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MARKETING & MEDIA

ADVERTISING / By THOMAS R. KING And JOHN B. HINGE

DDB Needham Liable for Death at Outing

A federal jury's verdict holding DDB Needham responsible for the drowning death of an employee on a company-sponsored rafting trip will force businesses to reassess the risks of giving employees and clients a good time.

Late last week, a U.S. District Court jury in Chicago ordered DDB Needham to pay \$1.1 million to the family of retired adman James Fasules, one of five men who drowned on a white-water rafting expedition on Canada's Chilko River in 1987. The jury held the Omnicom Group unit partly responsible for the accident. Mr. Fasules was held partly responsible himself. The rafting company, which ran the trip, wasn't held responsible at all.



The jury award sends a clear message that companies can be held responsible for events they sponsor—even those outings in which the lines between business and social activity are blurred. Two more lawsuits arising out of the drownings still are to be decided—one of which concerns the death of a would-be client, Procter & Gamble executive Robert Goldstein.

Lawyers and ad officials quizzed yesterday said the decision will make it nearly impossible for businesses to justify outings that can in any way be viewed as potentially dangerous. Events such as wilderness hiking expeditions and rock climbing, for example, will likely be substituted with tamer outings, such as picnicking and rounds of golf.

"We think it's a very important jury decision, not only for this case but for all future cases where businesses are using marketing tools that are dangerous," said Stanley M. Chesley, a Cincinnati attorney for the family of Mr. Goldstein.

The Fasules case is believed to be the first time a federal jury has decided that companies can be held liable for off-work outings, said Brian Crowe, the attorney for the Fasules family. But he doesn't expect the ruling to apply to mishaps in milder celebrations.

"The whole message is that if you're going to take someone on a risky venture, you have to let him know what he's getting involved with," said Mr. Crowe of the Chicago law firm Henslee Monek & Henslee. In this instance, Mr. Fasules was a raw rookie at rafting while other participants were veterans who knew what to expect, the attorney explained.

But DDB Needham's attorney, William Swindal of the Chicago law firm Hinshaw & Culbertson, maintained the agency's innocence. "Our argument was that there was no duty owed to Mr. Fasules," he said. "We did nothing wrong. We didn't run or operate the raft." He wouldn't comment on whether the agency plans to appeal the verdict.

If there was any good news for DDB Needham, it was the fact that the jury award fell short of the \$5 million that Mr. Fasules's family had originally sought.

The jury decided on the \$1.1 million award after determining Mr. Fasules was partly responsible. One guide who was aboard the raft testified that he pulled Mr. Fasules to a safe place after the accident, but that the retired executive apparently left that place and then drowned.

Now other ad agencies are reevaluating their own activities. "If an agency was contemplating anything like this in the future, you'd probably think twice now," said Jerry Slano, chairman and chief executive officer at ad agency Ayer. "As the facts exist, and you see what can happen, you're probably better off not doing anything on this grand scale—even if a client wants to go." His agency, he said, hasn't traditionally had many big-scale outings.

Felix Kent, a New York ad lawyer, said he expects some of his clients, including a few agencies that take clients to hunting lodges and yachts, to take more precautions. "I think people are certainly going to be more careful," he said. "Not just in this field, but in any field. This is food for thought for any business that does entertaining."

Robert Schmidt, chairman and chief executive at Levine, Huntley, Schmidt & Beaver, said he now expects many companies to issue stiffer regulations on outside entertaining. But don't be surprised if they aren't followed once the storm dies down around the Chilko cases, he said. "I don't think anybody's going to go rafting again," he said. But "you can't lock everybody up in a room."

Others in the ad business said the weakened economy, rather than liability fears, has already choked off most big-time client entertainment. "The margins have been whittled away in this business to the point that there's not a great deal of client entertainment at all," said John O'Toole, president of the American Association of Advertising Agencies, a trade group.

"If this sort of thing is done in the future, precautions will be taken to make sure it isn't construed as a business situation," Mr. O'Toole said, such as disclaimers stating that the trip was strictly personal, even though the people involved knew one another from work.

But in the Chilko incident, attendees did sign waivers at the airport just before beginning the trip. The judge in the Fasules case, however, refused to allow DDB Needham to present the forms as evidence. A federal judge in the pending Goldstein case also made that ruling, saying the waiver was too broad and ambiguous.

In any event, lawyers now look to the next two cases. Mr. Chesley, attorney for the Goldstein family, said the family is asking for \$15 million to \$18 million in damages. The trial is expected to begin next June.

"We feel this [ruling] is proof of the position that we have always taken—that there is liability on the part of Needham," Mr. Chesley said.

Ad Notes....

BALLY MEDIA MOVES: Health & Tennis Corp., a unit of financially troubled Bally Manufacturing, shifted its \$50 million

media account to Western International Media from the Los Angeles office of WPP Group's J. Walter Thompson. JWT proposed the switch after Health & Tennis resisted the agency's demand to pay cash up front for media buys, said Arthur Quinby, the Bally unit's marketing chief. He said he'll keep his \$10 million creative business at JWT and pay cash for now, but he'll decide by March 1 whether to switch creative shops as well. Health & Tennis had been JWT's biggest L.A. client.

LAWYERS' ADS: Attorneys in New York state can now use client testimonials in ads, as long as the ads include disclaimers stating past results are no guarantee of future success, according to a recent opinion by a New York State Bar Association committee. Use of testimonials previously weren't permitted in New York. Many other states have prohibited them.

NEWSPAPER ADS: Third-quarter ad spending in daily newspapers rose 2% to \$7.98 billion, compared with 1989's third quarter, according to a study by the Newspaper Advertising Bureau, a New York-based trade group. That means spending is "clearly still down in real terms," a spokesman for the bureau said. National ad spending was up 5.7% while retail, the largest newspaper ad category, rose 4.2%. Classified ad spending fell 1.9%.

Acme United Markets Line With 90% Recycled Plastic

By a WALL STREET JOURNAL Staff Reporter
FAIRFIELD, Conn. — Acme United Corp., looking to capitalize on "green" consumerism to sell school supplies, says the coffee cup you just discarded may be part of your child's next pair of scissors.

The company, which has been making scissors, shears and rulers for 123 years, is marketing a new line of products using recycled plastic. The scissor handles, and rulers, are made of 90% post-consumer waste-cleaned and remolded coffee cups and burger containers as well as other forms of Styrofoam, such as the "peanuts" used in packages. The company said using 100% waste content made the plastic too brittle, so it used some chemical agents to keep the product pliable.

Company officials say they have an adequate supply of the recycled plastic, which they believe is done in a closed-loop process that results in no unused byproducts. They wouldn't disclose the recycled plastic resin supplier for competitive reasons. Because it plans to market the products for schoolchildren, the company expects school districts to be a big source of sorted plastics for the recyclable material.

Acme, which calls the products Kleen Earth, is packaging them in recycled cardboard. It also said it will send consumers a pine tree sprout if they return the paper packaging from the products for recycling. It is even printing its packaging with a vegetable-based ink, rather than a petroleum-based ink.