

CONSUMER PROTECTION LAW UPDATE

November 2016 Report

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Agenda

- Federal Trade Commission
- State Attorneys General
- Consumer Financial Protection Bureau
- Private Litigation Developments
- NAD

Federal Trade Commission

Fresh Complaints

- **FTC Charges Prepaid Card Company with Deceptive Marketing (2-1 Commission Vote)**
 - FTC alleged that NetSpend, a prepaid debit card company, denied or blocked consumer access to their funds despite advertising claims that the consumers can “use it today”, have “immediate access” to their funds
 - Commissioner Ohlhausen voted no
- **FTC Charges Insulated House Wrap Marketer With Making False Claims (3-0 Commission Vote)**
 - FTC alleged that Pittsburgh-based Innovative Designs, Inc. made false and unsubstantiated claims about its Insultex House Wrap
 - Innovative Designs, Inc. claimed that its house wrap would provide significant insulation and advertised an insulation value that was flawed/invalid

Sales Lead Generators Settle FTC Charges

- Allegations:
 - Defendants, Consumer Education Group, made millions of illegal telemarketing phone calls to consumers on the Do Not Call Registry, violating the Telemarketing Sales Rule
 - Purpose of telemarketing campaign was to collect consumer information and then sell the information as leads to third party
- Settlement Terms:
 - Partially suspended \$2,339,687 penalty (\$100,000 due to inability to pay), and
 - Defendants barred from making unauthorized telemarketing calls to consumers

Debt Relief Defendants Settle FTC Action

- Allegation: Debt relief defendants promised to reduce consumers' credit card interest rates, for an up-front fee, but never delivered on that promise
- Settlement Terms:
 - Defendants banned from telemarketing and from selling debt relief services,
 - Complicit payment processors banned from the payment processing industry under settlements with the FTC and the State of Florida, and
 - Partially suspended judgments under three stipulated orders:
 - \$12.3M Debt Relief Defendants (surrender of frozen assets)
 - \$12.3M Payment Processors (\$1.8M)
 - \$2.5M Telemarketing Company (\$6K with surrender of assets)

Warner Bros. Consent Order

- Allegation: Warner Bros. deceived consumers when they failed to disclose that they paid online influencers to post positive gameplay videos about the company's action-adventure video game on YouTube and on social media
- Settlement Terms:
 - Warner Bros. must disclose material connections between the company and an influencer
 - Prohibits misrepresentation that an influencer is an independent user/ordinary consumer of the product



Fl. District Court Issues Summary Judgment Against Green Coffee Pitchman

- Allegation: “Pure Green Coffee” pitchman used deceptive marketing, including false weight-loss claims, bogus testimonials, and fake news websites to promote the “Pure Green Coffee” weight loss product
- Judgement:
 - The \$30M judgement also bars defendant from engaging in deceptive practices
 - The Court also entered judgment (\$550K) against a relief defendant who indirectly profited from the scheme

Rule Changes

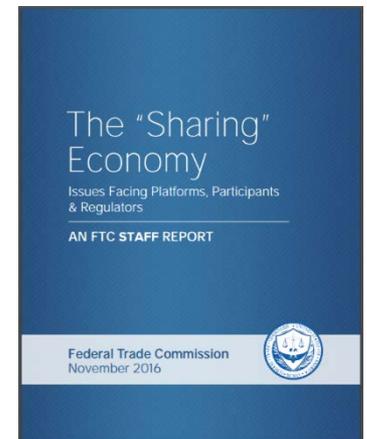
- Used Car Rule, Final Changes Approved
 - Revised description of an “as is” sale,
 - Buyer’s Guide check box to indicate if vehicle is covered by third party warranty and if a service contract is available
 - Requires that Buyer’s Guide include additional information about how to obtain vehicle history reports, and
 - Several other changes
- Seeking Comments on Amendment to Contact Lens Rule
 - Proposed Change: Prescribers must obtain a signed acknowledgement after releasing a contact lens prescription to the patient, and maintain it for at least three years.
 - Comment deadline is January 30, 2017

Guidance & Policy Statement

- Guidance: How to Defend Against Ransomware
 - Business and consumer guidance on how to protect devices and respond to ransomware
- Policy Statement: Marketing Claims for Over-the-Counter (OTC) Homeopathic Drugs
 - OTC homeopathic drugs and other products making similar claims to have same standard for efficacy and safety claims
 - What if claim not substantiated by competent and reliable scientific evidence? The claim may not be deceptive provided the advertisement effectively communicates that:
 1. there is no scientific evidence that the product works; and
 2. claims are based only on theories of homeopathy from the 1700s that are not accepted by most modern medical experts

Sharing Economy Report

- The “Sharing” Economy: Issues Facing Platforms, Participants, and Regulators
 - Analyzes evolving business models that rely on internet and app-based sharing economy platforms
 - Highlights competition, consumer protection, and regulatory issues given the growing popularity of sharing economy platforms



State Attorneys General

Settlements



- NY: \$25M Settlement in Trump University Case
 - \$1 million in penalties to New York for violating state education laws
 - NYAG alleged that defendants engaged “in persistent fraudulent, illegal and deceptive conduct in connection with the operation of Trump University”
- Multistate: Adobe \$1M Data Breach Settlement
 - 15 participating Attorneys General
 - Adobe agreed to regularly evaluate its practices for safeguarding personal information, and to comply with applicable state consumer laws



Recommendations and Reorganizations

- California AG's Comprehensive Recommendations to Protect Student Privacy and Their Data
 - Report outlines best practices for the education technology industry (“Ed Tech”)
 - The report's recommendations focus on: (1) Data Collection and Retention; (2) Data Use; (3) Data Disclosure; (4) Individual Control; (5) Data Security; and (6) Transparency
- Expansion and Reorganization of Virginia AG's Consumer Protection Section
 - 10 attorney positions in the Section (up from 5),
 - 18 additional personnel including investigators, dispute resolution specialists, intake specialists, and paralegals

Consumer Financial Protection Bureau

Beware of Unchecked Incentive Plans

- On Nov. 28, CFPB issued bulletin warning companies against using unchecked incentive plans for sales and production
- Cited incentive plans in many consumer financial markets, such as credit cards, mortgages, checking accounts, and debt collection
- Potential issues include:
 - Opening accounts without consent
 - Misrepresenting benefits of products
 - Steering consumers towards less favorable products
- Comes after Wells Fargo paid \$185 million in fines to settle similar charges

What's Next for the CFPB?

- Continued speculation about what the CFPB could look like in a Trump administration
- CFPB filed motion for *en banc* rehearing from the D.C. Circuit in *PHH Corp. v. CFPB*
 - D.C. Circuit initially ruled that the Agency's single-director structure is unconstitutional and requiring the director to be removable at will by the President

Private Litigation

Lanham Act False Advertising Cases

Protein Powder Makers Square Off

- *SI03 Inc. v. MuscleGen Research Inc.*, No. 16-cv-00274 (E.D. Mo.)
- SI03 alleges that MuscleGen falsely represents that its GenePro protein powder product contains approximately 30 grams of protein per tablespoon serving, when it actually only contains about 11 grams
- “MuscleGen's false and misleading representations regarding the protein content of its GenePro product deceive consumers, causing them to falsely believe that its product is superior to other protein powders, which it is not.”

Protein Powder Makers Square Off (cont'd)

- *SI03 Inc. v. MuscleGen Research Inc.*, No. 16-cv-00274 (E.D. Mo.)
- Also question of whether the protein is “medical grade”
- SI03 alleges that the designation is misleading in that it suggests that the product is superior to or different from competitors when that is not the case
- Claims for false advertising under Lanham Act and Missouri common-law claims for unfair competition and unjust enrichment
- Seeking an injunction, treble damages, and attorneys’ fees

Consumer Fraud Class Actions

Courts Continue to Grapple with How to Apply *Spokeo*

- *JWD Automotive Inc. v. DJM Advisory Group LLC*, No. [2:15-cv-00793](#) (M.D. Fla.)
- Suit alleges that company received junk faxes in violation of the Telephone Consumer Protection Act
- DJM argued that plaintiff lacked standing under *Spokeo*
- Judge rejected DJM’s argument and found that JWD has Article III standing because “at least some of the particularized harm alleged ... — loss of toner and paper and the unwanted temporary occupation of plaintiff’s fax machine and telephone line — is tangible in nature”
 - “[I]n this circuit, the successful transmission of even a single unsolicited fax causes an injury sufficiently concrete and particularized to confer standing under Article III to assert a TCPA claim.”

Spokeo applied (cont'd)

- *O'Shea v. P.C. Richard & Son LLC*, No. [2:15-cv-09069](#) (S.D.N.Y.)
- Consumer alleged that electronics and appliances chain P.C. Richard printed too much information on receipts in violation of the Fair and Accurate Credit Transactions Act
 - Receipt allegedly included expiration date and last four digits of credit card number
 - FACTA enacted in 2003; effective compliance date of 2006
- P.C. Richard argued that the consumer lacked standing, relying heavily on *Spokeo*

Spokeo applied (cont'd)

- *O'Shea v. P.C. Richard & Son LLC*, No. [2:15-cv-09069](#) (S.D.N.Y.)
- Consumers countered and argued that the “violation of a federal substantive right is sufficient in and of itself to confer Article III standing”
- Essentially arguing that even if FACTA were a procedural statute, it still confers Art. III standing
- Case is ongoing

VW Facing New Allegations over Audi Gasoline Engines

- *Platt v. Audi AG*, No. 16-cv-06738 (N.D. Cal.)
- Plaintiffs allege that Audi sold certain automobiles with gasoline engines with an illegal emissions defeat device designed to evade government emissions regulations by falsely portraying the affected vehicles as emitting far less carbon dioxide gas than they actually do
- Similar but separate from allegations resolved in October 2016 settlement against Volkswagen AG (Audi's parent company) involving diesel allegations
- Plaintiffs cite a November 2017 German newspaper article that reported that the California Air Resources Board (CARB) had found that Audi had secretly been installing emissions defeat devices in vehicles with gasoline engines

Nivea Skin Firming Lotion – Cosmetic or Drug?

- *Franz v. Beiersdorf Inc.*, No. [3:14-cv-02241](#)
(S.D. Cal.)
- Consumer class action against Nivea alleging that its skin-firming lotion is an unapproved drug
- Beiersdorf seeking dismissal, alleging that the product is indisputably a cosmetic under FDA's latest regulations
- Plaintiff responds that the motion for dismissal would require affirmative proof as to intended use, a question of fact that can't be decided at this stage

Other Notable Cases

Dr. Oz. vs. the Olive Oil Industry?

- *North American Olive Oil Association v. Mehmet Cengiz Oz* (Ga. Super. Ct.)
- Association alleged that Oz made a series of false statements regarding the quality of olive oils sold in U.S. supermarkets
 - 80 percent of olive oil sold in the U.S. “isn’t the real deal”
- Also alleged that Oz failed to disclose material connection of expert featured on the program



Dr. Oz. vs. the Olive Oil Industry? (cont'd)

- *“This case is particularly troubling because in many previous controversies Dr. Oz has recommended products with no proven benefits, but in this case his false and careless words have discouraged millions of people from using a product with scientifically demonstrated advantages.”*
- Includes counts for disparagement of perishable food products, tortious interference with business relations and negligent misrepresentation

National Advertising Division

Pavlok, Wearable Wristband

- Behavioral Technology Group, Inc., NAD Case #6028 (Nov. 22, 2016)
- NAD opened case to examine claims that device helped users break bad habits such as smoking, nail-biting, unhealthy eating and overspending and that consumers could “see results in just a few days”
- NAD found that the results of a user survey did not provide a reasonable basis for the claims
 - Only 148 users responded to survey and advertiser did not submit methodology
 - “a properly conducted consumer use survey requires certain standards and controls to ensure that the responses are free from bias (e.g., blinding, randomization), that there is a representative study population, and that there is proper validation of the results”

Pavlok, Wearable Wristband (cont'd)

- NAD also recommended that advertiser discontinue use of testimonials suggesting that users quit their bad habits
- NAD reviewed evidence in connection with aversion therapy to determine whether it constitutes competent and reliable scientific evidence
 - Only one study on the Pavlok device itself – 8 person pilot study
 - Animal studies also were insufficient
 - “NAD has consistently held that animal studies, without more, cannot support advertising claims for products marketed for use by humans”



Body Armor SuperDrink

- BA Sports Nutrition, LLC, Case #6026 (Nov. 21, 2016)
- Stokely-Van Camp Inc. (maker of Gatorade) challenged claims for Body Armor SuperDrink including:
 - Many challenged claims had already been discontinued except “ditch artificial sports drinks” and “Switch to BodyArmor”
- Question related to whether reasonable consumer would think that Gatorade’s most popular product, Thirst Quencher, contains artificial colors, sweeteners, and flavors
 - Not disputed that Thirst Quencher does not

Body Armor SuperDrink (cont'd)

- NAD noted that there's no limiting reference that suggests that only certain other sports drinks contain artificial colors, flavors and sweeteners
- As such, recommended that the claim "Ditch artificial Sports Drinks: artificial flavors, artificial sweeteners, artificial colors" be discontinued
- Found that the following claim was supported: "Switch to BodyArmor Sports Drink: Natural Flavors, Natural Sweeteners, No Colors from Artificial Sources"

Questions?

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