Advertising Law manatt

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U.S. Supreme Court to Decide Marketing Consent Law

The United States Supreme Court granted certiorari to decide whether the First Amendment prohibits a law that requires the consent of drug prescribers before their non-public, identifying information is sold or marketed.

Vermont enacted a law banning the sale, transmission, or use of prescriber-identifiable data for marketing or promotion of a prescription drug unless the prescriber consents. Data-mining companies typically purchase data about which drugs are prescribed by which doctors. While the information doesn't include patient names, the companies can match the doctors' names to specific drugs and then target them for individualized medication-related sales pitches.

IMS Health, a data-mining company, challenged the Vermont law, arguing that it violates its First Amendment rights because the purchase of the information is a constitutionally protected form of commercial speech.

The 2nd Circuit agreed and concluded that the statute was overbroad and that Vermont could have enacted a more limited restriction on speech.

The 2nd Circuit stated: "Because the statute restricts speech even with regard to prescriptions of breakthrough brand-name medications for which there are no generic alternatives, and because the state could pursue alternative routes that are directly targeted at encouraging the use of generic drugs the state wishes to promote, the state has not demonstrated that its interests in protecting public health and containing health care costs could not be as well served by a more limited restriction on speech."

Similar "prescription privacy" laws have been passed in Maine and New Hampshire, and were upheld by the 1st Circuit when challenged by the data-mining companies.

The justices have not set the case for oral argument but should hear it later this term.

To read the 2nd Circuit's decision in *Sorrell v. IMS Health Inc.*, click here.

Why it matters: While the case is limited to Vermont law, a decision from the court could have an impact on privacy issues more generally. Although the information purchased by data-mining companies generally does not include patient names, privacy rights groups have objected to the practice on the grounds that sufficient information could be obtained to re-identify a person. And the arguments made by the data-mining companies – that limits on their ability to track purchase information limits their free speech rights – are similar to those made by behavioral tracking companies when faced with potential regulation or litigation.

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NAD Weighs In on Toning Shoes

In a recent decision, the National Advertising Division recommended that Reebok discontinue certain claims for its EasyTone toning shoe line made in print and Internet advertising.

Although the decision was not prompted by a competitor challenge, the NAD nevertheless requested substantiation from Reebok for certain performance and establishment claims like "Better legs and a better butt with every step" and "It's the shoe proven to work your hamstrings and calves up to 11% harder and tones your butt up to 28% more than regular sneakers just by walking."

The NAD determined that a 2008 study commissioned by Reebok did not support the advertiser's quantified performance claims.

The study included just five subjects who were assigned to wear Reebok's EasyTone shoes, regular walking shoes, or no shoes at all on an indoor treadmill at a freely chosen pace for five minutes, with electrodes attached to key muscle areas.

"[T]his was a very small scale study both in number of participants and duration of the study," the NAD noted, adding that a sample size of five participants is not sufficiently "representative of the universe of consumers to whom this product making broad performance claims is targeted. It is well-established that tests offered to support product performance claims must reflect real world conditions. Here, the only testing that was conducted was on a treadmill for a five-minute period of time."

Although test results for the subjects wearing EasyTone shoes "suggest[ed] the potential" for greater muscle force generation and greater metabolic expenditure, the NAD concluded that such "results that suggest potential toning are insufficient to support unequivocal claims that you *will* 'tighten and tone with EasyTone' and 'get a better butt.'"

Finding that Reebok's quantified and general strengthening and toning claims had insufficient support, the NAD recommended that they be discontinued.

In its advertiser's statement, Reebok said it disagreed with the NAD's conclusions, but would take the findings into account in future advertising.

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

Why it matters: "Product testing should reflect consumers' real world experience to ensure performance claims are meaningful," the NAD decision reminded advertisers. Advertisers should ensure that their claims can be

adequately substantiated with tests that reflect real world conditions. The NAD's decision comes at an interesting moment for the toning shoe industry, as several recent false advertising class actions have been filed against Reebok's competitors, like Skechers and New Balance.

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'Well-Known' Robocaller Banned from Telemarketing

A robocaller agreed to a permanent ban from all telemarketing-related business as part of a settlement with the Federal Trade Commission over claims that he and his business, The Dolce Group Worldwide, used prerecorded robocalls to sell consumers auto service contracts.

Fereidoun "Fred" Khalilian was "well-known" to the FTC after a 2001 settlement that banned him from all travel-related telemarketing and required him to pay $185,000 for making deceptive travel package pitches.

The new operation, known as My Car Solutions, allegedly used prerecorded robocalls to warn consumers that their car warranties were about to expire. When consumers pressed a button to speak with a representative, they were transferred to a telemarketer who claimed to be from the "service contract department" who asked to "verify" information about the consumer's car and "confirm" other information, according to the FTC complaint.

Only after consumers purchased the warranties did they learn My Car Solutions was not affiliated with their car manufacturer and the warranties had limited coverage and excluded certain pre-existing conditions, the FTC said. Consumers paid between $1300 and $2845 for each warranty.

Under the terms of the settlement, Khalilian and The Dolce Group are banned from telemarketing or helping others to telemarket, and are prohibited from making any misrepresentations or omissions when selling any goods or services. The settlement included a monetary judgment of $4.2 million,

which will be satisfied in part by Khalilian's turning over corporate and personal property.

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

To read the settlement order in *FTC v. Khalilian*, click here.

Why it matters: The settlement – and permanent ban from telemarketing for the defendant – are the latest action in the FTC's crackdown on deceptive prerecorded calls. Telemarketers should remember that prior, written consent is now required before robocalls can be made to consumers, regardless of whether a relationship already exists. Companies must also include information at the beginning of the call about how to stop future calls and provide an automated opt-out mechanism as part of the call.

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FTC Settles False Environmental Certification Claims

The Federal Trade Commission settled with Tested Green and its owner over claims that the company advertised, marketed, and sold phony environmental certifications via its Web site and mass e-mails to consumers.

Tested Green claimed it was the "nation's leading certification program with over 45,000 certifications in the U.S." but actually failed to test any of the companies it provided with an environmental certification, the FTC alleged.

Instead, for either $189.95 or $549.95 (for a "Rapid" or "Pro" certification), the company would issue a certificate to anyone, the FTC said.

The FTC alleged that while the Tested Green Web site said that certification seekers must answer a series of green-related questions and possibly submit to a site visit to verify their green practices, applicants were merely required to provide a name and address, and pay for the certificate.

In fact, 129 consumers who applied for and paid the designated amounts were provided with a Tested Green logo and a link to a "certification verification page" that they could use to advertise a "certified" status.

The company cited endorsements from two environmental groups, the National Green Business Association and the National Association of Government Contractors, but both "independent organizations" were in fact owned and operated by Jeremy Ryan Claeys, the owner of Tested Green, the FTC said.

Under the terms of the settlement, both Claeys and Tested Green are barred from future misrepresentations about certifications or evaluations of environmental attributes, specifically whether an outside party has evaluated a product, service, package or program based on its environmental attributes; or whether they or a third party has the expertise to evaluate the environmental benefits or attributes of a product, service, package, or program.

To read the complaint in *In the Matter of Nonprofit Management LLC*, click here.

To read the consent order, click here.

Why it matters: Environmental claims remain high on the FTC's radar, and the agency has vowed to protect consumers who rely on earth-friendly claims. "It's really tough for most people to know whether green or environmental claims are credible," said David Vladeck, Director of the FTC's Bureau of Consumer Protection, in a statement about the Tested Green settlement. "Legitimate seals and certifications are a useful tool that can help consumers choose where to place their trust and how to spend their money. The FTC will continue to weed out deceptive seals and certifications like the one in this case." With the release of proposed revisions to the FTC's Green Guides, scrutiny of environmental claims will continue.

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Kellogg Settles Again, This Time Over Rice Krispies

Kellogg Co. has agreed to pay $5 million to settle a class action lawsuit over claims made about the company's Rice Krispies cereal.

The federal suit alleged that Kellogg falsely claimed the cereal boosts children's immune systems. The company settled with the Federal Trade Commission over similar claims in June 2010.

In the summer of 2009, Kellogg launched a new ad campaign for Rice Krispies, which included product packaging claiming the cereal "Now helps support your child's immunity" and that "Kellogg's Rice Krispies has been improved to include antioxidants and nutrients that your family needs to help them stay healthy."

Kellogg used the claims for just six months before being challenged by the Oregon attorney general. It settled with the AG, agreeing to destroy 2 million units of packaging and donating the cereal to charity organizations. The FTC then took action, and a number of private suits followed, which were consolidated into one class action in California federal court. The plaintiffs claimed that Kellogg did not have a clinical study that adequately supports its claims and that it failed to adequately disclose whether the inclusion of sugar and high fructose corn syrup negates or otherwise decreases any health and immunity benefits.

Under the terms of the class action settlement, Kellogg admitted no fault, but agreed to pay consumers $2.5 million (between $5 and $15 per consumer) and to donate $2.5 million worth of Kellogg products to charity. The company also agreed to discontinue making claims of immunity benefits unless it has competent and reliable scientific evidence to support the claims.

To read the settlement agreement in *Weeks v. Kellogg*, click here.

Why it matters: Will this settlement end Kellogg's legal woes? In addition to facing litigation over its Rice Krispies claims, the company recently reached a $10.5 million settlement over attention-boosting claims made about its Frosted Mini-Wheats – claims that it had already settled with the FTC. Under

the terms of its amended FTC consent order, Kellogg is now prohibited from making claims about any health benefit of any of its food products, unless the claims are backed by scientific evidence and are not misleading.

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