representative Henry Waxman (D-CA) and the Food and Drug Administration Act 2007 (S. 468/H.R.788), sponsored by Senators Chuck Grassley (R-IA) and Chris Dodd (D-CT) and Representative John Tierney (D-MA). Each of these bills contained either a two- or three-year moratorium on new prescription drug ads and mandated new disclosure requirements for promotional material. The Senate Health, Education, Labor and Pensions (HELP) Committee held an initial hearing on the drug user fees and drug safety issues in March.

The most serious threat came in April. The Senate HELP Committee considered drug safety legislation (S. 1082) sponsored by Chairman Ted Kennedy (D-MA) that contained three dangerous proposals: 1) mandated preclearance of prescription drug advertising, 2) extensive new government-mandated warnings and disclosures, and 3) permitted the

FDA to impose a two year moratorium on new ads. At the Senate HELP Committee markup, Senators Pat Roberts (R-KS), Richard Burr (R-NC) and Tom Coburn (R-OK) introduced an amendment to the bill to remove these proposals. The amendment was defeated on a party line vote (11-10), and the bill was reported with the restrictions intact. Fortunately, after weeks of negotiations and heavy lobbying by ANA, the prescription drug industry, and others in the advertising and media communities, the Senate passed S. 1082 without these restrictions in mid-May. This success was substantially fostered by the fact that the Washington Legal Foundation, the American Civil Liberties Union and a number of other constitutional scholars weighed in with clear statements about the unconstitutionality of these proposals.

In June, ANA faced a similar fight in the House of Representatives. The discussion draft of the House bill, which eventually became H.R. 2900, included five provisions that would have imposed even more substantial burdens on prescription drug advertising. These included:

- A three-year ban on ads for new medications;
- Preapproval of ad content by the FDA;
- Mandated warning language about nonspecific, unidentified possible adverse events;
- A mandated "black triangle" or similar type of warning symbol for all new drugs; and
- Preapproval of a medication's marketing plan by FDA.

Representatives Ed Towns (D-NY) and Steve Buyer (R-IN) introduced an amendment to strip the bill of these proposals. In their place, the amendment established civil monetary penalties for false or misleading drug ads. The amendment passed during the committee markup on a bipartisan 23-9 vote. The full bill overwhelmingly passed the House of Representatives in July.

The House Energy and Commerce Committee and the Senate HELP Committee held negotiations over the August recess to produce a compromise bill, H.R. 3580. The final version of the bill contained the civil penalties adopted by both the House and Senate. It also deleted a provision that required companies to submit marketing plans to the FDA for preclearance. Additionally, it modified an amendment by Representative Jan Schakowsky (D-IL), which originally required all advertising to include an 800 number where consumers could report adverse effects. The modified provision requires the 800 number to appear in print ads for six months while the FDA studies whether it should appear in broadcast advertising as well. The bill cleared the House on September 19th and the Senate the next day. President Bush signed the bill into law one week later.

There were also bills introduced in the House and Senate dealing with the deductibility of advertising of prescription drugs as a business expense. Senator Ron Wyden (D-OR) introduced the Healthy Americans Act (S. 334), which would disallow the tax deduction for advertising expenses unless the drug manufacturer submitted a comparison effectiveness study to other drugs, including over-the-counter medication, or included a statement indicating a lower cost alternative may soon be available. In the House,

Representative Pete Stark (D-CA) again introduced legislation to deny the tax deductibility of prescription drug advertising unless it presents a “fair balance” between benefit and risk information. His bill, the Fair Balance Prescription Drug Advertisement Act of 2007 (H.R. 2823) would also prohibit deductibility for two years for all new prescription drug advertising.

In November, Representatives Henry Waxman (D-CA) and Tom Allen (D-ME) introduced legislation - the Non-Prescription Drug Modernization Act of 2007 (H.R. 4083) - that would extend the FDA’s jurisdiction to advertising for over-the-counter drugs. Senator Ted Kennedy introduced a version of this bill (S. 2311) in the Senate.

David Kessler Editorial

In the January/February issue of the *Annals of Family Medicine*, Dr. David Kessler, the former Commissioner of the FDA, criticized direct-to-consumer prescription drug advertising, comparing it unfavorably (and erroneously) to ads for soap and other consumer products. Unfortunately, his editorial ignored the major educational benefits of DTC advertising. It also ignored the steps the drug industry has taken since the release of PhRMA’s self-regulatory guidelines to improve the quality and content of prescription drug ads.

NMA Study

In contrast to the David Kessler editorial, the National Medical Association (NMA), which represents African-American physicians, released a study in March that demonstrates the positive impact of DTC advertising on underserved minorities and the African-American community in particular. According to the study, 66% of the doctors surveyed attested to the positive benefits that prescription drug ads provide their patients. This was up from the 55% positive finding contained in a survey carried out by NMA in 2001. This study is just another example in a long line of studies from the FDA, the NMA, and *Prevention* magazine that demonstrate the enormous benefits DTC advertising provides to consumers.

The NMA study can be viewed at <http://www.nmanet.org/images/uploads/Publications/OC0287.pdf>.

FDA Request for Comments

In August, the FDA issued a Federal Register notice requesting comment on the interplay between verbal and visual presentations and fair balance in televised DTC ads by October 22, 2007. The FDA plans to study whether the use of competing visual information in ads interferes with processing of risk information about drugs. The study plans to look into whether visuals in ads are distracting consumers from adequately processing risk information and whether compelling visuals are shaping consumer perceptions about

brand name drugs. It also plans to look into whether the use of text to convey where risk information can be found distracts consumers from audio information.

The Federal Register notice can be viewed at <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-16603.pdf>.

Outlook for 2008

The prescription drug industry dodged several bullets in the beginning of 2007, but the battle is far from over. There are many other bills that have been introduced to restrict DTC prescription drug advertising, as it remains an issue with members of Congress and various advocacy groups. We will continue to watch developments in the Congress in this area. Direct-to-consumer prescription drug advertising may also arise in the 2008 election campaign, as Senators Hillary Clinton and Barack Obama and former Senator John Edwards have all criticized DTC ads. We will work to educate policymakers and demonstrate that overly restrictive limitations on DTC would undermine the ability of the public to receive extremely important health information.

Food/Beverage Advertising and Obesity

Background

Food and beverage products are squarely in the crosshairs as consumer critics seek to blame food advertising for the rise in obesity rates in the U.S. There continue to be numerous calls for increased regulation of advertising, especially to children.

Research, however, demonstrates that while obesity rates are up, the amount of food, beverage, and restaurant advertising children see on television is actually declining. In July, the ANA and the Grocery Manufacturers of America/Food Products Association (GMA/FPA) released the results of a joint study at the FTC's forum on childhood obesity (discussed below) that showed an 8.5% reduction in food and beverage ads on children's programming from 2004 to 2006. This research, conducted by analyzing Nielsen data, supplements prior data that showed a 13.5% drop in food and beverage ads from 1993 to 2004.

Additionally, the food industry has done its part to alleviate the obesity problem. The GMA/FPA has carried out surveys which have found that in the past four years the food industry has introduced over 10,000 new and reformulated products that offer consumers healthier options. In 2006, the industry revised its self-regulatory guidelines under the Children's Advertising Review Unit (<http://www.caru.org>), strengthening them significantly to address online marketing and interactivity. The Ad Council also has undertaken public service campaigns such as the Small Step campaign, which has both an adult (<http://www.smallstep.gov>) and children's component (<http://www.smallstep.gov/kids/flash/index.html>). Groups such as the Coalition on Healthy Children (<http://healthychildren.adcouncil.org/messages.asp>) and the American Council for Fitness and Nutrition (<http://www.acfn.org>) are doing their part as well to ensure a healthier nation.

Congressional Activity

Senator Tom Harkin (D-IA), a frequent critic of the food and beverage industry, reintroduced his Healthy Lifestyles and Prevention America Act (also known as the HeLP America Act, S. 1342) in May, which would require the Department of Agriculture to set nutrition standards and exclude foods of "minimal nutritional value" from school lunch programs. It would also restore the Federal Trade Commission's unfairness rulemaking authority over children's advertising. The FTC in the late 1970's attempted to utilize this authority to severely restrict children's advertising, but Congress took this power away from the Commission in the early 1980's. Representative Tom Udall (D-NM) has introduced a version of the HeLP America Act (H.R. 2633) in the House of Representatives. Washington, DC's non-voting delegate, Eleanor Holmes Norton (D) also has legislation (H.R. 2278) to restore the FTC's unfairness authority.

Also on the House side, Representative Ed Markey (D-MA) has been a persistent critic of the food industry. In April, he sent letters to Federal Communications Commission Chairman Kevin Martin and Commissioners Deborah Taylor Tate and Michael Copps, urging them to consider new restrictions on food marketing. In these letters, Rep. Markey urged the FCC to use its power under the Children's Television Act to consider substantially reducing time limits for advertising during children's programming and to determine whether stations are undermining educational program requirements with advertising for "unhealthy" foods. The Chairman and Commissioner Tate responded by saying they would wait until the FCC Task Force on Media and Childhood Obesity released its report to take any action. These letters can be viewed at <http://www.ana.net/advocacy/content/641>.

In November, Senator Edward Kennedy (D-MA) considered introducing an amendment to the farm bill (H.R. 2419) that would have required the IOM to come up with guidelines for the marketing of foods and beverages to children. The guidelines would be enforced by the FTC, with fines for violations. Senator Kennedy's amendment was not considered, however, among those when the bill was finally taken up on the floor.

FCC Task Force on Media and Childhood Obesity

ANA is a member of the FCC's Task Force on Media and Childhood Obesity. The Task Force includes FCC Chairman Martin and Commissioners Tate and Copps, along with Senators Harkin (D-IA) and Sam Brownback (R-KS). It also includes representatives from industry such as the GMA/FPA and industry critics such as the American Academy of Pediatrics and Children Now. The goal of the task force is to release specific recommendations on how to stem the rise in obesity rates. It is expected to issue a report sometime in the early part of 2008.

ANA is serving as chair of an advertising industry subgroup that has been tasked to come up with initiatives to address childhood obesity. The FCC has more information on the taskforce on its website at <http://www.fcc.gov/obesity/>.

FTC Forum and CBBB Food and Beverage Advertising Initiative

The Federal Trade Commission and the Department of Health and Human Services (DHHS) sponsored a joint forum on food marketing to children in July. At the forum, the Council of Better Business Bureaus (CBBB) announced a new marketing pledge by eleven major food and beverage companies (Cadbury Adams, USA, LLC; Campbell Soup Company; The Coca-Cola Company; General Mills, Inc.; The Hershey Company; Kellogg Company; Kraft Foods Inc.; Mars, Inc.; McDonald's USA; PepsiCo, Inc. and Unilever United States) as part of the industry's Food and Beverage Advertising Initiative. The companies in the Food and Beverage Advertising Initiative program carry out more than two-thirds of all advertising directed to children on television. As part of the pledges, companies agreed to change how they target their advertising and limit the number of high-fat, high-sugar foods that are advertised to children.

The industry pledges received mostly complimentary reviews, with Senator Tom Harkin (D-IA) "commending the companies who have such tremendous impact on what children in America are eating and drinking." Additionally, Congressman Ed Markey (D-MA) called the pledges "an important step forward" that "will contribute positively to efforts to address our nation's childhood obesity epidemic." Both warned, however, that they would be closely watching to see that companies lived up to their pledges and they encouraged other major marketers to join the program. Even Dr. Margo Wootan, Director of Nutrition Policy for the Center for Science in the Public Interest (CSPI), a vociferous critic of the food and beverage industry, described the Initiative as a major step forward but urged other companies to join or face lawsuits. Others, including Professor Dale Kunkel of the University of Arizona, remained skeptical, stating that the Initiative had fallen short by focusing on the marketing of "better for you" products rather than "healthy" products.

In September, Burger King formally joined the pledge program, and in early October, ConAgra Foods also joined the ranks of the Initiative. More information on the program can be viewed at <http://www.cbbb.org/initiative>.

FTC 6(b) Orders

In August, the FTC issued 6(b) orders to 44 food and beverage manufacturers and quick service restaurants seeking highly detailed information about marketing practices to children. This request was in response to legislation from Senator Harkin that asked the FTC to detail all media expenditures on marketing to children within 60 days of the bills' passage. The FTC's order can be viewed at http://www.ftc.gov/os/6b_orders/foodmktg6b/index.shtm. The FTC had announced it would take this action at the July Workshop on Obesity.

Outlook for 2008

Despite all that industry is doing to help fight obesity, food and beverage advertising will remain a high-profile issue. We would urge policymakers in Congress and in the agencies to wait until they can carefully examine the results of the Food and Beverage Advertising Initiative and the FCC Task Force on Media and Childhood Obesity to emerge before they consider further action in this area. We also believe that the industry's self-regulatory program, lauded as one of the strongest in the world, is sufficient to protect children from false and deceptive marketing practices. ANA hopes that industry, government, and children's groups can come together on solutions that do not infringe on the First Amendment rights of advertisers.

Media Content and Child Protection

Background

Indecency and violence on television have been a significant societal concern for decades. The issue of indecency came to the immediate political forefront in recent years primarily due to incidents on the airwaves of so-called “wardrobe malfunctions” and “fleeting expletives.” In 2006, Congress passed legislation to increase fines for indecency ten-fold, to \$325,000. The Federal Communications Commission (FCC) also changed its policy regarding single incidents of indecent language, fining a number of broadcasters. The Second Circuit Court of Appeals, however, recently overturned the FCC’s fines in this area (its opinion can be viewed at http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbnNcT1BOXDA2LTE3NjAtYWdfb3BuLnBkZg==/06-1760-ag_opn.pdf). The court also severely questioned the constitutionality of the FCC’s activities concerning indecency. Nevertheless, these issues keep heating up as court challenges continue. In addition, the issue of violence in the media is attracting attention from members of Congress, and will gain further traction due to the fact that the FCC in April released a long-awaited report on television violence.

Congressional Activity

Indecency

With the passage of indecency legislation in 2006, Congress turned its attention to “fleeting expletives.” After the Second Circuit Court of Appeals released its decision overturning a number of FCC fines in this area in June, Senator Jay Rockefeller (D-WV) introduced legislation that would make a single word or image indecent. His bill, S. 1780, passed the Senate Commerce Committee in July. It awaits action by the full Senate.

In the House, Representatives Dan Lipinski (D-IL) and Jeff Fortenberry (R-NE) introduced H.R. 2738, the Family and Consumer Choice Act of 2007, which requires the FCC to either 1) prohibit indecent and profane programming during the hours of 6:00am to 10:00pm (5:00am to 9:00pm in the Central and Mountain time zones), 2) scramble such programming free of charge, or 3) allow subscribers to receive a family tier of programming.

Violence

Senator Jay Rockefeller (D-WV) chaired a Senate Commerce Committee hearing in June that looked into media violence and its effects on children. At the hearing, Senator Rockefeller stated that, “Children today are being subjected to an unprecedented level of violent television content. There is no doubt it is coarsening our culture. I fear, too, that it is weakening our society.” He also stated his belief that current blocking technology and more programming options were insufficient, that the industry was hiding behind these tools to put more sex and violence on the airwaves, and that regulation could be carried out in a constitutional manner. On the other hand, a number of Senators,

including ranking Republican Ted Stevens (R-AK), were skeptical of increased government regulation in the violence area, expressing concern about the dangers of restrictions running afoul of First Amendment constitutional protections.

In the 109th Congress, Senator Rockefeller introduced legislation with Senator Kay Bailey Hutchison (R-TX) that required the Federal Communications Commission to examine television ratings systems for “effectiveness” in rating violent programming. If the Commission found that the ratings system in use was inadequate, it could ban such programming. Local broadcasters could refuse to air any programming they found objectionable, and required stations to air 30 second content warnings before each program and after each additional 30 minutes. At the June hearing, Senator Rockefeller promised to reintroduce and push this legislation in the current Congress.

ANA filed a detailed policy statement prior to the hearing, joined by the American Association of Advertising Agencies and the American Advertising Federation, which urged the committee to consider the many difficult policy and constitutional issues that would result from a vast expansion of the FCC’s authority over programming content, including advertising. Our statement can be viewed at <http://www.ana.net/advocacy/content/702>.

FCC Report on Violent Television Programming

In April, the FCC released its long-awaited violence report. The FCC first asked for comment in a Notice of Inquiry (NOI) released in 2004. In the NOI, the FCC requested for comment on three issues: the effects of violent media on childhood development, the constitutional limits on regulation of violent content, and whether the government could develop an appropriate definition of “excessively” violent programming. ANA and a number of media organizations filed comments with the FCC arguing that any attempt to regulate programming on the basis of violence would raise insurmountable First Amendment concerns. The comments noted that almost inevitably, this effort would unleash indiscriminate censorship or impose an amorphous or highly confusing standard, due to the fact that there are complex and subtle gradations in the portrayal and depictions of violence on the broadcast media. These comments can be read at <http://www.ana.net/advocacy/content/702>.

In the report, however, the FCC concluded that violence in the media can cause a short term increase in aggressive behavior in children, and to alleviate those effects, Congress could constitutionally limit the depiction of “excessive violence” on broadcast television when there are a “substantial number” of children in the audience. The report suggested that this “safe harbor” time period could run for as long as 6:00am to 10:00pm. The FCC gave short shrift to the value of blocking technologies, such as the v-chip, and the television ratings system, but gave support to the development of an “a la carte” system for consumers to purchase cable channels as a way to prevent unwanted content from entering the home. The FCC, however, left it entirely up to Congress to attempt to come up with a definition of excessively violent programming that would be

consistent with judicial precedent. The report, while ostensibly unanimous, in fact did not reflect the views of a unified agency, as both Commissioners Jonathan Adelstein and Robert McDowell in their concurring statements expressed serious problems with the underlying findings. Specifically, Commissioner McDowell noted that the report only addressed the numerous legal questions surrounding this issue in a cursory manner.

Notably, in statements that accompanied the report, some commissioners, including Commissioner Adelstein, suggested that commercials could be rated for violent content as well.

The full FCC report can be viewed at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-50A1.pdf.

Kaiser Family Foundation Report

The Kaiser Family Foundation issued a report (<http://www.kff.org/entmedia/entmedia061907pkg.cfm>) in June examining what parents think about children's exposure to sex and violence in the media. The report found that parents feel as if they are gaining greater control over their kids' exposure to violence in the media. In fact, the number of parents who are "very concerned" that children are exposed to too much violence dropped 16% since 1998. The number of parents "very concerned" about exposure to sexual content also dropped by the exact same percentage. Kaiser did find, however, that parents continue to support restrictions on violent and sexual content.

Outlook for 2008

It is likely that both the FCC and the Kaiser reports will prove to be an impetus for further legislative activity in this area. ANA has long opposed overly restrictive regulation of television programming content. The proposals for broad restrictions on violent content on television clearly would place the government in the role of censor. Under current First Amendment jurisprudence, such a step almost certainly would be found unconstitutional. ANA will continue to be active in protecting the First Amendment rights of advertisers from this well-meaning but misguided type of censorship.

Privacy and Information Security

Background

Increasingly advertisers are using consumer information to target their marketing in a rapidly fragmenting marketplace. These developments have given rise to growing concern about the use of such data and calls for greatly enhanced privacy protection. Recently, the focus of Congressional and regulatory attention has turned to the collection of personal information through spyware or the unlawful acquisition of consumer information through security breaches. This latter concern has been fueled by a series of high-profile breaches of security at major government and business entities since 2005. The advertising industry is particularly sensitive to these concerns. Unfortunately, many of the proposals put forward to remedy these problems fail to strike an appropriate balance between the needs of marketers and the protection of consumers.

Congressional Activity

The House Energy and Commerce Committee introduced a bipartisan package of four privacy-related bills in February. Two of these bills impact advertisers who use personal information. One is H.R. 958, the Data Accountability and Trust (DATA) Act, introduced by Representatives Bobby Rush (D-IL) and Cliff Stearns (R-FL). This bill requires companies to adopt reasonable security policies and procedures to protect consumer information against cyber attack and requires notice in the event of a breach.

The other bill is H.R. 964, the Securely Protect Yourself Against Cyber Trespass Act (or the SPY ACT), introduced by Representatives Ed Towns (D-NY) and Mary Bono (R-CA). This legislation prohibits the surreptitious downloading of spyware to computers and the collection of consumer data without user consent. The FTC can seek penalties for a “pattern or practice of violations” under the act up to \$3 million. The remaining two bills dealt with fraudulent access to phone records and the sale of social security numbers.

The Energy and Commerce Committee held a hearing on the SPY ACT in March and marked it up in May. It passed the full House in June.

The House Judiciary Committee considered its own version of spyware legislation, H.R. 1525, the Internet Spyware (I-SPY) Prevention Act of 2007. Introduced by Representative Zoe Lofgren (D-CA), this bill imposes monetary penalties or imprisonment for intentional access of computer systems without authorization to obtain personal information or to impair security systems with intent to injure a person or damage a computer. The House also passed this bill in May. Both spyware bills await action in the Senate.

Meanwhile, the Senate has focused on data security in 2007. Senator Patrick Leahy (D-VT), the Chairman of the Senate Judiciary Committee, introduced S. 495, the Personal

Data Privacy and Security Act of 2007. Chairman Leahy's bill makes it a criminal offense to conceal breaches of data security and also sets civil penalties, with potential fines up to \$500,000 per violation. The legislation provides additional power to State Attorneys General to levy further fines. It requires companies that have over 10,000 consumer records to establish personal data privacy and security programs. Data brokers would also be required to provide consumers access to their information and provide notice to consumers when a security breach occurs. This bill passed out of committee in May.

Chairman Leahy's colleague on the Judiciary Committee, Senator Dianne Feinstein (D-CA), also has a data breach bill. Her bill, S. 239, the Notification of Risk to Personal Data Act of 2007, requires notice to consumers in the event of a security breach. This bill also was approved by the Judiciary Committee in May.

FTC Townhall Meeting on Privacy and Online Behavioral Advertising – and “Do-Not-Track”

The Federal Trade Commission (FTC) held a townhall meeting in November in Washington, D.C. that examined the privacy issues raised by tracking consumer activities online to target advertising. It examined the types of data collected and how it is used. In addition, the Commission will review how companies protect the data they collect, and whether consumers understand their data is being used to personalize the advertising they receive. This meeting is a follow-up to a workshop the FTC held in 2000. More information about this meeting can be viewed at <http://www.ftc.gov/bcp/workshops/ehavioral/index.shtml>.

Just prior to the townhall meeting, Representative Ed Markey (D-MA) called on the FTC to investigate online tracking of consumers. A “do-not-track” list similar to the “do-not-call” list has also been urged by consumer groups.

In December, the FTC released a framework for self-regulatory principles in this area. The draft principles urge transparency in regard to the use of consumer information, reasonable security and limited retention for consumer data, and obtaining affirmative express consent for changes to privacy policies and for using data for advertising purposes. The FTC also asked for more data on the uses of tracking data for purposes other than advertising. The FTC's framework can be viewed at <http://www.ftc.gov/opa/2007/12/principles.shtm>.

Outlook for 2008

There is bipartisan support to pass legislation on spyware and data security. It is not yet clear, however, whether this support can translate to floor action. While we are aware of the concerns surrounding the issues of spyware and data security, we believe that the FTC already has strong enforcement power in this area. The Commission has pursued actions against downloaders of illegal spyware and has slapped some of the largest

monetary penalties in its history on companies that have not adequately protected consumer data. There also is the potential for the Congress to craft an omnibus privacy bill that deals with each of these individual issues, as well as imposing a standard for the consent to the collection of personal data. ANA opposes a mandated “opt-in” standard as too restrictive and economically disadvantageous to marketers. We also strongly support voluntary seal programs and individual company efforts, through the development and promulgation of strong company privacy policies and privacy best practices, to adequately maintain and protect consumer privacy rights.

Alcohol Beverage Advertising

Background

The sale of alcohol beverages traditionally has been age restricted. The alcohol beverage industry, therefore, works hard to ensure that its advertising is targeted to reach an appropriate audience. The three industry trade groups – the Beer Institute, the Wine Institute and the Distilled Spirits Council of the United States – all have stringent self-regulatory codes that provide consensual limits on advertising placement and content. The industry’s self-regulation efforts in general have been pointed to as an effective model by the Federal Trade Commission.

Despite these actions, the alcohol beverage industry continues to come under fire from groups such as Mothers Against Drunk Driving (MADD) and the Center for Science in the Public Interest’s (CSPI) Alcohol Policies Project. These groups call for further restrictions or even bans on alcohol beverage advertising. Another group, the Center on Alcohol Marketing and Youth (CAMY), continually attacks the industry for its ad placement and content practices in various media, such as on television, the radio, and in print. However, a CAMY report in August 2007 found that youth exposure to ads in magazines fell 49% from 2001 to 2005.

Additionally, the industry came under attack in August from 30 state Attorneys General, who wrote the Administrator of the Alcohol and Tobacco Tax and Trade Bureau criticizing the industry’s marketing of so-called “alcoholic energy drinks.” The Attorneys General claim marketers are taking advantage of the popularity of nonalcoholic energy drinks with teens in order to try to convince them to consume versions of these drinks that contain alcohol.

Outlook for 2008

In the past, members of Congress such as Representative Lucille Roybal-Allard (D-CA) have pushed legislation to conduct research into teen alcohol beverage consumption and brand preferences. It is likely that Congress will consider similar legislation in the future. However, Congress cannot restrict truthful, nondeceptive advertising targeted at an adult audience based simply on a youth protection rationale without running afoul of the First Amendment.

Tobacco Advertising

Background

Tobacco advertising is heavily restricted by a voluntary agreement reached in 1998 between 46 state attorneys general and the tobacco industry, known as the Master Settlement Agreement (MSA). In exchange for exemption from tort liability, the industry agreed to place limits on ad placement and content.

For some policymakers and interest groups, these voluntary restrictions are insufficient. The Food and Drug Administration (FDA), for example, attempted to assert authority over tobacco products and advertising in a 1996 rulemaking, which would have placed severe limits on ad content and placement. The FDA's attempt at regulation was struck down by the U.S. Supreme Court two years later when the Court held that the Congress had not provided jurisdiction to the FDA over tobacco products. Since that time, a number of members of Congress have sponsored legislation to provide FDA with jurisdiction over tobacco products, its advertising, and to codify the FDA rulemaking on tobacco ads.

Congressional Activity

The Chairman of the Senate Health, Education, Labor and Pensions (HELP) Committee, Senator Edward Kennedy (D-MA), introduced legislation in February (S. 625, the Family Smoking Prevention and Tobacco Control Act) to grant the FDA the authority over the manufacture, marketing, and sale of tobacco products. A HELP Committee hearing was held on the bill soon after it was introduced and the committee marked up and passed the legislation in August. At both the hearing and the markup, ANA, along with the American Advertising Federation (AAF) and the American Association of Advertising Agencies (AAAA), submitted a statement opposing the legislation and noting the various problems constitutional scholars, from across the legal spectrum, have strongly expressed concerning the bill's advertising provisions.

Senator Kennedy's legislation, which has 52 co-sponsors, awaits action in the full Senate. Similar legislation was introduced as H.R. 1108 in the House of Representatives by Representative Henry Waxman (D-CA). The Health Subcommittee of the House Energy and Commerce Committee held a hearing on this bill in early October. ANA, AAF, and the AAAA's submitted the statement we sent to the Senate at this hearing as well. Our statement can be viewed at <http://www.ana.net/advocacy/content/739>.

In May, Senator Tom Harkin (D-IA) reintroduced his Healthy Lifestyles and Prevention America Act (or the HeLP America Act, S.1342) which would disallow the tax deductibility of advertising for tobacco products. Representative Tom Udall (D-NM) introduced companion legislation in the House of Representatives.

Judicial Activity

In August, the California Supreme Court affirmed the state Court of Appeal's dismissal of a class action lawsuit alleging that four tobacco companies had targeted minors in their advertising. ANA, along with the AAF and the AAAA's, filed a "friend-of-the-court" brief in the case, *Daniels v. Philip Morris USA, Inc. (In re Tobacco Cases II)*. Our brief argued that this case would set a dangerous precedent for all types of marketing in California by exposing marketers to civil liability for simply making their products appear attractive. The state Supreme Court held that the U.S. Supreme Court's precedent in *Lorillard v. Reilly* preempted the class's claims under the Unfair Competition law in California's Business and Professions code. The court concluded that the marketing of tobacco products to adults is a lawful activity protected by the First Amendment. The court's opinion can be viewed at www.courtinfo.ca.gov/opinions/documents/S129522.PDF.

IOM Report

In May, the Institute of Medicine (IOM) issued a report that recommended regulations similar to those in the Kennedy bill, including granting the FDA authority over tobacco advertising and marketing, requiring that advertising be limited to a black-and-white, text only format, and repealing federal preemption that barred states from enacting more restrictive regulations. The report, entitled "Ending the Tobacco Problem: A Blueprint for the Nation" can be viewed at <http://www.iom.edu/CMS/3793/20076/43179.aspx>.

Outlook for 2008

It remains to be seen if Senator Kennedy's legislation will make it through the Congress this year. Congressman Waxman, the second-ranking member of the House Energy and Commerce Committee, is also a long-standing critic of tobacco and will undoubtedly seek to move the legislation in the House. ANA will continue to oppose legislative attempts to grant the FDA overly broad and unconstitutional authority over tobacco advertising.

Key Court Cases

Background

Every year, there are a number of important cases impacting advertising considered in the state and federal court systems. ANA, to protect the advertiser community's interests, often participates in these cases, either as a party or through a "friend-of-the court" amicus brief. ANA believes it is critical to intervene in such cases to ensure that the courts hear key arguments about the commercial free speech rights of advertisers. Our involvement in past cases has significantly strengthened the First Amendment protection extended to advertising over the past thirty years.

We also regularly provide updates in regard to these and other key cases on our website, at <http://www.ana.net>.

Below are the cases the Washington office followed in 2007:

Tobacco Advertising

Daniels v. Philip Morris USA, Inc. (In re Tobacco Cases II)

This suit was brought against four major tobacco companies under California's false advertising code, alleging the companies had targeted minors through their advertising. The plaintiffs argued the ads were illegal because they "glamorized" tobacco products and made it attractive to minors as well as adults, and were not afforded any First Amendment protection since the advertising promoted supposedly "illegal" sales.

The lower court dismissed the suit, and the plaintiff appealed to the California Supreme Court. In August, the California Supreme Court affirmed the dismissal. The court held that the claim was preempted by federal law as a result of the U.S. Supreme Court's decision in *Lorillard v. Reilly*, 533 U.S. 525. Additionally, it held that in the circumstances of this case, the First Amendment barred plaintiffs from pursuing a claim that advertising "aided and abetted" in the illegal sales of cigarettes to minors.

ANA, along with the American Association of Advertising Agencies (AAAA) and the American Advertising Federation (AAF), filed a "friend-of-the court" brief with the court. Our brief was authored by noted First Amendment litigator Floyd Abrams of the Cahill, Gordon and Reindel law firm. Had the plaintiffs succeeded, companies truthfully promoting adult oriented products would be exposed to civil liability in the name of protecting minors just because they made the products appear appealing.

Utah Children's Registry

Free Speech Coalition v. Shurtleff

In 2004, Utah enacted a law establishing the creation of an electronic database where parents can register their child's "contact points," including e-mail addresses.

Marketers of “adult-oriented” products are prohibited from contacting these addresses. Stiff civil and criminal penalties result from failure to comply with the Act. This suit was brought in federal court by the Free Speech Coalition seeking an injunction against enforcement of the Act. ANA filed a “friend-of-the-court” brief along with the American Advertising Federation (AAF), the American Association of Advertising Agencies (AAAA), the Email Sender and Provider Coalition, the Electronic Frontier Foundation (EFF), and the Center for Democracy and Technology (CDT) arguing that the Utah registry law 1) is preempted by the federal CAN-SPAM Act, 2) is an impermissible state burden on interstate commerce and violates the Commerce Clause of the U.S. Constitution, 3) is inherently vague and violates the Due Process Clause of the U.S. Constitution, and 4) violates the First Amendment of the U.S. Constitution.

Unfortunately, the court denied the motion for preliminary injunction on the grounds that the Free Speech Coalition did not prove by a substantial likelihood that it would prevail on the merits. The court ruled that:

- The law was not preempted by the federal CAN-SPAM Act because that law reserved to the states the right to prohibit computer crimes;
- It did not violate the Commerce Clause of the Constitution because Congress granted the states authority to regulate email; and
- The First Amendment was not implicated because the government has a substantial interest in protecting minors from harmful speech, and the law was narrowly tailored since parents had to opt-in to stop receiving emails.

Our brief can be viewed at <http://www.ana.net/advocacy/content/468>. ANA is considering our next steps in regard to this very important issue.

False Advertising Class Action

Pfizer Inc. v. Superior Court of the State of California, Los Angeles County

Steve Galfano filed this class action lawsuit in Los Angeles County Superior Court alleging that Pfizer had made false claims in its ads for Listerine. He included in his class “all persons who purchased Listerine from June 2004 to January 7, 2005.” The trial court certified the class, but the Court of Appeal reversed the decision in July 2006, holding that to have standing, each member of the class had to suffer an injury and not just the lead plaintiff. This was one of the first cases brought since California voters approved Proposition 64 in 2004, which created more stringent standards for private citizens to sue on behalf of the public at large under the Unfair Competition Law (UCL) of the state Business and Professions Code.

ANA, along with the U.S. Chamber of Commerce and the Coalition for Healthcare Communication, successfully filed a “friend-of-the-court” brief with the Court of Appeal. The industry brief stated: “The UCL, as construed by the trial court, allows an action to be maintained on behalf of class members who – for lack of injury, loss, or proximate causation – could not otherwise maintain an individual action in their own name. So

construed, the UCL violates the First Amendment and the California Constitution by upsetting the balance between the competing interests of free speech and the regulation of false and misleading speech, and thereby chilling the speech of California advertisers. Furthermore, because California advertisers are typically national advertisers, the trial court's constitutionally infirm construction of the UCL also places an unconstitutional burden on interstate commerce."

Our brief can be viewed at <http://www.ana.net/advocacy/content/231>. The case has been appealed to the California Supreme Court, and is awaiting that court's action. The danger in this case, if the court rules in favor of the plaintiff, would mean that a certified class of "hypothetically injured" claimants would be able to bring suit, even if they had not suffered a direct injury as a result of the marketing claims. Such a class has the potential to be staggering in scope (especially in a state as large as California) and would have a very real chilling effect on marketers.

Alcohol Beverage Industry Class Actions

Since 2003, the alcohol beverage industry has been subject to class action suits brought in various courts around the country alleging that alcohol beverage advertising is responsible for the purchase of alcohol beverages by underage children and teens. Five of these suits (in Wisconsin, Colorado, the District of Columbia, and in the federal Fourth Circuit and Sixth Circuit Courts of Appeals), have made it to the appellate stage. In July, the District of Columbia Court of Appeals upheld the D.C. Superior Court's dismissal of the class action suit in that court, finding the plaintiff had no standing to sue and had not stated a claim on which relief could be granted. Later in July, the Sixth Circuit Court of Appeals, ruling on consolidated cases from Michigan and Ohio, held that there was no "injury in fact" to the plaintiffs sufficient for standing. Significantly, the court wrote that, "If these plaintiffs are convinced that alcohol advertising (i.e., First Amendment commercial speech) should be outlawed, then the means must be by legislation or constitutional amendment, not judicial fiat." In October, the trial court dismissals in Colorado and Wisconsin were both affirmed in the state appellate courts.

False Advertising Claims

Time Warner Cable, Inc. v. DIRECTV, Inc.

In August, the New York-based Second Circuit Court of Appeals issued an opinion involving claims made in two DIRECTV television ads and one internet ad regarding its high-definition picture quality in comparison to that of cable. Time Warner contended that its HD picture quality was equivalent to that of DIRECTV's and that the ads were literally false. The District Court for the Southern District of New York held in favor of Time Warner, finding that it had met its burden that the ads were false. The Second Circuit affirmed in part, vacated in part and remanded the case to the lower court. It held that the television ads were "false by necessary implication," which includes an evaluation of the claims in their full context to determine their falsity. It also held, however, that the lower court should have permitted DIRECTV to raise puffery as a

defense when it depicted a cable signal as highly pixilated in comparison to its own in the internet ad. Finally, it held that Time Warner suffered irreparable harm because of the advertisements, even though it was not named in the ads, based on the falsity of the ad and the nature of the market (where Time Warner is the main cable provider).

Product Placement

Background

Product placement involves the placement of brand-named products in a movie or program. The products are often then used by the characters in the production, giving the setting a real-world air. The use of this practice on television is regulated by the Federal Communications Commission (FCC), which requires the identification of a sponsor at the time of the broadcast of a program containing product placements.

Markey/Waxman Letter to the FCC

In September, Representatives Ed Markey (D-MA) and Henry Waxman (D-CA) sent a letter (<http://markey.house.gov/index.php?option=content&task=view&id=3103&Itemid=125>) to Kevin Martin, the Chairman of the FCC, asking the Commission to conduct an inquiry into the growth of product placement and its effects on the composition and nature of television programming. The letter noted the increased use of product placement due to the rising use of digital video recorders (DVRs) to skip over commercials during playback. The Congressmen asked the Commission to explore how broadcasters and cable operators distinguish between commercial and creative content, and to reexamine the FCC's rules governing disclosure.

This is not the first time the FCC has been asked to investigate product placement. In 2003, Commercial Alert, an activist group with ties to Ralph Nader, filed a complaint with the Federal Trade Commission (FTC) and Federal Communications Commission (FCC) asking the agencies to conduct an investigation and rule-making that would require new disclosures each time a product was placed in a program. Commercial Alert recommended rules that required identification of product placements, both before a program and a “pop up” disclosure when the product appeared on screen during the program. It argued that disclosing product placements before or after the show was not sufficient, as the audience may not be watching at that time.

ANA, as part of the Freedom to Advertise Coalition (FAC), sent letters to the FTC and FCC in response to Commercial Alert's petition, asking them to reject the recommended proposal. The FAC letter argued that Commercial Alert's proposal is impractical and extreme, and would make television virtually unwatchable by constantly distracting the viewer. Instead, we argued that the government's current regulations were adequate, and that further action was impractical. The FTC responded by saying that the current rules, evaluating placements on a case-by-case basis, were sufficient to protect consumers, including children.

The FCC initially scheduled a discussion of a Notice of Proposed Rulemaking (NPRM) in regard to product placement (or embedded advertising, as the notice called it) on the agenda for its December open commission meeting. ANA filed a statement with the FCC, drafted by Robert Corn-Revere of Davis Wright Tremaine LLP, asking the

Commission to consider a Notice of Inquiry (NOI) rather than an NPRM. Our letter can be viewed at <http://www.ana.net/advocacy/content/987>. The item was pulled from the agenda immediately prior to the meeting.

Outlook for 2008

We agree with the FTC that the government already has sufficient authority to go after false or misleading advertising in the product placement arena. We believe that new and overly burdensome identification requirements for product placement are unnecessary and intrusive. Both FCC Chairman Martin and Commissioner Jonathan Adelstein have made comments critical of product placement in the past, and we expect the issue will come up again in the coming months.

FTC Review of Testimonial and Endorsement Guidelines

Background

The Federal Trade Commission (FTC) has established guidelines for testimonials and endorsements of products or services. Endorsements and testimonials are used by virtually every sector of the advertising industry. They include any marketing message that consumers are likely to believe and that reflects the honest opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser. Like other forms of advertising, they cannot be false or deceptive, and must be substantiated. In 2007, the FTC undertook a review of the guidelines, in order to consider their effectiveness and the credibility of endorsements. Specifically, the FTC considered amendments that would require all marketers to (1) conduct pre-publication proof of "generally expected results" and (2) to disclose the "typical" experience a consumer could expect to receive.

Anthony DiResta, Esq. of Reed Smith LLP drafted ANA's comments to the Commission. Our comments argued that the guidelines as constituted reflected an appropriate balance between the government's interest in protecting consumers and the interests of marketers in using endorsements and testimonials. We argued that in addition to the FTC guidelines, there are multiple layers of enforcement from state Attorneys General to the self-regulatory efforts of the National Advertising Division of the Council of Better Business Bureaus. We asserted that the proposed changes by the FTC would raise serious First Amendment concerns for a number of reasons. These included:

- The restrictions would be overbroad and unnecessary under the U.S. Supreme Court's *Central Hudson* line of cases, as they would not only restrict advertisers who transmit potentially misleading information, but also would significantly and inappropriately burden advertisers who transmit truthful and non-misleading testimonials and endorsements as well.
- They would prevent truthful and informative speech about the accurate experiences of users from reaching consumers, since typicality claims are often hard to measure, particularly for new products.
- Businesses could conclude that these restrictions would be so burdensome that they would no longer include testimonials and endorsements in advertising, even though they were truthful and provided useful information.
- Requiring the disclosure of a typical consumer's experience could constitute impermissible compelled speech.

Thus, the guidelines would have a chilling effect on truthful advertising, and we argued that the FTC had enough authority under the current guidelines and existing law to go after any false or deceptive claims.

The FTC review has not yet been completed. Our letter can be viewed in full at <http://www.ana.net/advocacy/content/695>.

FTC Review of “Green Marketing” Guidelines

Background

The Federal Trade Commission first issued environmental marketing guidelines (the Green Marketing Guides) in 1992 to provide general principles for the use of "green" claims such as degradability, recyclability and recycled content. These guides were updated in 1996 and 1998, with ANA working closely with the Commission in each instance. With the growth in the use of green claims in the ensuing years, the FTC announced in December that it plans to undertake a review of the guidelines to ensure they are keeping up with changes in the marketplace.

These guidelines, which can be viewed at <http://www.ftc.gov/bcp/grnrule/guides980427.htm>, are important in providing guidance to marketers in discussing the environmental attributes of their products, packaging, or manufacturing process.

In conjunction with the review of the guidelines, the FTC plans to hold a workshop on carbon offsets and renewable energy certificates in January 2008. It plans a series of workshops over the next several months. ANA plans on paying very close attention to the FTC's activities in this area.

International Developments

Background

ANA regularly follows international developments relating to advertising. We are a member of the World Federation of Advertisers (WFA), which brings together national advertising associations and international advertisers to ensure that advertisers can promote their products to a worldwide audience.

Children's Advertising in Britain

Ofcom, the United Kingdom's communications regulator, issued proposals to ban all high-fat, high-sugar or high-salt (HFSS) product advertising on television to children under 16 in 2006. This ban took effect on January 1, 2008. In 2007, the Committee of Advertising Practice (CAP), the body responsible for writing the UK non-broadcast advertising code, published the new rules for food and soft drink product advertisements to children (<http://www.cap.org.uk/cap/codes/>). The code requires that marketing communications not encourage poor nutritional habits or appeal to the emotions of children.

French Study on Advertising to Children

The French government has commissioned Missouri State University to undertake an international study of marketing's influence on childhood obesity. Specifically the study will examine how advertising affects food choice and how it could be used as a positive tool in tackling childhood obesity.

Norwegian Food Advertising Guidelines

The Norwegian Consumer Council, with the input of the Norwegian Advertisers Association (ANFO) and the Food Industry Federation (NBL), instituted a self-regulatory code setting parameters for advertising to children. The guidelines require that advertising to children must be clearly distinguished from other media. They also require that advertising for high-energy, low-nutrition food products should not be placed in media that are intended for children. Additionally, they urge that caution should be used in the use of celebrity endorsers for high-energy, low-nutrition food products.

The government of Norway has stated it will regulate advertising if the guidelines do not have the desired effects.

South Africa Advertising Guidelines

In July, the South African Department of Health released draft regulations relating to food advertising. The draft regulations would prohibit the advertising of "foodstuffs not regarded essential for a healthy diet" to children younger than 16 or use a child actor

under 16 or a cartoon character to promote those types of products. The draft regulations also set specific regulations for labeling and health claims. The department has requested that relevant stakeholders weigh in on the regulations by the end of October, with the final regulations to enter into effect by 2008.

Outlook for 2008

ANA monitors attempts in other countries to limit or ban advertising. Regulations imposed abroad often are attempted to be imported to the United States. In fact, a few members of Congress, most notably Representative Ed Markey (D-MA), have suggested that the Federal Communications Commission consider adopting an Ofcom-like model for children's advertising in the U.S. We will continue to work through the WFA and our international advertiser members to ensure that the rights of advertisers receive as much protection as possible globally.

Coalitions

ANA is an active member of The Advertising Coalition; the Alliance for American Advertising; the Freedom to Advertise Coalition (FAC); the State Advertising Coalition (SAC); the Coalition for Health Care Communication (CHC); and the American Council for Fitness and Nutrition (ACFN). These coalitions enhance the efforts of the diverse groups that share the common interest of protecting the rights of advertisers. They provide the industry with a united front when lobbying Congress and government agencies, and serve to buttress ANA's efforts on behalf of the advertising community.

The Advertising Coalition

The Advertising Coalition was established in 1988 to direct the fight against federal advertising tax proposals. It has since expanded its scope to include general advertising issues. In 2004, the Coalition sponsored the Global Insight study, which demonstrated the enormous impact of the advertising industry on the national economy. The current members of The Advertising Coalition include: the ANA; the American Advertising Federation (AAF); the American Association of Advertising Agencies (AAAA); CBS Corporation; the Grocery Manufacturers of America/Food Products Association (GMA/FPA); the Magazine Publishers of America (MPA); the National Association of Broadcasters (NAB); the National Broadcasting Company (NBC); the National Cable & Telecommunications Association (NCTA); the Newspaper Association of America (NAA); the National Newspaper Association (NNA); and the Pharmaceutical Research and Manufacturers of America (PhRMA).

In 2007, The Advertising Coalition played an important role in defeating burdensome new restrictions on DTC prescription drug advertising.

The Alliance for American Advertising

Leaders in the advertising and media industries have created The Alliance for American Advertising (AAA) to demonstrate to policymakers and to the general public the commitment of the advertising industry to responsible advertising. The Coalition consists of major national advertisers, manufacturers, and advertising and media professionals who are prepared to increase their already significant efforts to educate the public on the general causes of obesity and support effective ways to reverse this trend.

The ANA, along with the American Advertising Federation (AAF); the American Association of Advertising Agencies (AAAA); and the Grocery Manufacturers of America/Food Products Association (GMA/FPA) are charter members of the AAA. Other members include the National Restaurant Association (NRA), the Magazine Publishers of America (MPA), the Point of Purchasing Advertising International (POPAI), the National Cable & Telecommunications Association (NCTA), the National Association of Broadcasters (NAB), General Mills, Inc., Kellogg Company, Kraft Foods, Inc., and PepsiCo, Inc.

The Alliance was instrumental in the past year in aiding the industry's work on the FCC Task Force on Media and Childhood Obesity.

Freedom to Advertise Coalition

The Freedom to Advertise Coalition (FAC) is an informal coalition whose purpose is to oppose proposals that restrict truthful and non-deceptive advertising for any legal product or service. FAC's members include the ANA and the American Advertising Federation (AAF); the American Association of Advertising Agencies (AAAA); the Magazine Publishers of America (MPA); the Direct Marketing Association (DMA); the Newspaper Association of America (NAA); the Outdoor Advertising Association of America (OAAA); the National Retail Federation (NRF); and the Point of Purchasing Advertising International (POPAI).

FAC was involved in the child protection registry debate in Utah, privacy issues such as "do-not-mail," and in industry coordination on product-specific advertising restrictions in 2007.

State Advertising Coalition

The ANA, the American Association of Advertising Agencies (AAAA), and the American Advertising Federation (AAF) formed the State Advertising Coalition (SAC) in 1986 to provide information and resources necessary to combat overly restrictive state and local advertising proposals. Since its formation, SAC has responded to more than 120 ad tax proposals in over 40 states. Our activities on the state level in 2007 are detailed on page 8.

Coalition for Healthcare Communications

The Coalition for Healthcare Communications (CHC) was formed in 1991 for the purpose of defending organizations that dedicate their time to provide truthful information about pharmaceutical and medical products without inappropriate government intervention. The CHC advocates the flow of this information to health professionals and consumers for educational purposes so that prescription drugs and medical devices can be used efficiently and safely. The members of CHC include the ANA; the American Association of Advertising Agencies (AAAA); the American Advertising Federation (AAF); American Business Media; the American Medical Publishers Association (AMPA); the Association of Medical Publications (AMP); the Healthcare Businesswomen's Association (HBA); the Healthcare Marketing and Communications Council (HMCC); the Medical Marketing Association (MMA); and the Midwest Healthcare Marketing Association (MHMA). More information about the CHC can be found at <http://www.cohealthcom.org>.

American Council for Fitness and Nutrition

The American Council for Fitness and Nutrition (ACFN) was formed in 2003 to respond to the challenges posed by obesity and overweight in the United States. Its mission is to "advocate comprehensive, long-term strategies and constructive public policies for improving the health and wellness of all Americans, particularly youth, by promoting science- and behavior-based solutions focused on the critical balance between fitness

and nutrition.” The ACFN carries out these programs by advocating these positions to federal and local officials. It also promotes activities by its members that encourage consumers in reaching the correct balance between fitness and nutrition, engages in ventures with public and private entities to promote fitness and nutrition programs, and supports scientific research that looks into achieving a balance between fitness and nutrition.

The ACFN has over 50 members, including food and beverage manufacturers, restaurant chains, and trade associations representing a variety of industries involved in the production and marketing of food products. More information about the ACFN can be found at <http://www.acfn.org>.