



For Immediate Release

February 23, 2007

LEGAL NOTE Discusses Efforts to Increase Regulation of Innovative Marketing

“Viral Marketing” is an innovative marketing technique that seeks to manipulate and use consumer participation to promote products and brand recognition. “Viral marketing” often makes creative use of technology such as E-mail and the Internet and then harnesses such technological power to traditional word-of-mouth activities to create a rapid “critical mass” of brand awareness. Examples of such marketing include “forward to a friend messages and buzz marketing whereby seemingly ordinary people are encouraged to create “buzz” about a certain product.

Focusing on this new marketing technique, consumer advocates now call for increased regulation of such promotional efforts. In **ADVERTISING ON THE EDGE: VIRAL, BUZZ, WORD-OF-MOUTH, AND MUCH, MUCH MORE ...**, attorney Joseph J. Lewczak, of the New York City-based law firm Davis & Gilbert, discusses the use of viral advertising, the demand for greater regulation and why such regulation is redundant. The publication is the latest in Washington Legal Foundation’s CONTEMPORARY LEGAL NOTE series.

While advocates seeking to further regulate this area of advertising cite the potential for unfair or deceptive practices, Mr. Lewczak points out that such advertising is already regulated by existing federal, state and local laws, rendering any additional regulation clearly unnecessary. As Lewczak notes, “Section 5 of the Federal Trade Commission (FTC) Act prohibits unfair or deceptive acts or practices affecting interstate commerce...To comply with the law, viral marketing campaigns must therefore be neither unfair nor deceptive.” Further, the FTC’s Guides Concerning Use of Endorsements and Testimonials in Advertising regulate how advertisers can use testimonials in advertising campaigns. And in response to a petition sent by Commercial Alert, a consumer advocacy group, the FTC has confirmed that viral advertising techniques fall within the parameters of the Guides.

Viral Advertising also falls under the jurisdiction of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (commonly known as CAN-SPAM), which regulates advertisements “where the primary purpose of such messages is the commercial advertisement of goods or services.” Federal copyright and trademark law also come into play by viral advertising’s use of third party materials or intellectual property. Finally, Lewczak notes that existing state and local laws address viral advertising, particularly as it implicates individual rights of privacy and publicity—areas controlled by state law—and as such advertising might implicate local laws regulating graffiti, nuisance and crowd control. As he remarks, “...local laws may affect innovative viral campaigns involving large groups of people,

sound broadcasting equipment or placement of materials other than in purchased media.”

While the paper warns that consumer activists now look to viral advertising as fertile terrain in which to seek greater regulation of advertising and commercial speech, it also makes clear that the contours of existing laws easily accommodate any need for control of this innovative area of advertising.

Copies of WLF CONTEMPORARY LEGAL NOTE Number 55 can be obtained by forwarding a request to: Publications Department, Washington Legal Foundation, 2009 Massachusetts Avenue, NW, Washington, D.C. 20036, or calling (202) 588-0302.

Washington Legal Foundation is a national, non-profit, public interest law and policy center. By utilizing a unique approach to forward its mission — publishing timely legal studies, engaging in innovative litigation, and communicating directly to the public — WLF has become the nation's most effective advocate of free enterprise.