Car Manufacturer and Ad Agency Settle False-Advertising Claims for "Hill Climb" Ad

In a 2011 commercial for the Nissan Frontier produced by advertising agency TBWA Worldwide, Inc., the audience sees the wheels of an elaborately designed dune buggy spinning and kicking up sand in a fruitless attempt to climb a steep hill. The dune buggy is stuck. Suddenly, a red midsize pickup truck speeds up the sand-covered hill and pushes the stranded dune buggy to the top, as bystanders off camera exclaim: "Gun it, bro!" "What's this guy doing?" "Whoa, man. No way." "Go! Go! Go! Go! Go! Go! Go!" "Are you kidding?" "Did you guys see that?" "Maniac!" The commercial's voiceover message states: "The midsize Nissan Frontier with full-size horsepower and torque. Innovation for doers, innovation for all."

The 30-second commercial "Hill Climb" aired on television and over the Internet. The video, shot to look like a YouTube video taken on someone's cell phone camera, is action-packed and entertaining. According to the Federal Trade Commission, it also constitutes false advertising, despite the disclaimer placed in the bottom right corner of the frame that states: "Fictionalization. Do not attempt."

The FTC last month announced agreements with Nissan North America and TBWA in which the car company and the advertising agency agreed to a settle claims for false advertising relating to the advertisement. Specifically, the FTC's complaints asserted that "Hill Climb" violated the FTC Act by deceptively demonstrating the capabilities of the pickup truck, representing that the video accurately showed the performance of an unaltered Nissan Frontier under the conditions that were depicted. In reality, the video depicted a feat that the Frontier cannot accomplish, since both the truck and the dune buggy were pulled up the hill by cables not visible in the commercial. The complaints also alleged that the hill was made to look significantly steeper than it actually was.

According to the FTC, the advertisement violates a well-established legal tenet that "when an ad purports to show a 'right before your eyes' demonstration of a product in action, the visual must be a truthful representation of what it can do." In this case, the Nissan Frontier cannot push a dune buggy up a steep sand dune, and the fictionalized demonstration was used to illustrate and promote an actual, objective product attribute - the full-size horsepower and torque of the midsize truck.

The FTC also specifically noted that the disclosure in the video was insufficient to protect Nissan and its ad agency from the false advertising claim. Disclosures must be clear and conspicuous, and, as the FTC noted in statements about the settlements, "the effectiveness of disclosures is a fact-specific analysis, but it shouldn't surprise seasoned advertisers that a fleeting superscript in white letters against a sand dune didn't meet the FTC's 'clear and conspicuous' standard."

The enforcement actions are notable for the fact that the FTC targeted Nissan's advertising agency in addition to the car company, claiming that TBWA knew, or should have known, that the advertisement was false or misleading. By way of comparison, the car manufacturer faces a strict liability standard for false advertising.

The proposed consent orders relating to the "Hill Climb" ad prohibit Nissan and TBWA from using deceptive demonstrations in advertisements for pickup trucks, as well as misrepresenting any material quality or feature of a pickup truck "through the depiction of a test, experiment, or demonstration." The order does not prohibit the use of special effects and other production techniques, as long as they do not misrepresent the vehicle's abilities. Both

Nissan and TBWA must also maintain and make available to the FTC copies of relevant advertisements and unedited video and still images taken during the production of any advertisement depicting a demonstration, experiment, or test, as well as maintain any affidavits or certifications submitted to television networks affirming the accuracy or integrity of a demonstration contained in an advertisement.

For more information about the content of this alert, please contact Michael Mallow and Michael Thurman.

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