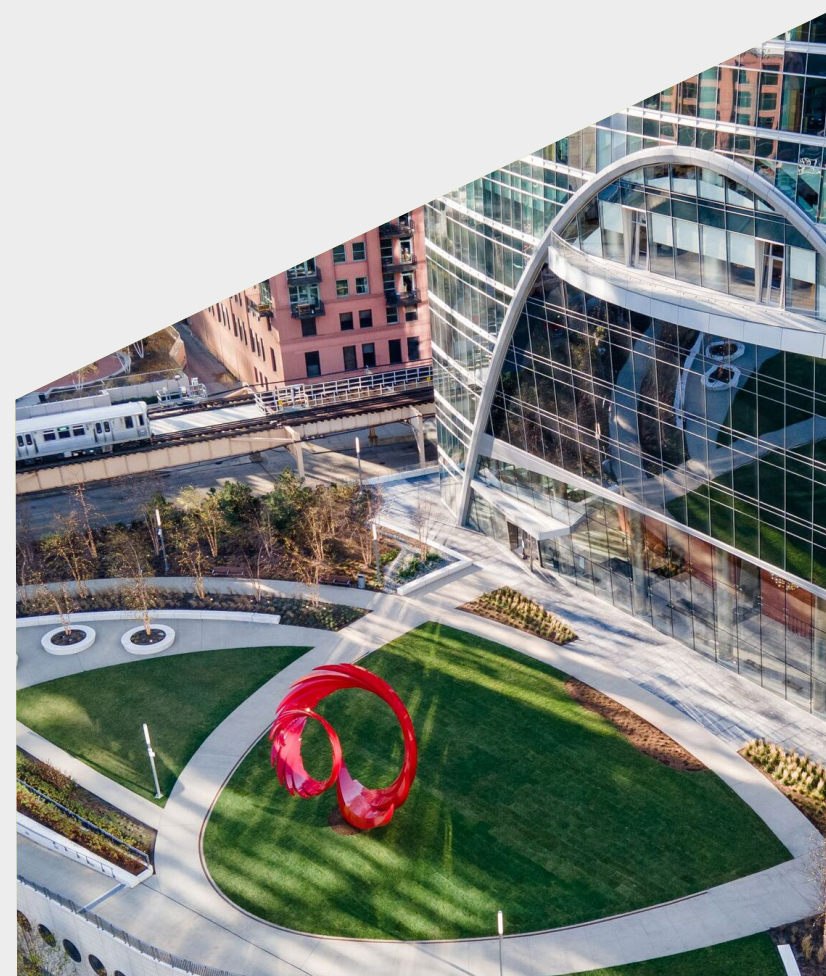




ADVERTISING & MARKETING – NAVIGATING KEY COMPLIANCE ISSUES AND ENFORCEMENT TRENDS

November 10, 2022

[mwe.com](https://www.mwe.com)



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ADVERTISING CAMPAIGNS





BASIC ADVERTISING REQUIREMENTS

- Claims (express, implied, comparative) must be **substantiated** before they are made
 - If an ad can be reasonably **interpreted in multiple ways**, each reasonable interpretation must be true
 - The **net impression** of the ad must be true
- Advertising cannot be **false or misleading**
- Cannot be **deceptive** (must disclose “material” facts and can’t present facts in a false or deceptive light)

WHAT CLAIM NEEDS TO BE SUBSTANTIATED?

- FTC reviews advertisements from the point of view of a “reasonable consumer”
 - A consumer acting reasonably in the circumstances
 - This standard does not preclude multiple interpretations of a claim
- If the promotion is directed primarily to a particular group, the agencies examine reasonableness from the perspective of that group
- Certain groups are considered vulnerable and receive higher scrutiny – *i.e.*, elderly, disabled

WHAT IS REQUIRED FOR CLAIM SUBSTANTIATION?

- An advertiser must have a **reasonable basis** for all express and implied claims about the product or service before disseminating the claims
- If an advertiser makes an express or implied statement about the amount of support it has for a claim (e.g., “studies show”), it must have the **amount and type of substantiation claimed**

CLAIM SUBSTANTIATION CONT'D

- In addition to a reasonable basis, the exact **amount and type of substantiation** required depends on several factors, including:
 - the claim being made
 - the consequences of a false or misleading claim
 - the benefits of a truthful claim
 - the cost of substantiating the claim
 - the substantiation that experts in the field would consider reasonable

WHAT IS “FALSE OR MISLEADING”?

- Claims may be **false or misleading** if they:
 - Do not include appropriate content and context of information
 - Misrepresent literature, data, or quotes from other sources
 - Use headline, pictures, or graphic matter in a misleading manner
 - Suggest something is safer or more effective than has been demonstrated
 - Health and safety claims require a higher level of substantiation and more scrutiny

WHAT IS “DECEPTIVE”?

- Claims can be truthful, but also misleading, usually due to omissions
- **Material** omissions can be deceptive
 - “Material” – important to a consumer’s decision to buy or use the product or service
- **Examples of material claims:**
 - A product or service’s performance
 - Features
 - Safety
 - Price
 - Effectiveness or the consequences that may result from the use of the device as recommended

BE CAUTIOUS WITH DISCLOSURES

- Sometimes a disclosure is necessary to prevent an advertisement from being deceptive or misleading
- Disclosures **cannot contradict claims** themselves
- To be effective, disclosures must be **clear and conspicuous**:
 - Use unambiguous language
 - Place any qualifying information close to the claim being qualified
 - Avoid using small type or any distracting elements
 - Prominently display the disclosure

SOCIAL MEDIA ENGAGEMENT



THIRD-PARTY MEDIA CONTENT

- Third-party media content and “native advertising” are growing in popularity as a way to connect with customers and leverage third-party messaging to support product messages
- Because these trends are evolving, current marketing and promotion laws do not specifically address the full range of these activities
- Use of or support for third-party media content can trigger FTC advertising and promotion laws
- It is important to develop guiding principles for these activities that address and minimize legal and compliance risks

THIRD-PARTY CONTENT: FTC IMPLICATIONS

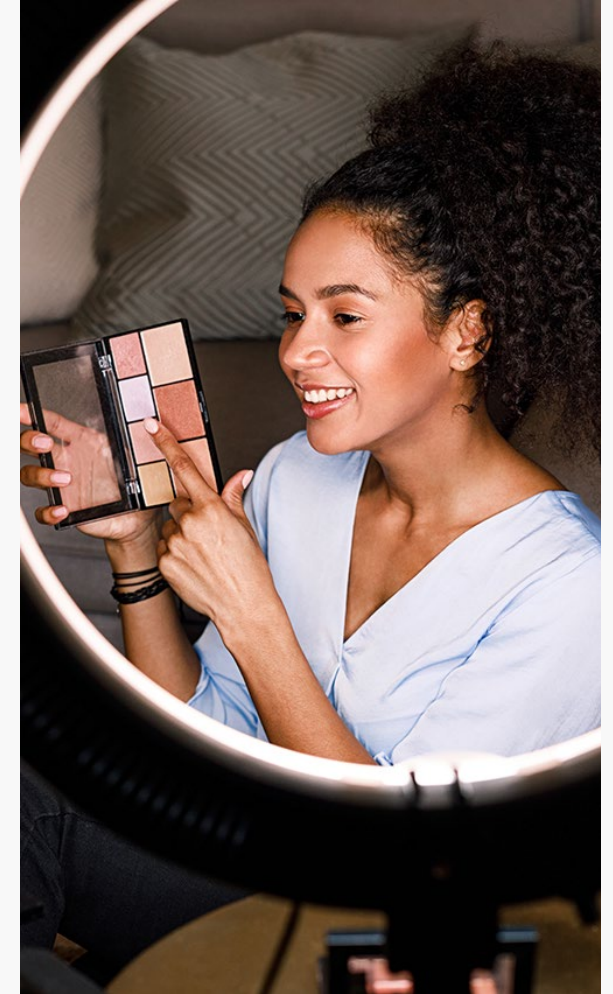
- Governed by the FTC's *Endorsement Guides* (16 C.F.R. Part 255)
 - Endorsements cannot convey express or implied claims that would be deceptive if advertiser made them directly
 - Must have adequate substantiation for all claims (express or implicit) made through endorsements
 - Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser
 - If the ad represents that the endorser used the product, they must have been a bona fide user
 - Must disclose material connections with the endorser

THIRD-PARTY CONTENT: DISCLOSURES

- Material connections must be adequately disclosed on all endorsements, including statements in social media
 - Material Connection:
 - any financial, employment, personal, or family relationship with a brand, including receiving free product or anything of value
 - Adequate Disclosure:
 - clear and conspicuous, “can’t be missed”
 - #ad before clicking more, displayed in the first 2-3 lines
 - “standing alone”

THIRD-PARTY CONTENT: OTHER CONSIDERATIONS

- Be aware that social media posts can trigger **other regulations and requirements**, like sweepstakes and lotteries
- Include appropriate **provisions in agreements with influencers and celebrities**:
 - Description of the content the influencer will be creating, including timing, mentions, aesthetics
 - Type, form and frequency of posting and compensation
 - Legal requirements, *i.e.*, compliance with policies, FTC requirements, indemnification



PROMOTIONS



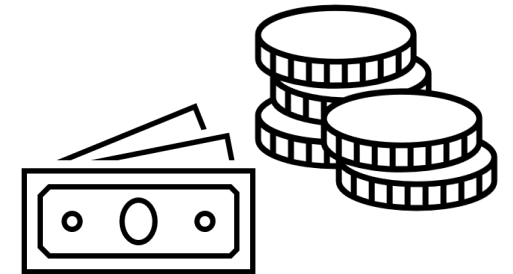
PROMOTIONS GENERALLY

- **Three primary types of promotions:**
 - Sweepstakes
 - Lotteries
 - Contests
- **Possible implications:**
 - State law requirements, including registering and bonding
 - Intellectual property considerations, including User-Generated Content (“UGC”)
 - Rights of publicity
 - Privacy laws



SWEEPSTAKES VS LOTTERY VS CONTEST

| | LOTTERY | SWEEPSTAKES | CONTEST |
|---------------|-------------------------------------|-------------------------------------|-------------------------------------|
| CHANCE | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| CONSIDERATION | <input checked="" type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| PRIZE | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> |



Consideration is broadly defined as anything of “value.”

PROMOTIONS CONT'D

Official Rules:

- Eligibility
- How to enter
- Winner selection
- Prize(s)
- Promotion period

Also consider including:

- Limitation of liability
- License or assignment to use any UGC
- Right to modify the promotion or substitute the prize

Don't forget the short-form rules!

Active enforcement:

- Next-Gen case
 - FTC returned almost \$25 million to consumers, including seniors, who were “defrauded” in a sweepstakes
- Draper James Class Action
 - Class action lawsuit arose from promotion offering teachers a free dress
- Arkansas Hole-In-One Contest
 - Sued by winner to receive promised prize

CONSUMER REVIEWS



CUSTOMER REVIEWS

- Section 5 of the FTC Act prohibits unfair and deceptive acts and practices:
 - Negative reviews cannot be suppressed
 - Negative reviews cannot be hidden – reviews should be displayed by date, not star rating
 - Incentives for reviews must be disclosed – such as being entered in a sweepstakes
 - Material connections between the reviewer and the reviewed product must be disclosed – such as an employee or owner of the company, receipt of free product
 - Review gating is prohibited



CUSTOMER REVIEWS CONT'D

- However, as a Company, you do have some rights with regard to reviews
- You **can remove** reviews that:
 - Contain confidential or private information
 - Are libelous, harassing, abusive, obscene, vulgar, sexually explicit, or are inappropriate with respect to race, gender, sexuality, ethnicity, or other intrinsic characteristics
 - Are unrelated to the company's products or services
 - Are clearly false or misleading

THANK YOU / QUESTIONS?

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15 MINUTE BREAK

PANEL TWO WILL BEGIN AT
3:15PMCT



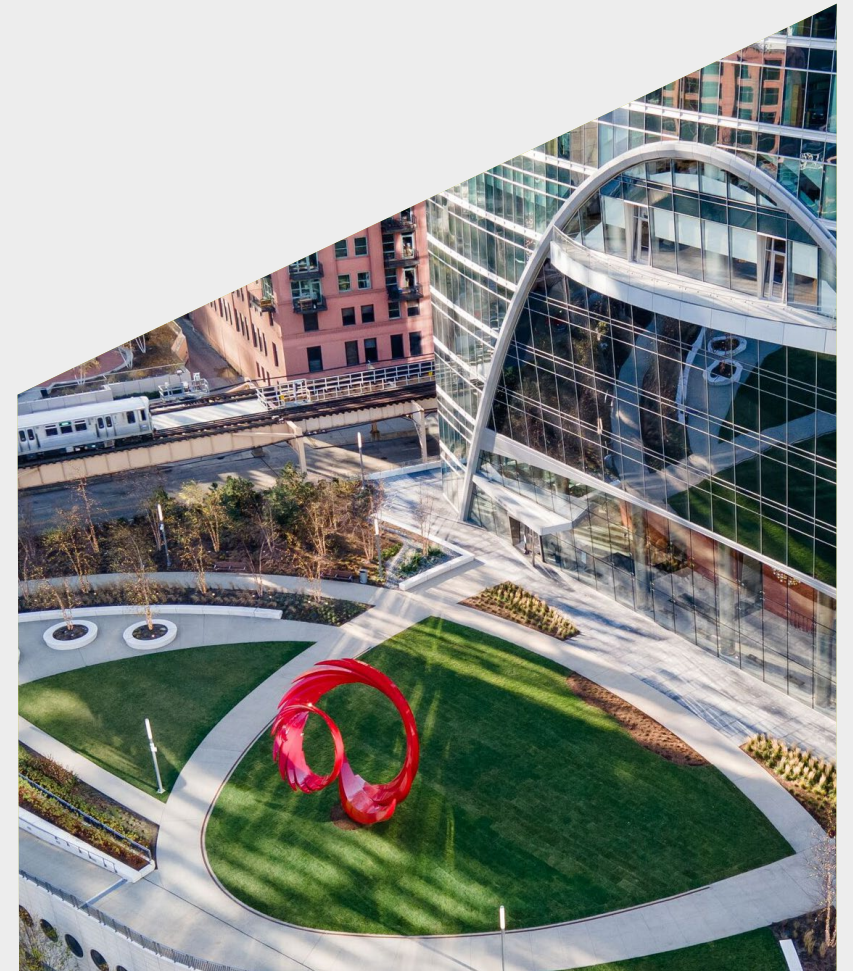
McDermott
Will & Emery



ENFORCEMENT AND LITIGATION – UNDERSTANDING THEM AS BOTH A SWORD AND A SHIELD

November 10, 2022

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FTC ENFORCEMENT TRENDS



FTC ENFORCEMENT TRENDS

- FTC Priorities and Enforcement Trends
 - Letter Writing Campaign
 - Establishing ability to obtain monetary judgements
 - The Usual Suspects
 - Disclosures, endorsements, and reviews
 - The New Kids on the Block
 - Consumer “surveillance”, technology, dark patterns
 - FTC Rulemaking and Public Comment

THE LETTER WRITING CAMPAIGN



LETTER WRITING CAMPAIGN

AMG Capital Management v. FTC

US Supreme Court, 593 US ____ (2021)

- US Supreme Court ruled 9-0 that the FTC did *not* have redress or disgorgement authority under Section 13(b) of the FTC Act
- The case involved a payday lender who allegedly failed to disclose that \$300 loan might end up costing nearly \$1000 to repay
- Involved allegations of inadequate fine print disclosures, misleading “TILA Box”
- US Supreme Court overturned summary judgement award of \$1.27 Billion

The Impact: FTC turned to other provisions and avenues for obtaining monetary redress and disgorgement

LETTER WRITING CAMPAIGN: NOTICE OF PENALTY OFFENSES

- Oct 6, 2021 – 70 for-profit higher education institutions put on notice relating to any false promises about job prospects
- Oct 13, 2021 – more than 700 letters warning businesses using fake reviews and other misleading endorsements subject to civil penalties
- Oct 26, 2021 – 1,100 letters sent to businesses warning if they deceive or mislead consumers about potential earnings the FTC will target for large civil penalties
- “Receipt of the notice puts your company on notice that engaging in conduct described therein could subject the company to civil penalties of up to \$43,792 per violation.”

THE USUAL SUSPECTS



FTC Staff Reminds Influencers and Brands to Clearly Disclose Relationship

FTC Releases Advertising Disclosures Guidance for Online Influencers

Latest FTC Notice of Penalty Offenses tells 700+ national advertisers that deceptive endorsements can lead to financial penalties

Kardashians Accused of Failing to Keep up With FTC Regulations

CONSUMER REVIEWS

Fashion Nova Enforcement Action

- The FTC has shown an increased interest in consumer reviews in the past year
- FTC's first case challenging a [company's failure to post negative reviews](#)
- At issue was a third party online product review management interface used by Fashion Nova in which 4 or 5 star reviews were automatically posted and lower rating reviews were withheld for approval prior to publication (many of which were never approved or posted)
- Resulted in a [\\$4.2 million penalty](#) and required Fashion Nova to display all reviews for products that [are or were](#) submitted by consumers to its website, including [all reviews that it previously withheld](#) from public view

Fashion Nova will Pay \$4.2 Million as part of Settlement of FTC Allegations it Blocked Negative Reviews of Products

January 25, 2022

Case is first to challenge a company's failure to post negative reviews

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FOR RELEASE

TAGS: [Clothing and Textiles](#) | [Bureau of Consumer Protection](#) | [Consumer Protection](#) | [Advertising and Marketing](#) | [Endorsements, Influencers, and Reviews](#) | [Shopping](#)

Online fashion retailer Fashion Nova, LLC will be prohibited from suppressing customer reviews of its products and required to pay \$4.2 million to settle Federal Trade Commission allegations that the company blocked negative reviews of its products from being posted to its website.

The FTC alleged in a [complaint](#) that the California-based retailer, which primarily sells its "fast fashion" products online, misrepresented that the product reviews on its website reflected the views of all purchasers who submitted reviews, when in fact it suppressed reviews with ratings lower than four stars out of five. The case is the FTC's first involving a company's efforts to conceal negative customer reviews.

"Deceptive review practices cheat consumers, undercut honest businesses, and pollute online commerce," said Samuel Levine, Director of the FTC's Bureau of Consumer Protection. "Fashion Nova is being held accountable for these practices, and other firms should take note."

According to the FTC's complaint, Fashion Nova used a third-party online product review management interface to automatically post four- and five-star reviews to its website and hold lower-starred reviews for the company's approval. But from late-2015 until November 2019, Fashion Nova never approved or posted the hundreds of thousands of lower-starred, more negative reviews. Suppressing a product's negative reviews deprives consumers of potentially useful information and artificially inflates the product's average star rating.

CONSUMER REVIEWS

- Roomster allows users to post and search listings for living arrangements, including home or apartment rentals, room rentals, sublets, and roommate requests
- FTC, CA, CO, FL, IL, MA, and NY allege Roomster defendants do not verify listings or ensure their authenticity and have posted tens of thousands of 4- and 5-star fake reviews, or “testi-phony-als”, on their platform and the app stores where Roomster gets most of its customers
- FTC & states also allege Roomster posted bogus listings—many of which included attractive photos—on sites like Craigslist with links that direct people to the Roomster platform
- Consumers are encouraged to pay a fee to get access to listing information and only after signing up do many people learn the listing doesn’t exist

FTC and States take on “testi-phony-als”
in action against housing platform
Roomster and operation that posted
bogus reviews on its behalf

THE NEW KIDS ON THE BLOCK



CONSUMER SURVEILLANCE DATA

- In August 2022, the FTC filed a lawsuit against Kochava alleging Kochava engaged in unfair and deceptive practices by selling “precise location information” of consumers.
- First case after FTC’s announcement that it would “crack down” on “commercial surveillance practices.”
- FTC argues the data amassed by Kochava by tracking the mobile advertising IDs of mobile phones could be used to track people visiting abortion clinics, places of worship, and other sensitive locations.
- FTC wants to block the sale of such data and require that it be deleted and destroyed.

FTC FLEXES ITS MUSCLE IN SUIT AGAINST KOCHAVA (BUT MAY NOT LIKE THE RESULTS)

AUGUST 31, 2022 | Lesli C. Esposito | Amy C. Pimentel | David P. Saunders |

[ACCESS RESOURCE CENTER →](#)

🕒 Reading Time: 4 minutes

[Overview](#) [In Depth](#) [Authors](#)

[Related Services & Industries](#) ▾

[> HOME](#) / [INSIGHTS](#) / [FTC FLEXES ITS MUSCLE IN SUIT AGAINST KOCHAVA \(BUT MAY NOT L...](#)

On August 29, 2022, the Federal Trade Commission (FTC) filed a [lawsuit](#) against Kochava, Inc. [alleging](#) that Kochava engaged in unfair and deceptive practices by selling the “precise location information” of consumers. This suit comes on the heels of the FTC’s [announcement](#) earlier this month that it would “crack down” on “commercial surveillance practices” and July’s [warning](#) that the agency would be exercising its enforcement authority against the “illegal” use and sharing of sensitive consumer data.

METaverse

- In April 2022, TINA.org, a nonprofit organization that aims to protect consumers from “false advertising and deceptive marketing,” filed a complaint with the FTC concerning allegedly deceptive advertising on Roblox
- Alleged Roblox has “completely shirked its responsibility” in following advertising laws on the kids gaming platform
- TINA.org targeted:
 - Improper disclosure of commercial content on Roblox by brands
 - Improper disclosure of material connections by influencers who interacted with consumers within branded worlds on Roblox
- Provided specific examples to the FTC of brands that TINA.org considered were not following FTC guidance for further action

Roblox is ‘exploiting’ users with deceptive advertising, watchdog group says

DARK PATTERNS

- FTC seeking to shed light and crack down on the ways marketers can manipulate people into buying merchandise or giving up personal information through the use of dark patterns
- Broad range of deceptive design elements constitute “dark patterns”; a few examples include design elements that:
 - Cause false beliefs
 - Hide key information
 - Lead to unauthorized charges
 - Trick customers into sharing personal data

FTC to Ramp up Enforcement
against Illegal Dark Patterns
that Trick or Trap Consumers
into Subscriptions



Bringing **Dark Patterns** to **Light**
AN FTC WORKSHOP

FTC issues illuminating report
on digital dark patterns

“NEW” AGENCIES

- SEC achieved \$1.3M settlement with Kim Kardashian over inadequate disclosures.
- SEC alleged Kardashian failed to disclose she was paid \$250,000 to publish an Instagram post about EMAX tokens.
- This allegedly violated the anti-touting provision of federal securities law.
- The post contained “#ad” but the SEC said it should have included that she was paid \$250,000 for the post.

SEC Charges Kim Kardashian for Unlawfully Touting Crypto Security

FOR IMMEDIATE RELEASE

2022-183

Washington D.C., Oct. 3, 2022 — The Securities and Exchange Commission today announced charges against Kim Kardashian for touting on social media a crypto asset security offered and sold by EthereumMax without disclosing the payment she received for the promotion. Kardashian agreed to settle the charges, pay \$1.26 million in penalties, disgorgement, and interest, and cooperate with the Commission's ongoing investigation.

The SEC's order finds that Kardashian failed to disclose that she was paid \$250,000 to publish a post on her Instagram account about EMAX tokens, the crypto asset security being offered by EthereumMax. Kardashian's post contained a link to the EthereumMax website, which provided instructions for potential investors to purchase EMAX tokens.

"This case is a reminder that, when celebrities or influencers endorse investment opportunities, including crypto asset securities, it doesn't mean that those investment products are right for all investors," said SEC Chair Gary Gensler. "We encourage investors to consider an investment's potential risks and opportunities in light of their own financial goals."

"Ms. Kardashian's case also serves as a reminder to celebrities and others that the law requires them to disclose to the public when and how much they are paid to promote investing in securities," Chair Gensler added.

"The federal securities laws are clear that any celebrity or other individual who promotes a crypto asset security must disclose the nature, source, and amount of compensation they received in exchange for the promotion," said Gurbir S. Grewal, Director of the SEC's Division of Enforcement. "Investors are entitled to know whether the publicity of a security is unbiased, and Ms. Kardashian failed to disclose this information."

RULEMAKING AND PUBLIC COMMENT

RECENT FTC PROPOSED RULEMAKING

- Proposed Earnings Claims Rule
- Proposed Rulemaking Regarding the Telemarketing Sales Rule
- Automotive Fees and Advertising Rulemaking
- Commercial Surveillance and Privacy Rulemaking
- Impersonation of Government and Business Rule

OTHER FTC GUIDANCE FORESHADOWING INFORMAL RULEMAKING

The FTC's updates to guidance documents and policy statements might be viewed as informal regulation:

- Updates to Endorsement and Testimonial Guides
- Updates to Dot-Com Disclosure Guidance
- Enforcement Policy Statement Regarding Negative Option Marketing
 - Details three requirements:
 - Disclosures of materials terms, nature of the charges, and frequency of charges
 - Evidence of consumer's express informed consent prior to charge
 - A "simple" cancellation mechanism
- Guidance on Consumer Reviews
 - Soliciting and Paying for Online Reviews: A Guide for Marketers
 - Featuring Online Customer Reviews: A Guide for Platforms

CONTRIBUTORY FALSE ADVERTISING – A BROADER REACH OF LIABILITY

OVERVIEW & BACKGROUND

- The Lanham Act, as applied to ***trademark infringement***, can be used to hold manufacturers contributorily liable for intentionally inducing infringement or knowingly supplying products to infringers.
- Some courts, but not all, have applied the contributory liability doctrine to false advertising
 - Lanham Act Section 43(a) encompasses both trademark infringement and ***false advertising***.
 - There is an established contributory liability doctrine for trademark infringement, so it is logically applicable to false advertising.
 - No indication that Congress intended to limit the Lanham Act in a way that prevents a contributory infringement claim for false advertising.
- Several recent decisions in 2021-2022

FIRST RECOGNIZED IN THE 11TH CIRCUIT: DUTY FREE AMS., INC. V. ESTEE LAUDER COS., 797 F.3D 1248 (11TH CIR. 2015)

- Duty Free, an airport retail store, sued Estee Lauder as a contributory false advertiser under Section 43(a) of the Lanham Act. In bids for airport retail space, Duty Free's **competitors** stated that Duty Free's inability to sell Estee Lauder products made Duty Free less attractive to customers. Estee Lauder confirmed to the airports that Duty Free did not have permission to sell Estee Lauder products, and Duty Free lost RFP bids.
- The Eleventh Circuit affirmed dismissal of Duty Free's Section 43(a) claim but clarified that defendants can be held contributorily liable for false advertising under Section 43(a) of the Lanham Act in appropriate circumstances.
- No liability from fact that Estee Lauder merely sold its products to Duty Free's competitors, or because Estee Lauder confirmed to the airports that it does not have a business relationship with Duty Free.
- Estee Lauder's acts do not justify a finding that Defendant **knowingly induced, encouraged, caused, or materially participated in** false advertising.

ELEMENTS OF CONTRIBUTORY FALSE ADVERTISING

DIRECT FALSE ADVERTISING:

- Plaintiff must prove that the defendant made a false or misleading statement of fact, which
 - Is made or used in a commercial advertisement or promotion;
 - Deceives or is likely to deceive consumers in a material way;
 - Is disseminated in interstate commerce or affects interstate commerce; and
 - Is likely to harm the Plaintiff

CONTRIBUTORY FALSE ADVERTISING:

- The plaintiff must show that ***a third party in fact directly engaged in false advertising that injured the plaintiff.***
- The plaintiff must allege ***that the defendant contributed to that conduct*** either by ***knowingly inducing or causing the conduct, or by materially participating in it.*** For example:
 - Defendant “directly controlled or monitored” the false advertising
 - Defendant provided a “necessary product or service” for the third-party false advertising

GROWING ACCEPTANCE OF CONTRIBUTORY FALSE ADVERTISING IN 2021-2022: ***EASTERN DISTRICT OF VIRGINIA***

- *Isk Biocides, Inc. v. Pallet Mach. Grp. Inc.*, No. 3:21-cv-386, 2022 U.S. Dist. LEXIS 6450 (E.D. Va Jan. 12, 2022)
 - ISK alleged that Defendant J&G contributed to false advertising by assuring Defendant PMG that users of ISK's product did not need to wear personal protective equipment. ISK also argued Defendant PMG is contributorily liable for distributing J&G's false advertisements.
 - Although the Fourth Circuit has not yet recognized contributory false advertising, the Eastern District of Virginia followed the Eleventh Circuit's ruling in *Duty Free Ams., Inc. v. Estee Lauder Cos.*, 797 F.3d 1248 (11th Cir. 2015). Motion to dismiss for contributory liable claim for false advertising denied.

GROWING ACCEPTANCE OF CONTRIBUTORY FALSE ADVERTISING IN 2021-2022: ***NORTHERN DISTRICT OF GEORGIA***

- *ExeGi Pharma, LLC v. Pacifici*, No. 1:21-CV-2134-TWT, 2022 U.S. Dist. LEXIS 54862 (N.D. Ga. Mar. 25, 2022)
 - Plaintiff alleged that a "Generally Recognized as Safe" (GRAS) Report materially supported a third party's false advertising. Defendant Pacifici knew of the alleged false equivalence being expressed in the Report, and Defendant refused to rescind his signature after being presented with information that the equivalence statement was false.
 - Contributory false advertising claim allowed. Defendant need not engage in the false and harmful commercial speech, but can have liability if it ***knowingly assists*** the commercial speech of the third party.

GROWING ACCEPTANCE OF CONTRIBUTORY FALSE ADVERTISING IN 2021-2022: ***SOUTHERN DISTRICT OF FLORIDA***

- *U.S. Structural Plywood Integrity Coal. v. PFS Corp.*, No. 19-62225-CIV-ALTMAN, 2022 U.S. Dist. LEXIS 58755 (S.D. Fla Mar. 30, 2022)
 - Plaintiff claimed that Defendant PFS had knowledge of a shoddy third-party product, as evidenced by several emails where Defendant's employees discussed deficiencies.
 - Defendant PFS did not retain data on whether the third-party product met industry standards, which Plaintiff alleges assisted the third-party in “gaming the system” by sending cherry-picked (and thus non-representative) samples for certification testing.
 - The court, sitting in the Eleventh Circuit, recognized contributory false advertising as a viable claim and sent the question to the jury.

EXAMPLES OF COURTS REJECTING OR NOT RECOGNIZING CONTRIBUTORY FALSE ADVERTISING: ILLINOIS

- *Telebrands Corp. v. My Pillow, Inc.*, 2019 U.S. Dist. LEXIS 72832, at *8 (N.D. Ill. April 30, 2019) ("This novel contributory false advertising claim under the Lanham Act has not been adopted by either the Seventh Circuit or any other circuit.").
- *Fireblok IP Holdings, LLC v. Hilti, Inc.*, 2021 U.S. Dist. LEXIS 260212 (N.D. Ill. Sept. 20, 2020) ("The Seventh Circuit has not recognized contributory false advertising claims").
- Not **yet** recognized by the Seventh Circuit...
- Other judges in N.D. IL might disagree with *Telebrands* and *Fireblok*

ADDITIONAL DISTRICT COURTS REJECTING CONTRIBUTORY FALSE ADVERTISING CLAIM

- *Purple Innovations, LLC v. Honest Reviews, LLC*, No. 2:17-cv-138-DB, 2017 U.S. Dist. LEXIS 116216 (**D. Utah** July 25, 2017) (Finding ***no authority in the Tenth Circuit*** recognizing a claim for contributory false advertising and declining to extend the Lanham Act to allow such a claim).
- *Acad. of Drs. of Audiology v. Int’l Hearing Soc’y*, 237 F. Supp. 3d 644 (**E.D. Mich.** 2017) (Noting **Sixth Circuit has not extended the Lanham Act as the Eleventh Circuit has**, and declining to so extend).
- *Healthcare Integrity, LLC v. Rehobeth McKinley Christian Health Care Servs., Inc.*, No. 20-0750 KG/LF, 2022 U.S. Dist. LEXIS 127298 (**D.N.M.** July 18, 2022) (“***Plaintiffs did not identify any authority in this Circuit*** supporting... a [contributory false advertising] claim, and the Court declines to extend the Lanham Act.”)

KEY TAKEAWAYS

- ***Forum selection*** is very important. Filing a complaint in a jurisdiction where contributory false advertising has been recognized – or at least hasn't been expressly rejected -- is helpful.
 - 11th Circuit has recognized this doctrine
 - Some districts that have recognized this doctrine are federal district courts in Virginia, Georgia and Florida
- Be prepared to prove an ***intentional or knowing act*** by the defendant. At the very least, proving defendant's reasonable inference or knowledge or intent is required.
- Some court decisions are merely denying a motion to dismiss based on this doctrine; therefore, viability of a claim has not been fully tested in even most of those courts.

TWO CLASS ACTION TRENDS



CLASS ACTIONS RELATED TO COVID 19 ARE STILL WORKING THEIR WAY THROUGH THE COURTS

- Event, travel, and tuition refund cases
- Employee and insurance cases
- Paycheck Protection Program (PPP) Class Actions
 - Against the Lender

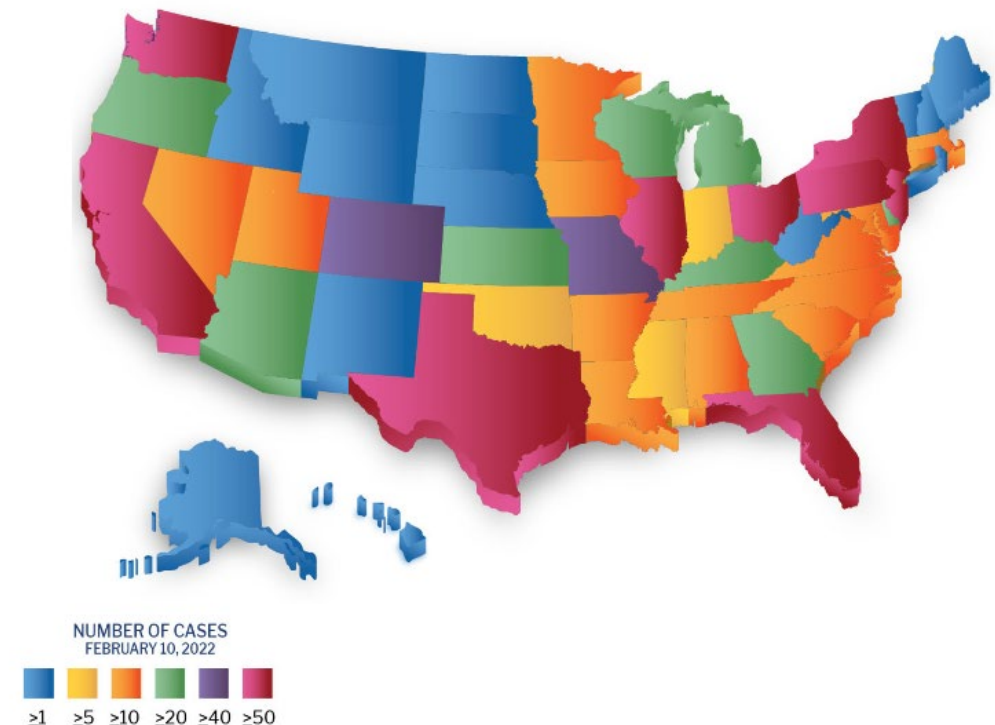
DOJ Announces First False Claims Act Settlement With PPP Lender

- Against the employer

Fired Employee Alleges Employer Unlawfully Retaliated Against Him For Complaining of PPP Fraud

In total, we located 2,875 putative class actions filed since the start of the pandemic related to COVID-19. Forget a wave of class actions — this was a flood.

The COVID-19 class action heat map below summarizes this work:



Source: <https://www.carltonfields.com/insights/publications/2022/covid-19-class-action-map-pandemic-class-actions>

RISE OF BIPA CASES AND POTENTIAL EXPOSURE

- Thousands of cases filed since the Illinois Supreme Court opened the floodgates in the 2019 Rosenbach decision.
- Dozens of new cases filed each month – impacting a growing number of industries and clients
- “Each violation” carries liquidated damages of \$1,000 or \$5,000 (if reckless or intentional) per person plus attorneys’ fees and expert fees and costs.
 - Typically, Plaintiffs allege four violations per class member in a class action consisting of every person who has used a biometric feature.
 - Facebook settlement of \$650 million (\$550 million initial settlement rejected by court) – related only to Facebook’s Illinois users
 - We are seeing typical settlements starting at \$700 per class member
- BNSF Case – First BIPA Trial

First Ever BIPA Trial Results in \$228 Million Judgment Against BNSF Railway

STRATEGIES FOR GOVERNMENT INVESTIGATIONS



EFFECTIVE STRATEGIES

- Before an Investigation
 - Compliance Programs and Training
 - Practical Document Creation Guidelines
- During an Investigation
 - Conduct internal investigation
 - Recognize that “one size doesn't fit all”
 - Be pro-active
 - Open-minded about settlement
 - Understand the impact of third parties and the ramifications of being a third party
- After an Investigation
 - Prepare for the PR impact
 - Learn your lessons

AVOID COMMON MISTAKES

- Prepare for the long haul
- Preserve documents
- Be forthcoming
- Recognize the boundaries of attorney-client privilege
- Remember agencies talk to each other
- Take it seriously

MONEY DAMAGES AND OTHER REMEDIES



IS PROOF OF WILLFULNESS OR ACTUAL INJURY REQUIRED?

- All Lanham Act damages claims are subject to ***principles of equity***
 - Courts have significant discretion
 - There cannot be a “windfall” to the plaintiff
- REMEDIES:
 - Damages for false advertising are the same as in trademark infringement cases, which include:
 - Plaintiff’s lost profits
 - Disgorgement of defendant’s profits. Traditionally, it is very difficult in false advertising to win disgorgement of profits without proof of willfulness or actual injury.
 - Injunctive relief for false advertising does not require willfulness or actual injury.
 - Don’t forget about corrective advertising.

IS PROOF OF WILLFULNESS OR ACTUAL INJURY REQUIRED?

- *Romag Fasteners, Inc. v. Fossil Grp., Inc.*, 140 S. Ct. 1492 (2020)
 - The Supreme Court held that willfulness is ***not required*** to recover damages in trademark infringement cases.
 - However, defendant's mental state is ***highly important*** in determining whether an award of profits is appropriate.
 - The Supreme Court did not make it clear whether this ruling applies to Lanham Act false advertising.

DISGORGEMENT WITHOUT WILLFULNESS

- Disgorgement without willfulness goes to threshold issue of ***whether*** plaintiff is entitled to damages
- *Harbor Breeze Corp. v. Newport Landing Sportfishing, Inc.*, 28 F.4th 35 (9th Cir. 2022)
 - Harbor Breeze Corp. and its affiliate sued Newport Landing Sportfishing, Inc. for unfair competition. The jury found that defendants had engaged in materially false or misleading advertising about their competing whale-watching-cruise business. Jury awarded \$0 in actual damages and declined to award the equitable remedy of disgorgement of profits.
 - Reversing in part, the 9th Circuit held that under *Romag*, the district court erred in instructing the jury that plaintiff had to show that defendants acted willfully. Rather, under the correct legal standard, a defendant's mental state is (merely) a highly important consideration in determining whether an award of profits is appropriate. New trial ordered.

DISGORGEMENT WITHOUT WILLFULNESS

- *Monster Energy Co. v. Vital Pharms., Inc.*, No. EDCV 18-1882 JGB (SHKx), 2022 U.S. Dist. LEXIS 95893 (C.D. Cal Apr. 19, 2022)
 - Genuine dispute of material fact regarding damages for false advertising claim because
 - "willfulness is ***not an 'inflexible precondition to recovery,'***"
 - though a "***defendant's mental state is a highly important consideration.***")

PLAINTIFFS MUST PROVE INJURY

- The proof of injury element goes to the **quantum** of plaintiff's damages.
- *Am. Soc'y of Home Inspectors, Inc. v. Int'l Ass'n of Certified Home Inspectors*, 36 F.4th 1238 (10th Cir. 2022)
 - Competing trade associations, International Association of Certified Home Inspectors (InterNACHI) and the American Society of Home Inspectors (ASHI), both offer memberships to home inspectors, who inspect homes prior to home sales. InterNACHI sued, claiming ASHI tagline "Educated. Tested. Verified. Certified" constitutes false advertising because ASHI includes novice members.
 - The district court concluded no reasonable jury could find that InterNACHI was injured by ASHI's allegedly false commercial advertising.
 - The 10th Cir. declined to apply a presumption of harm merely because parties were direct competitors. The tagline "Educated. Tested. Verified. Certified" did not reference appellant or disparage appellant's memberships, and home inspectors could and did belong to both parties' organizations.

CORRECTIVE ADVERTISING CAN BE A POWERFUL (AND EXPENSIVE) REMEDY

Pods Enterprises v. U-Haul Int'l Inc., No. 8:12-CV-01479, 2015 WL 5021668 (M.D. Fla. 2015)

- Largest-ever award of corrective advertising damages: **\$45m** of \$61m jury award (subsequently settled for “only “ \$41m.
- U-Haul’s use of “U-Boxes” migrated to reference to “U-Box pods” in advertising.
- Award designed to **correct public misimpression**, and “**confirm the fame, validity and enforceability of the PODS trademark.**”
- Calculation of award
 - 113m unique visitors had visited U-Haul’s website, often searching for “pods.” Consumers thereafter formed a misimpression about Plaintiff’s trademark.
 - Expert testimony on cost of marketing plans to reach those consumers, including:
 - Google AdWords campaign
 - Direct advertising
- Plaintiff is **not** required to use the award for corrective advertising....

KEY TAKEAWAYS

- Awards of disgorgement of profits without evidence of willfulness are still rare.
- Once again, **forum selection** is an important consideration – the Ninth Circuit and the United States District Court for the Central District of California may be favorable.
- Evidence of **willfulness is still very helpful and important**, even if it not always “required” per se
- Proof of causation (e.g. of lost sales) remains a crucial element.
- Lost sales are harder to show in **large multi-seller markets**.
- Consider alternative measures of damages, such as:
 - Surveys of favorable purchaser views from false advertising.
 - Extrapolate future lost sales from period of harm to date.
 - Don’t forget about **corrective advertising** remedy

THANK YOU / QUESTIONS?

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