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Companies Seek Protection in Post-Tiger Woods World of Scandal

Companies who use celebrity endorsers are trying to protect their brands in the wake of the Tiger Woods scandal.

In addition to updating their morals clauses, companies are purchasing insurance against the loss of sales if their endorser suffers a public embarrassment.

Before his dalliances became extremely public, Tiger Woods was one of the highest-paid celebrity endorsers with a family man image.

But one study, performed by Chris Knittel, a professor of economics at the University of California, Davis, found that the stock prices of the seven publicly held companies that still have or did have sponsorship deals with Woods lost $12 billion in market value in the month after his statement that he was taking a leave from golf.

While companies routinely take out disability or death insurance to cover themselves if an endorser – typically an athlete – is injured while under contract, the Woods scandal has companies looking for even greater protection.

More companies are now trying to insure against the loss of sales if their product endorsers become involved in a scandal, although calculating the cost of such an insurance policy is difficult and varies depending on the product, the endorser, and the revenue generated by him or her.

Insurance covering losses as a result of a scandal could also include the cost of the company's advertisements using the scandal-plagued endorser as well as the costs of finding a replacement athlete and producing and filming new commercials.

Companies may also seek to make their morals clauses more stringent. Morals clauses often give a company the right to terminate only once a player has been convicted of a crime, not just charged or investigated, even though the negative publicity can have the same impact.

The Woods scandal could also cause companies to conduct more detailed investigations before signing a potential endorser, to rely on contracts with shorter terms, or to try to incentivize endorsers with payments based upon specific goals or targets.

Why it matters: A celebrity or athlete endorser is the face of a product, in good times or bad. With the speed of today's celebrity news cycle, companies should consider protecting themselves as best as possible against a potential scandal through more detailed investigations, carefully crafted morals clauses, and insurance policies.

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California Enacts New Law on Promotions

California recently enacted a new law on promotions, specifically dealing with automatic renewal and continuous service offers.

Under the new law, which takes effect December 1, 2010, companies must present offer terms in a clear and conspicuous manner and must first obtain the consumer's affirmative consent before charging for an offer.

Companies must also provide an acknowledgment letter to consumers that includes the terms of the offer, the cancellation policy, and information regarding how to cancel.

Companies that make automatic renewal or continuous service offers are required to have a toll-free telephone number, e-mail address, postal address, or another "easy-to-use" mechanism for cancellation, which must be described in the written information to consumers.

The new law prohibits marketing a product as "free" if the complimentary product is offered only as an element in the automatic renewal, and products that are sent to the consumer without first obtaining the consumer's affirmative consent are deemed an unconditional gift.

If there is a material change in the offer terms, the new law mandates that companies provide consumers with clear and conspicuous notice of the change as well as information on how to cancel.

Why it matters: The California law mirrors the Federal Trade Commission guidelines on automatic renewal and continuity programs for the most part, but companies should be aware of the continuing

UPCOMING EVENTS

March 13, 2010
Supply Expo 2010
Topic: "Live from D.C.: It's Make Your Claims Right!"
Speaker: Ivan Wasserman
for more information

March 15-17, 2010
Practising Law Institute CLE Program
Topic: "Counseling Clients in the Entertainment Industry"
Speakers: Alan Brunswick, Kenneth Kaufman
New York, NY
PLI New York Center
for more information

March 18-19, 2010
Minority Corporate Counsel Association
9th Annual CLE Expo 2010
Topic: "Green Litigation & Corporate Sustainability Programs: Beware the Trojan Horse"
Speaker: Linda Goldstein
Chicago, IL
Chicago Marriott Downtown
for more information

April 14-15, 2010
American Conference Institute
Advertising, eMarketing & Promotions for the Pharmaceutical Industry
Speaker: Linda Goldstein
Philadelphia, PA
The Union League
for more information

April 21-23, 2010
ABA Antitrust Law Spring Conference
Topic: "Mock Trial 2010: A Jury Review of Exclusionary Conduct"
Speaker: Tom Morrison
Washington, DC
for more information

crackdown on such programs.

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FTC Warns 78 Companies About Advertising "Bamboo" Products

The Federal Trade Commission sent letters to 78 companies warning them that they could be breaking the law by selling clothing and other textile products labeled and advertised as "bamboo," but which are actually made of manufactured rayon fiber.

Recipients included national retailers such as Bloomingdale's, Kohl's, Lands' End, Nordstrom, REI, and Target.

"We need to make sure companies use proper labeling and advertising in their efforts to appeal to environmentally conscious consumers," David C. Vladeck, Director of the FTC's Bureau of Consumer Protection, said in a statement. "Rayon is rayon, even if bamboo has been used somewhere along the line in the manufacturing process."

Rayon is a man-made fiber created from the cellulose found in all plants and trees – not just bamboo – and unless a product is made directly with bamboo fiber, it can't be called bamboo, the letter explains.

"Rayon, even if manufactured using cellulose from bamboo, must be properly described using an appropriate term recognized under the FTC's Textile Rules," the letter said.

The letter warns companies about four enforcement actions the FTC brought in 2009 against companies for selling rayon products misleadingly labeled and advertised as bamboo. It also cautioned recipients that a violation of the FTC Act, by failing to use proper fiber names in textile labeling and advertising, could cost up to $16,000 per violation.

Why it matters: The warning letters, coming on the heels of last year's enforcement actions, are the latest example of the FTC's regulation of "green" marketing or other environmentally friendly claims. Companies should review the FTC's environmental marketing guidelines and/or the Textile Rules carefully when making and substantiating a "green" claim.

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Verizon Wins NAD Challenge Against Sprint

Verizon brought a successful challenge against Sprint Nextel at the National Advertising Division of the Council of Better Business Bureaus, which determined that Sprint lacked sufficient support for its claim to be "America's most dependable 3G network."

Verizon argued that Sprint based its "most dependable" claim on Nielsen Mobile drive test data that measured two factors: success in connecting to the 3G network and success in downloading or uploading files. According to Verizon, Sprint used a combination of two different Nielsen tests instead of the most recent data results, which showed that Verizon had better numbers than Sprint in both measurements. Because of its lower ratings, Verizon said Sprint had also added a third factor to the mix: signal strength, in which it outperformed Verizon.

Sprint argued that signal strength is an "essential measure" of network dependability, and that it combined the test results to correct for "weather issues, cell tower failures and other anomalies" that could skew the results of any one test.

Sprint contended that customers want to know how the service performs over time and that they care about signal strength as indicated by the bars pictured on every cell phone.

But the NAD disagreed.

It expressed concern about Sprint's data on signal strength, including whether the evidence was a reliable indicator of the indoor dependability of the network.

Further, the NAD said that the test results should not have been combined.

Because 3G networks "are constantly evolving, far more quickly than conventional consumer products," advertisers must therefore use "particularly current data."

The most recent test data showed that Verizon outperformed Sprint, the NAD noted, and even Sprint's disclosure that dependability was measured according to signal strength, among other factors, did not cure the fact that the claim was not supported by adequate substantiation.

The NAD therefore recommended that Sprint discontinue its "most dependable" claim.

Sprint indicated that it disagreed with the decision and would appeal to the National Advertising Review Board.

Why it matters: For companies with a product or service that is continually evolving, the NAD decision makes clear that substantiation of a claim must be based on the most recent data available.

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