Advertising Law

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Gillette's Close Shave: Judge Dismisses Deceptive Ad Suit

A U.S. District Court judge dismissed a potential class action against Gillette in a suit that accused the razor manufacturer of making false claims about its Fusion Power razor system. Plaintiff Ryan Edmunson alleged that Gillette deceptively advertised its Fusion Power system as superior to its Fusion manual system, and that as a result he paid 20 percent more for the Power product.

According to the plaintiff, Gillette advertised the Power cartridges as materially different from – and superior to – the Fusion manual razors, and claimed that the Power handle requires use of the Power cartridge, but in fact the cartridges are interchangeable and have no material differences.

The plaintiff also maintains that the Power cartridge labels say the blades have "a patented blade coating for incredible comfort," while the Fusion manual blades fail to disclose that they are also made with the same coating. Gillette also charged 20 percent more for the Power cartridges, "which itself suggests a meaningful difference between the two" types of cartridges, according to the complaint.

The judge dismissed the suit, ruling that the plaintiff's first claim was no more than puffery.

The alleged misrepresentation that Fusion Power razors are different and superior to Fusion manual razors "is not actionable," U.S. District Court Judge Irma E. Gonzalez wrote. "An alleged misrepresentation must relate to an objectively verifiable fact; subjective representations related to product superiority are mere puffery and are not actionable." She noted that the plaintiff pointed "to no authority supporting his contention that, for a manufacturer to advertise that two of its products differ, the products must differ by some specified degree. Whether the difference in the quality and comfort of the shave provided by the Fusion Power versus the Fusion manual razors is 'material' depends on individual consumers' subjective preferences."

With respect to the plaintiff's second alleged misrepresentation – the compatibility of the Fusion Power and manual cartridges with the Fusion Power and manual handles – the court said the claim was potentially actionable, but that the plaintiff failed to state any specific factual allegations about his purchases or his use of the products.

To read the court's order dismissing the suit, click here.

Why it matters: Although the court dismissed all of the plaintiff's claims against Gillette, they were dismissed with leave to amend. Judge Gonzalez wrote that the plaintiff failed to allege when, where, or how many times he purchased Fusion Power cartridges, nor did he specify how often he was exposed to the alleged misrepresentations, or whether he purchased any Fusion handles at all. The opinion therefore provides a blueprint to providing sufficient allegations should the plaintiff decide to refile a complaint.

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FTC to FCC: Hold Sellers Liable for Third-Party Calls

Emphasizing the need for consistent enforcement, the Federal Trade Commission submitted a comment to the Federal Communications Commission urging that the sellers of goods and services should be held responsible for sales calls made by others on their behalf, even if the seller did not physically place the calls.

The comment came as part of the lawsuit brought by the FTC and four states against Dish Network in which they alleged that the company engaged in multiple violations of the Do Not Call rules.

The FCC asked questions regarding the interpretation of the Telephone Consumer Protection Act: First, does a call placed by an entity that markets a seller's goods and services qualify as a call made on behalf of, and initiated by, the seller, even if the seller does not physically place the call? And second, what should determine whether a telemarketing call is made "on behalf of" a seller, thus triggering liability under the TCPA? Should federal common law agency principles apply, and what, if any, other principles could be used to define "on behalf of" liability for a seller under the TCPA?

Relying on its experience enforcing the Telemarketing Sales Rule – and referencing its 59 enforcement actions alleging Do Not Call violations since 2003 – the FTC answered the first question in the affirmative and said the plain meaning of "on behalf of" should be used when determining if illegal conduct took place.

Responding to what constitutes a marketer's efforts "on behalf of" a seller, the FTC said the question turned upon "whether the marketer's solicitations are in the seller's 'interest' or 'aid' or for the seller's 'benefit.' "

This definition "ensures that sellers will not be rewarded for turning a blind eye to those who market sellers' goods or services and whose marketing efforts inure to sellers' benefit," the FTC said.

An opposite interpretation would "completely subvert Congress's privacy-protection goals," according to the FTC, because sellers could avoid liability by having others place calls on its behalf.

The FTC has emphasized that it "consistently maintained" that "a seller cannot escape liability for the telemarketing violations of its marketer," and the two agencies should strive for a uniform application of the Do Not Call rules.

"Conformity in this regard is essential to promote key law enforcement goals and to effectuate Congress's mandate to create a federal standard for protecting consumers' privacy," according to the comment.

The FTC noted that the FCC itself concluded in 1995 that an entity could be liable under the TCPA for a call made on its behalf where the entity did not place the call, and said that order was consistent with its own precedent.

To read the text of the FTC's comment, click here.

Why it matters: "The Do Not Call Registry is important to the FTC, but is absolutely critical to consumers who want a stop to the telemarketing and robocalls that interrupt their dinner hour," FTC Chairman Jon Leibowitz said in a statement about the case. "We hope that the FCC acts quickly to resolve this issue." According to Chairman Leibowitz, resolving the questions in the manner urged by the FTC would "effectuate consumers' desire to protect their privacy and avoid telemarketing calls," as well as to "ensure [that] the FTC and the FCC can effectively protect consumers' privacy by holding both sellers and their marketers liable for violations of Do Not Call and Robocall Rules."

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FTC Files Suit over "Free Vacation" Scams

The Federal Trade Commission filed two actions against several companies and individuals engaged in what the agency alleged is a nationwide "Free Vacation" prize scam.

According to the Commission, the defendants used Spanish language radio and TV ads to offer a vacation package supposedly worth thousands of dollars that callers could win if they correctly answered a trivia question; while in fact, "winners" were either unable to collect their prize or paid a fee up to $400.

VGC Corporation of America's television ads said, "Attention! This program has been interrupted. It's time to win for the first thirty people that dial the number that appears on the screen and can tell me correctly how that famous Mexican comedian (Mario Moreno) was also known. . . If you know the answer. . . you are going to Disneyland!" In the background, images of Disneyland included Mickey Mouse and the Magic Castle.

Similar radio ads encouraged consumers to call with the name of a country without the letter "A" in it, the agency said.

According to the complaint, VGC "uniformly" told consumers they had won, but then later notified them they were not eligible, or they had failed to meet previously undisclosed conditions or restrictions, such as age, income, or marital status requirements, or had failed to attend a timeshare presentation.

The company and three individuals were charged with violating the FTC Act, while the Florida Attorney General alleged they violated the state's unfair and deceptive trade practices law. A U.S. District Court in Florida granted the FTC's motion to halt the defendants' business operations and freeze their assets pending further litigation.

In the second suit, the Commission charged Holiday Vacations Marketing Group, Happy Life Corporation of America, Happy Life Carribbean Corp., and two individuals with operating a similar scam from April 2009 to June 2010.

In the defendants' ads, consumers were instructed to "Dial now and tell me what animal lays eggs and is not a bird, and the whole family wins" a trip to Disney.

Again targeting Spanish-speaking consumers, the defendants asked for a credit or debit card number when consumers called to accept their prizes. Accounts were charged with a fee up to $400, according to the agency, and some consumers were mailed terms and conditions telling them to pay their own airfare.

Consumers who tried to redeem their prize often could not reach an operator, according to the FTC, or were unable to reserve the number of nights they were promised for their trip. Others learned of additional requirements after their arrival at Disney.

The FTC said that one consumer traveled from Texas to Florida and was charged for her hotel stay because she failed to attend a timeshare presentation that was scheduled the day after her departure.

The agency said consumers who tried to complain or get a refund struggled to make contact with the defendants or did not receive promised refunds.

To read the complaint in *FTC v. VGC Corporation*, click here.

To read the complaint in *FTC v. Holiday Vacations Marketing Group*, click here.

Why it matters: The Commission said the two actions were filed as part of the agency's Hispanic Law Enforcement Initiative and its ongoing efforts to combat telemarketing travel fraud. In the complaint against VGC Corporation, the FTC said telemarketers had a script (obtained from a former employee) which directed employees to tell consumers that "this is the winning call!" The script further instructed employees to "Transmit emotion" and "take advantage of the emotion that the client is feeling, use it to your favor!!" with comments such as, "Congratulations to you and your family!" and "Wonderful! Perfect!!"

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Third Time's a Charm for Suit Against Yelp

A group of businesses has filed a third amended complaint against the business review site Yelp, claiming that the defendant offered to hide bad reviews if the plaintiffs purchased advertising on the site.

The plaintiffs – the operators of a furniture restoration company, dental practice, veterinary clinic, and a body shop – claim that they were subject to "extortion and/or attempted extortion" by Yelp employees to obtain payments for advertising.

The suit seeks to certify two separate classes of plaintiffs: those that purchased advertising and those that did not. Representative of those that did not, plaintiff Boris Levitt, owner of Renaissance Furniture Restoration, claims that he was called twice by a Yelp sales rep who wanted him to purchase advertising on the site. When he was contacted by the representative, he had an overall rating of 4.5 stars; two days after he declined to purchase advertising, his overall rating dropped to 3.5 stars and he received fewer page views. According to the complaint, his business suffered accordingly. "Yelp manipulated the reviews of Levitt's business because he did not purchase advertising as a threat and with the intent to instill fear in Levitt that he needed to purchase advertising to avoid a further decrease in the positive reviews posted about his business."

Dr. Tracy Chan, DDS, the named plaintiff for those who purchased advertising, asserted that she paid for advertising on Yelp for her California-based dental practice, but claims

Yelp removed nine 5-star reviews from her page and dropped her overall star rating from 5 stars to 3 stars after she stopped purchasing ads.

“As a result, and out of fear of further manipulations, Chan felt compelled to sign up for advertising on Yelp so that Yelp would reinstate the positive reviews,” according to the complaint.

The suit was filed in California federal court.

To read the complaint in *Levitt v. Yelp*, click here.

Why it matters: Yelp responded to a previous suit by releasing a statement that it plans to fight the claims. “The allegations are demonstrably false, since many businesses that advertise on Yelp have both negative and positive reviews,” the company said. Although prior complaints against the company were dismissed earlier this year, the plaintiffs have continued to amend their claims and pursue the litigation.

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FTC to Update Online Ad Law Guidance

Looking to update its guidance on how federal advertising law applies to the Internet, the Federal Trade Commission announced that it is revising its 2000 “Dot Com Disclosures: Information About Online Advertising” document to update the guidelines to reflect technological and legal changes of the last 11 years.

“Eleven years ago, mobile marketing was just a vision, there was not an ‘App’ economy, the use of ‘pop-up blockers’ was not widespread, and online social networking was nowhere as sophisticated or extensive as it is today,” the FTC said in its request for public comment.

“The primary focus of the 2000 publication was to counsel marketers on how to provide clear and conspicuous disclosures of information that consumers needed in order to make informed decisions about goods and services being offered on the Internet,” the agency said, and to emphasize that consumer protection laws applied online as well as off.

Recognizing that the online world has changed dramatically since 2000, the agency is seeking comment on the following specific questions:

• What issues have been raised by online technologies or Internet activities or features that have emerged since the business guide was issued (e.g., mobile marketing, including screen size) that should be addressed in a revised guidance document?

• What issues raised by new technologies or Internet activities or features on the horizon should be addressed in a revised business guide?

• What issues raised by new laws or regulations should be addressed in a revised guidance document?

• What research or other information regarding the online marketplace, online advertising techniques, or consumer online behavior should the staff consider in revising "Dot Com Disclosures"?

• What research or other information regarding the effectiveness of disclosures – and, in particular, online disclosures – should the staff consider in revising "Dot Com Disclosures"?

• What specific types of online disclosures, if any, raise unique issues that should be considered separately from general disclosure requirements?

• What guidance in the original "Dot Com Disclosures" document is outdated or unnecessary?

• What guidance in "Dot Com Disclosures" should be clarified, expanded, strengthened, or limited?

• What issues relating to disclosures have arisen from such multiparty selling arrangements in Internet commerce as (1) established online sellers providing a platform for other firms to market and sell their products online, (2) website operators being compensated for referring consumers to other Internet sites that offer products and services, and (3) other affiliate marketing arrangements?

• What additional issues or principles relating to online advertising should be addressed in the business guidance document?

• What other changes, if any, should be made to “Dot Com Disclosures”?

Comments can be submitted until July 11, 2011.

To read the current guidance, click here.

Why it matters: The updated “Dot Com Disclosures” could have a significant impact on Internet advertising, including issues related to affiliate marketing and the challenges of making clear and conspicuous disclosures on the small screen of a mobile device or within the 140-character confines of Twitter.

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