Hot Ad Law Topics for 2020

Resolve this new year to avoid advertising mistakes that could result in class actions, regulator enforcement, or competitor claims. Five advertising law takeaways for brand and legal teams to consider for 2020 follow.

1. **Watch out for influencer and endorser developments.** The Federal Trade Commission (FTC) recently published *Disclosures 101 for Social Media Influencers*, providing additional compliance tips for influencers, and brought an action against sellers of "fake indicators of social media influencers," offering fake "likes" or followers). The agency also has signaled that influencer compliance will remain a point of emphasis in 2020. For example, the FTC reported that it will review its Endorsement Guides in 2020 and potentially update its guidelines after completing that process. Good policies and contract terms are only the tip of the compliance iceberg, and it is more important than ever for advertisers to have a sensible compliance program to manage these relationships and address influencer-related compliance requirements.

2. **Remember "Made in the USA" origin claim standards.** Surveys have shown that American consumers often prefer to buy, and are even willing to pay more for, products that are advertised or labeled as "Made in the USA." Brands therefore frequently market their products as Made in USA, sometimes in a way that is false or misleading. This trend has resulted in a steady stream of FTC and state enforcement actions targeting misleading Made in USA claims. In mid-November the FTC even held a public workshop asking how the agency can improve its Made in USA enforcement program. This continued investment in and prioritization of Made in USA enforcement by the FTC should serve as a reminder to businesses to carefully consider the rigorous state and federal standards governing Made in USA claims before they are made.

3. **Don't prohibit honest consumer reviews and or use reviews in a misleading way.** The FTC enforced the Consumer Review Fairness Act (CRFA) several times in 2019. These actions reinforce that brands must not restrict honest reviews about the brand's products, services, or conduct or impose a penalty or fee on someone who gives a negative review. In addition, the FTC has cracked down on the purchase of "fake reviews," emphasizing that reviews must be truthful and reflect the sincere and honest beliefs of the reviewer. Finally, two commissioners

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indicated that there might be a growing appetite (at least among certain commissioners) to aggressively seek monetary relief in such cases.

4. **Substantiate your CBD claims.** 'Tis the season to get your CBD advertising in order, as the FTC (sometimes jointly with the Food and Drug Administration) has begun issuing warning letters to businesses advertising CBD products. The most common theme of these letters? Don't make unsubstantiated claims about the benefits of CBD, particularly health claims which require competent and reliable scientific evidence. Word of mouth, news articles, and consumer testimonials do not count as adequate substantiation for CBD health claims. And even broad CBD claims like "works like magic" have triggered FTC warning letters.

5. **Review hidden fees and drip pricing practices**. Class actions and government enforcement actions have proliferated around the practices of "drip pricing" (where fees are not disclosed until the end of a transaction) and adding "hidden" or disguised fees to a consumer transaction (e.g., implying a fee is a tax or other government fee when it is not). It may be time to audit your pricing practices to make sure all relevant fees are accurately described and clearly and conspicuously disclosed.

Check with experienced advertising law counsel if you have any questions, and follow us at consumerprotectionreview.com to read more about ad law developments throughout 2020.

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