Advertising Law

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A Poor Trade: FTC Settles with Car Dealers Over Trade-Ins

The Federal Trade Commission has reached settlements with five national car dealers that allegedly deceived consumers with ads about car trade-ins.

According to the Commission, the defendants ran ads on their Web sites and YouTube that falsely conveyed to consumers that even if their trade-in cars had negative equity, they would not be responsible for paying off the loan balance. Instead, the dealers rolled the negative equity into the new vehicle loan taken out by the consumer.

Examples of the claims made by the defendants include "Uncle Frank wants to pay [your trade] off in full, no matter how much you owe"; "I want your trade no matter how much you owe or what you're driving. In fact I'll pay off your trade when you upgrade to a nicer, newer vehicle"; and "Credit upside down? Need a new car? Go to Billionpayoff.com. We want to pay off your car."

In addition to violating the FTC Act, the Commission claimed some of the defendants violated the Truth in Lending Act and Regulation Z; others allegedly also violated the Consumer Leasing Act and its Regulation M.

Under the proposed settlements, the defendants – South Dakota-based Billion Auto, Frank Myers AutoMaxx in Winston-Salem, North Carolina, West Virginia's Ramey Motors, and Key Hyundai of Manchester and Hyundai of Milford, Connecticut, dealers which advertised jointly – would be prohibited from future misrepresentations regarding trade-ins and would be required to make clear and conspicuous disclosures in advertising certain terms.

The dealers can no longer claim that they will pay the remaining balance on a consumer's trade-in and that the consumer will have no further obligations for that loan. Any other facts relating to the leasing or financing of a vehicle must also be stated accurately, the FTC said.

Each of the dealers must also keep for 20 years copies of all relevant

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Upcoming Events

April 3-4, 2012
April 19-20, 2012
PLI Information Technology Law Institute 2012
Topic: "Social Media Issues in Technology"
Speaker: Marc Roth
San Francisco, CA
New York, NY
For more information

May 4, 2012
New York City Bar Association's Sweepstakes, Promotions, & Marketing Laws: Comprehension & Compliance Seminar
Topic: "Mobile Marketing—Certainties & Uncertainties"
Speaker: Marc Roth
New York, NY
For more information

May 5–9, 2012
INTA's 134th Annual Meeting
Topic: "Social Media—An Ever Changing, Challenging and Competitive World: How to Provide Legal and Business Advice to Clients"
Speaker: Linda Goldstein
Washington, DC
For more information

May 7-8, 2012
ERA Government Affairs Fly-In 2012
Speaker: Linda Goldstein
Washington, DC
For more information

May 17, 2012
Response Expo 2012
Topic: "Counterfeits, Knockoffs and Digital Reputation Management"
Speaker: Linda Goldstein
San Diego, CA
For more information

July 24–27, 2012
15th Annual Nutrition Business Journal Summit
Topic: "NBJ State of the Industry"
Speaker: Ivan Wasserman
Dana Point, CA
For more information

Awards

advertisements and substantiating materials, as well as file compliance reports with the agency to show they are meeting the terms of the orders.

To read the complaints and proposed settlement orders in the cases, click here.

Why it matters: In a statement about the proposed settlements, the Director of the FTC's Bureau of Consumer Protection, David Vladeck, said the suits were part of the agency's ongoing efforts to protect consumers in financial distress. "Buying a new car or truck is a major financial commitment, and the last thing consumers need is to be tricked into thinking that a dealer will 'pay off' what they owe on their current vehicle, when they really won't," Vladeck said. "The Federal Trade Commission is constantly on the lookout for potentially deceptive ads, and brings actions to stop them when appropriate."

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FDA Releases Regs on TV Ads

Coming soon to a TV near you: Food and Drug Administration-approved ads.

The FDA released new draft guidance, the Direct-to-Consumer Television Advertisements – FDAAA DTC Television Ad Pre-Dissemination Review Program, setting forth how it plans to review television ads prior to airing.

Pursuant to the guidance, the FDA would require that all covered TV ads be submitted for review at least 45 days prior to public dissemination.

The agency has the power to recommend ad and drug label "changes that are necessary to protect the consumer good and well-being, or that are consistent with prescribing information for the product under review." The agency can also recommend greater clarification regarding drug efficacy as it relates to specific population groups (such as children, racial and ethnic minorities, or the elderly).

The guidance lists five types of commercials that will be subject to pre-dissemination review: the initial TV ad for any prescription drug or for a new or expanded approved indication; all TV ads for prescription drugs subject to a risk evaluation and mitigation strategy; all TV ads for Schedule II controlled substances; the first TV ad for a prescription drug after a safety labeling update that affects the boxed warning, contraindications, or the warning and precautions labeling; and the first TV ad for a prescription drug following the receipt of an enforcement letter that references a TV ad.

In addition, the agency included a sixth, catchall category that includes "Any TV ad that is otherwise identified by FDA as subject to the pre-dissemination review provision."

The guidance explains how the FDA will notify advertisers that an ad is

subject to review and the applicable procedures for submitting ads for review.

Notice will be delivered either in the letter approving the drug's application (for newly approved drugs or those receiving labeling updates), in an enforcement letter, or by notice in the *Federal Register* for those companies with drugs that have received approval prior to the issuance of the guidance.

To submit an ad for review, advertisers must provide the TV ad itself, the product's current approved labeling and any references the advertiser will use to support claims made in the ad. An annotated storyboard must connect references to the support for each claim. If a person is identified in the ad as an actual patient or health care practitioner, and not an actor or a model, verification must be provided. Multiple TV ads must be submitted separately.

Recognizing that advertisers may change their ads after receiving comments from the agency prior to dissemination, the FDA said it did not expect advertisers to resubmit drafts. However, if the advertiser revises the ad "to add new claims, concepts, or creative themes," resubmission is required.

To read the guidance, click here.

Why it matters: The agency is seeking comments and suggestions on the draft guidance for 60 days from March 12. Advertisers should take note of the guidance, as a failure to follow the requirements can result in criminal penalties or civil monetary penalties if the ad is deemed false and misleading by the agency or if suggested changes are not made. The FDA also acknowledged that it may not complete its review within the 45-day window and will notify advertisers in those situations. Advertisers may then choose to disseminate the ad without waiting for the FDA's comments; however, they are at risk of an enforcement action if the agency later determines the ad is in violation of the Food, Drug and Cosmetic Act.

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Product Claims Can't Be Based on Ingredient Testing, Says the NAD

Although the National Advertising Division found that Irwin Naturals could support certain claims for its "Doctor Developed Clear Pure Complexion" dietary supplement, it recommended that the advertiser discontinue others, such as a claim that the product was "scientifically developed."

To defend its advertising, Irwin argued that all of the claims for its dietary supplement were truthful and substantiated and that the formula was developed from a holistic perspective by a naturopathic doctor. Claims at issue included "This formula has been scientifically-developed to target the vital organs and systems of the body that directly affect skin health," "Doctor developed powerful nutrition to promote healthy and vibrant skin," and the implied claim that the product treats and eliminates acne.

The advertiser provided documents concerning individual ingredients contained in Clear Pure Complexion and their effects on skin health,

specifically zinc, vitamin A, and vitamin B6.

While the NAD appreciated the advertiser's numerous studies and reference articles about the product's specific ingredients and their properties, no actual product testing was provided and no direct evidence was presented that the combined ingredients in the product itself would have the same effect as an individual ingredient. "Consumers could reasonably take away the message from the product label that Clear Pure Complexion formula itself, and not simply some of its ingredients, provides the claimed benefits regarding improving the health and appearance of acne prone skin," the NAD said.

Therefore, the NAD recommended that the claims be expressly qualified as ingredient claims.

For example, Irwin could advertise – using a "carefully qualified ingredient claim" – that vitamin A in Clear Pure Complexion may be helpful in reducing acne in vitamin A-deficient patients.

The NAD also cautioned Irwin about advertising claims based solely on traditional uses of botanical remedy products. Such claims are allowed under the Federal Trade Commission's Guide on Dietary Supplements so long as they are presented carefully to avoid the implication that the product has been scientifically evaluated for efficacy.

Because Irwin's evidence established only that certain ingredients in the product were traditional herbal ingredients, not those that had been scientifically validated, the NAD recommended that the advertiser discontinue its use of the phrase "scientifically developed."

To read the NAD's press release about the decision, click here.

Why it matters: The decision serves as a reminder to advertisers to substantiate product claims based on product – not ingredient – testing. "In the absence of testing on the product itself, any claims about the product would necessarily have to be clearly limited to ingredient claims, and not suggest or imply that the product itself has been tested or shown to provide the claimed results," the NAD emphasized. The decision recognized that some general product efficacy claims promising health benefits can be substantiated without clinical studies of the specific product in question, but "the advertiser must still demonstrate that it is scientifically sound to draw conclusions from outside studies and data and apply them to the performance claimed by the advertised product," the NAD said. In the case at hand, "there is no actual product testing in the record, and thus no direct evidence that the product itself will have the same effect as an individual ingredient alone."

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The Latest in "Natural" Suits: Frozen Food, Fruit Drinks and Deodorant

Continuing the unending flood of consumer class actions filed over the use of "all natural" claims, ConAgra, PepsiCo, and Arm & Hammer all recently were served with complaints.

ConAgra subsidiary Alexia Foods markets its frozen meals as "all natural" on product packaging and its Web site. The products, however, actually contain disodium dihydrogen pyrophosphate, a synthetic chemical preservative that "may lead to imbalanced levels of minerals

in the body and bone loss if used in excess," according to the complaint filed in New York federal court.

The suit contends that Alexia's frozen potato products and side dishes include the industrial chemical additive, which is also used in the leather industry to remove hair in hog slaughter and feathers in poultry slaughter. According to the plaintiff and other similarly situated, reasonable consumers, such industrial uses are inconsistent in a product labeled "all natural."

The suit seeks to certify a nationwide class to receive compensatory, treble and punitive damages, as well as injunctive relief.

In the suit against PepsiCo, plaintiffs seeking class action status in a California federal court allege that the company's SoBe 0 Calories Lifewater drinks are not in fact "all natural," but contain unnaturally processed, synthetic, and other artificial ingredients.

The plaintiffs maintain that although they pay a premium for the drinks, which have names such as "Macintosh Apple Cherry" and "Strawberry Kiwi Lemonade," the products do not contain the corresponding fruit or fruit juices. And despite the "natural" claims, the drinks have ingredients, including ascorbic acid (used as a vitamin C supplement) and niacinamide, which is used to mimic vitamin B3.

"By labeling SoBe products as 'all natural' and using the name of fruits on the front of the labels, defendants create a reasonable consumer expectation that the products are manufactured with fruits or other edible ingredients originating from the natural environment," according to the complaint.

In addition to a refund for a nationwide class, the suit seeks injunctive relief halting the allegedly misleading advertisement and a corrective advertising campaign.

In a New Jersey federal court suit, a plaintiff maintains that the use of unnatural ingredients, including triclosan, a synthetic antibacterial agent, in Arm & Hammer Essentials natural deodorant, renders its "all natural" claims false and misleading.

The ingredients of the deodorant stand in "direct contradiction" to the defendant's claims because the product "contains potentially harmful, and definitely artificial, chemical ingredients." The Environmental Protection Agency has registered triclosan as a pesticide, according to the complaint, and the Food and Drug Administration announced that it was reviewing the safety and effectiveness of products containing the chemical.

Based on the company's "pervasive multi-media advertising and product packaging," including its "natural" claims and a statement that it is "The Standard of Purity," the plaintiffs seek compensatory, actual, and/or statutory damages, a corrective advertising campaign, and an injunction halting the current advertising.

To read the complaint in *Eckstein v. Alexia Foods*, click here.

To read the complaint in *Hairston v. South Beach Beverage Co.*, click here.

To read the complaint in *Trewin v. Church & Dwight*, click here.

Why it matters: The suits demonstrate the breadth and depth of "all natural" suits that continue to be filed. From frozen foods to deodorant to corn oil and ice cream, advertisers of all kinds should be prepared to face a challenge if they choose to market their products as "all natural."

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If the Settlement Fits: Payless ShoeSource Settles Text Suit For Up to $6.25M

Payless ShoeSource will pay up to $6.25 million to settle a class action lawsuit alleging that the company sent unsolicited text messages.

The California suit claimed that Payless, its parent company Collective Brands, Inc., and mobile marketing firm Voice-Mail Broadcasting Corp., used an automatic dialer and violated the Telephone Consumer Protection Act by sending thousands of text messages to promote the sales of Payless' shoe lines. The texts were sent without prior express consent as required by the Act and some of the recipients were registered on Do Not Call lists.

Pursuant to the settlement, which has received preliminary approval from the court, Payless will issue a $25 merchandise certificate to each class member with an approved claim from a funded settlement pool of up to $5 million.

The company also agreed to implement new procedures and safeguards to prevent unwanted texts from being sent in the future. In addition to providing training to employees and not using any lists of cell phone numbers compiled prior to the filing of the case, the company agreed to establish a "double opt-in" requirement for future text offers. Settlement class members will no longer receive a text message from Payless unless they text the company and request the receipt of such text offers and then subsequently confirm their selection. "That alone makes the litigation a success," the plaintiffs said in their motion for final approval of the settlement.

On top of the possible exposure of $6.25 million, Payless also agreed to pay for settlement expenses and $1.25 million in class counsel fees and $20,000 in expenses.

To read the settlement agreement in *Kazemi v. Payless ShoeSource*, click here.

Why it matters: In their motion in support of final approval of the settlement agreement, the plaintiffs argued that the class received "all of the injunctive relief that they could possibly have sought through litigation." And while each class member would have been entitled to $500 in statutory damages under the TCPA had the suit been successful, the plaintiffs argued that "the maximum potential recovery is, in a sense, largely illusory." With a potential class composed of 8 million consumers, the over $4 billion award would pose a serious problem to Payless' financial health. Although the $25 merchandise certificates represent just 5 percent of the maximum potential recovery per class member, when "combined with the injunctive relief that precisely targets the allegedly unlawful conduct at issue in the litigation, such recovery provides truly meaningful benefit to the class," the

plaintiffs argued. The plaintiffs also noted that not a single objection to the settlement was filed, with only one plaintiff choosing to opt-out and over 22,500 claims already filed.

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Noted and Quoted...Edward Glynn's Comments at ABA Antitrust Meeting Featured in False Advertising Law Blog

On March 28, 2012, Rebecca Tushnet, Georgetown University Law Center professor and author of a 43(b) blog, covered highlights from a panel presentation at the ABA's 60th Annual Spring Meeting in Washington, D.C., on the Federal Trade Commission's current enforcement practices. Manatt's Edward Glynn, a partner in the advertising practice, served as chair of the panel, "The FTC's Use of Federal Court for Consumer Remedies," which examined how FTC enforcement activity has changed since the landmark Singer decision. Enforcement has shifted from administrative actions to stop violations to federal court injunctions with consumer redress. However, the panel noted that the FTC continues to exercise its discretion in terms of the appropriate forum to address alleged deceptive practices; it doesn't always seek redress.

In the years following the *Singer* decision and based on the FTC's recent activities, the defense bar may choose actions differently. According to Glynn, it's getting harder to settle. After evaluating the worst that can happen in litigation compared to the settlement being offered, "the difference is shrinking in many cases," he said.

To read the full post, click here.

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