

COLUMNS

Advertising law issues that marketers can expect this year

February 15, 2013



By **Marc Roth**

Class action lawyers and the Federal Trade Commission made 2012 an interesting year for advertising lawyers and their clients.

Privacy concerns were high on the agency agenda, as were claims related to the environment, for products labeled as "natural" and for goods touted as "health related."

The class action bar was particularly hyperactive in 2012, as they challenged product claims and text message campaigns at a record pace.

We reviewed the year based on feedback from readers of our weekly advertising law newsletter, which includes hundreds of in-house counsel at leading consumer product and service companies, and recap below the categories that generated the most interest.

You claim it, they will sue

False advertising lawsuits were filed at a record pace in 2012.

Claims of "natural" were the targets of the class action bar. Hershey's white chocolate chips, Campbell's soup and Arm & Hammer deodorant, to name just a few, found themselves in court.

Suits challenging "cruelty free" and "environmentally responsible" advertising were filed against cosmetic companies and Dole, respectively.

Regulators were also active.

The FTC cited a window manufacturer that made unsubstantiated energy claims and the National Advertising Division weighed in on environmental claims made for cookware products.

A case involving beverage maker Pom Wonderful and its principals provided an important lesson for advertisers when the FTC's chief administrative law judge issued a 335-page ruling holding that the company lacked competent and reliable scientific evidence for its advertising claims.

The industry, however, found a level of comfort when the ALJ ruled that Pom was not required to obtain Food and Drug Administration approval before making any future health claims about its products (a mandate would be "over-reaching") and that, two, randomized, double-blind, placebo-controlled studies need not be conducted to support every health benefit claim.

Pom appealed the ALJ's ruling, finding that it did not possess the necessary substantiation for its claims to the full commission.

Not surprisingly, the commission upheld the ALJ's decision by ruling against Pom, and also required Pom to have two clinical trials before making future disease treatment and prevention claims, which could have broad impact on other food and drink companies and future ad campaigns.

Privacy for everyone

The FTC issued a landmark report that established a framework for protecting consumer privacy and included a series of proposals as to how companies should collect, use and share consumer data obtained online, offline and through applications and mobile devices.

To the online advertising industry's pleasant surprise, the FTC retreated from an earlier agency position that called for federal Do Not Track legislation, in light of advances made by self-regulatory groups and industry leaders.

The agency was also concerned with information collected from children, at geolocations, and from app developers that failed to implement privacy policies.

In another move, the FTC released the amended rule for the Children's Online Privacy Protection Act, set to take effect on July 1, 2013.

The new rule includes changes that broaden the Act's coverage to third parties and provides for greater parental controls.

The FTC acted aggressively on the enforcement front and cited a broad range of businesses for privacy violations. They include rent-to-own companies that illegally spied on consumers via rented computers, and major companies such as Facebook and Google, which the agency fined a record \$22.5 million.

State regulators were also active.

After declaring that a state law requires that mobile apps post a privacy policy, California Attorney General Kamala Harris filed her first lawsuit against a company that failed to comply.

New media, new legal issues

While the FTC has actively enforced its Endorsement and Testimonial Guides against bloggers and sponsors since 2009, when it "clarified" the guides to address social media concerns, the agency declined to take action against a company and its public relations firm that provided gifts to bloggers in exchange for product coverage.

Issuing its second "no-action" letter to date the first was with Ann Taylor in 2010 the FTC observed that Hewlett-Packard gave bloggers two \$50 gift certificates and a holiday pack with printable items, which raised concern for the agency because most bloggers failed to disclose they kept one of the two gift cards.

However, because a "relatively small" number of bloggers actually posted content about HP after they received the gift pack, and the company revised its social media policy, the FTC declined to take action.

Nonetheless, this non-action should still serve as a warning to other companies that they should implement and enforce a social media policy that comports with the guides.

Hot sites such as Pinterest, Groupon and Twitter attracted their share of attention.

Groupon reached an \$8.5 million settlement with a class of consumers for imposing allegedly illegal expiration dates on its "daily deal" coupons.

Another suit raised the question of ownership of a Twitter account after an employee left the company and continued to tweet from the account while working for a competitor.

Finally, Pinterest urged businesses to ensure they had permission to post images on their pin board.

Do not text me, maybe

The Telephone Consumer Protection Act provided a significant amount of legal work for attorneys last year as consumers filed dozens of suits over unwanted text messages.

As the TCPA requires prior, express consent for such messages, and provides for \$1,500 statutory fines per violation, there was little doubt consumers would stand by quietly.

In an attempt to avoid these steep damages, companies not surprisingly settled the suits for amounts ranging from \$24 million (Sallie Mae) to \$6.25 million (PayLess) to \$47 million (Jiffy Lube).

The close of the year brought some comfort to advertisers, however, when two federal courts and the Federal

Communications Commission ruled that a single, confirmatory opt-out message does not violate the TCPA.

What matters this year

Predictions are a dangerous thing, but they are too tempting to resist.

Looking ahead to 2013, here are five topics that we believe will be the most talked about in the coming year:

1. Regulatory wrinkles to be smoothed out

With the release of the FTC's new Guides for the Use of Environmental Marketing Claims (better known as the "Green Guides"), as well as the updated COPPA rules, neither of which have been enforced to date, advertisers will struggle to ascertain the boundaries of regulatory interest and enforcement in these areas.

2. Privacy remains top of mind

With a new congressional session set to begin, privacy bills that relate to information gathered from children, at geolocations, and mobile devices will be reintroduced, including possibly federal do not track legislation that enjoys support.

Whether or not any of these bills will gain traction or become law remains problematic.

Legislative uncertainty, however, leaves the door open for federal and state regulators to take action.

Advertisers should expect more litigation from the FTC and state attorneys general, in particular, California's Ms. Harris.

3. Class action trends

What to expect from consumer class actions in 2013?

If 2012 was any indication, claims for "natural" and health-related products will be the focus of plaintiffs' attorneys this year, particularly given the absence of a statutory definition of "natural."

But, as the FDA has indicated that it will address this issue in 2013, industry members may have some guidance to follow and the rising tide of law suits may ebb.

Privacy-related litigation will likely continue, but proving actual injury and damages for security breaches and privacy violations may be an uphill battle.

4. Defining the scope of the FTC's power

Defendants in FTC enforcement actions will continue to challenge the agency's authority.

Facing an enforcement action for failure to regulate its data security practices, Wyndham Hotel & Resorts argued that the agency lacks the statutory authority under Section 5 of the Federal Trade Commission Act to regulate such matters.

The court will rule on the motion in the coming months and its outcome will be eagerly watched.

If the court agrees that the FTC lacks the authority to regulate data security, such a limitation would tie the agency's hands in privacy-related matters.

The FTC's settlement powers will also face increased scrutiny this year.

When the agency announced its record fine against Google in 2012, one commissioner dissented and bemoaned the search engine company's denial of liability in the consent decree.

The dissenting commissioner's comments were shared by multiple federal court judges who declined to approve settlements where the defendant failed to admit liability. The debate will likely continue in 2013.

5. TCPA suits on the decline

Coming off a year of TCPA litigation that spanned from jurisdictional issues decided by the U.S. Supreme Court, to declaratory rulings from the FCC, to dozens of consumer class actions over text messages, a decline in text-related litigation is in store for 2013.

Although the courts and the FCC put a stop to the rising wave of litigation over opt-out confirmation texts, advertisers and marketers should have learned their lesson by now to obtain prior, express consent before launching a text message campaign.

Bonus: No. 6: Beware the CFPB

Of course, no crystal ball predictions would be complete without some mention of the CFPB.

The Consumer Financial Protection Bureau shifted into high gear in 2012, after a somewhat controversial and bumpy start, and targeted companies large and small that violated various consumer protection laws.

Look for more such actions in 2013, and the nascent agency's rule-making and oversight authority to rattle boardrooms of large banks, of call centers aggressively seeking to recover delinquent consumer debts, and of mortgage companies offering "too low to believe" refinance rates.

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