

Advertising, Marketing And Promotions Law Year In Review

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The year came in with a scare – but fortunately not a bang – when Boston police arrested two men in connection with a suspicious device alert that turned out to be a guerilla marketing ploy for a late night cable cartoon. Turner Broadcasting, the parent company of the Cartoon Network, said the devices were part of a promotion for the TV show “Aqua Teen Hunger Force.” Although the devices posed no danger and were part of a ten-city outdoor guerilla marketing campaign, the poorly planned publicity stunt proved costly for Turner Broadcasting, which paid millions of dollars to settle the matter.

But Turner Broadcasting was not the only advertiser entangled in controversy this year. Not unlike last year, 2007 was yet another year in which regulators and plaintiffs’ class action attorneys were vigilant in the area of advertising, marketing, and promotions. We explore below some of the year’s major issues.

Sweepstakes

What do Donald Trump, Howie Mandel and Simon Cowell have in common? The answer is that the trendy premium text messaging promotions advertised during *The Apprentice*, *Deal or No Deal*, and *American Idol* were the subjects of class action lawsuits this year. In February, a class charged *The Apprentice* with running an illegal gambling scheme for its “Get Rich With Trump” sweepstakes because viewers who entered by the text message method of entry were charged a 99 cent premium fee by their cellular providers. The suit alleged that the sweepstakes was an illegal lottery even though viewers could participate for free online. While this lawsuit was dismissed without prejudice, the very same attorneys filed class action lawsuits against NBC Universal for the sweepstakes broadcast during the television programs *Deal or No Deal* and *1 vs. 100* and against FOX for the sweepstakes broadcast during *American Idol*. The sweepstakes administered during these shows was much like “Get Rich With Trump” and similarly included an alternate free online method of entry with the 99 cent premium text message entry.

As proof that fantasy trumps reality, in June, a New Jersey court held that the payment of an entry fee to participate in a fantasy sports league does not constitute illegal gambling. In reaching its decision, the court noted that fantasy league participants do not sustain gambling losses within the meaning of the statutes at issue; rather, they pay an entry fee for which they bargain for and receive a number of services, such as statistical tracking and analysis, which participants may use in managing their teams. The court further held that the activities in question do not constitute gambling within the meaning of the statute, because (1) the entry fees are

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paid unconditionally, (2) the prizes offered to fantasy sports contestants are for amounts certain and are guaranteed to be awarded, and (3) defendants do not compete for the prizes.

Privacy/Data Protection

Privacy concerns and internet predators continued to capture headlines in 2007 with the widespread dissemination of racy pictures of Miss New Jersey, Amy Polumbo, taken from her Facebook profile, and Antonella Barba, the American Idol contestant, whose chances of winning the contest were sabotaged by explicit photos of her posted on MySpace.

In the “Hey, you’re not in my entourage” category, Attorneys General nationwide commenced an investigation into the use of social networking web sites, including MySpace and Facebook, by sexual predators to contact children. In October, New York Attorney General Andrew Cuomo and Facebook announced a new model to enforce safeguards aimed at protecting network members, especially children and adolescents, from sexual predators, obscene content, and harassment. Under the terms of the settlement, Facebook will promptly respond to user complaints about nudity, pornography, harassment or unwelcome contact within 24 hours, and allow an independent examiner to report on Facebook’s compliance for a two year period.

Earlier this year, hackers breached TJ Maxx’s data security system and stole the credit and debit card information of store customers. The data theft exposed 45 million credit and debit cards to potential fraud. Upon discovery of the breach, the company hired IBM and General Dynamics to uncover what information was lost and how their security systems could be improved. Elsewhere, a class action lawsuit was filed against Fidelity National Information Services accusing it and its subsidiary, Certegy Check Services, of negligence and invasion of privacy on behalf of the 8.5 million customers whose sensitive information was sold to direct marketers by a former employee.

Children’s Advertising

Though the statement may bring your kids to tears, it’s true – “Trix are *not* for kids.” Earlier this year, eleven major food companies, including McDonald’s, Campbell Soup, Kellogg’s, and PepsiCo, who are all charter members of the Children’s Food and Beverage Advertising Initiative (“Initiative”), agreed to stop advertising products that do not meet certain nutritional standards to children under 12.

The companies’ announcements came on the heels of the FTC and the Department of Health and Human Services (“HHS”) forum in Washington DC entitled, “Weighing In: A Check-Up on Marketing, Self-Regulation, and Childhood Obesity,” which reported on the industry’s progress in implementing initiatives addressing food and beverage marketing to children. The regulators in attendance were encouraged by the progress made by the Initiative members but called for broader participation in the fight against childhood obesity from the food and beverage advertisers who were not in attendance at the forum and those that have not yet joined the Initiative.

Despite the progress made by the industry in the fight against childhood obesity, shortly after the forum, the FTC served forty-four food, beverage and quick

service restaurants – including Burger King, Campbell Soup, and Coca-Cola – with subpoenas (technically, 6(b) information requests) seeking information concerning, among other things, their marketing activities and expenditures targeted toward children and adolescents. The companies are being asked to provide this detailed information so that the FTC can prepare a comprehensive report on this topic for Congress. The subpoenas seek wide-ranging information on the recipient’s use of media, including TV, radio, internet, cinema and in-store marketing, as well as viral marketing, product placement and licensed characters.

Telemarketing

In November, the FTC announced a law enforcement crackdown on companies and individuals accused of violating the requirements of the National Do Not Call (DNC) Registry. The actions resulted in six settlements, which collectively imposed nearly \$7.7 million in civil penalties, and were brought against companies ranging from the adjustable bed seller Craftmatic Industries to the alarm-monitoring provider ADT Security Services and lender Ameriquest Mortgage Company.

Even though you may have recently received an email stating that your cell phone number will be released to telemarketers as a result of a new cell phone number database, you needn’t worry – the email was a hoax. Federal law still prohibits telemarketers from using automated dialers to call cell phones.

In October, the FTC pledged not to drop any telephone numbers from the DNC Registry at the five year expiration term pending final Congressional or agency action on whether to make registration permanent. Thus, consumers who signed up for the DNC Registry when it began in June 2003 may be able to continue to enjoy uninterrupted dinners without having to re-enroll in the DNC Registry next June.

CAN-SPAM

The District Court in Arizona made advertisers think twice about their future business partners when it ruled that an advertiser could be held vicariously liable for its marketing partners’ violations of the CAN-SPAM Act. While the court rejected the government’s claim that the advertiser should be strictly liable simply for entering into the agreement with the spamming “affiliate,” it did find that the advertiser could be vicariously liable for the “foreseeable” violations of its affiliates. The court explained that advertisers who have the ability to control, monitor or supervise affiliate activities will be scrutinized closely both as to their actions or their inaction, and cannot hide from liability by claiming ignorance.

In May, MySpace settled spam and breach of contract claims against The Globe, a marketer which had opened at least ninety-five MySpace accounts on the MySpace web site with falsified and fraudulent information, and sent hundreds of thousands of unsolicited “e-messages” to other users, all of which advertised the defendant’s products. The settlement was preceded by an unpublished court ruling that found that “e-messages” sent between MySpace.com account holders qualify as email under the state and federal CAN-SPAM Act and California’s anti-spam statute and that MySpace.com was an “internet access provider” eligible to

invoke CAN-SPAM’s civil remedies.

Talk about multi-tasking – the CAN-SPAM Act has also been invoked to deter unwanted text messages. In mid-2006, Distributed Networks LLC, a wireless content and technology company, was sued by a class of consumers who allegedly received unwanted text messages encouraging them to subscribe to Distributed’s services. The case was brought under the Telephone Consumer Protection Act, which prohibits sending text message advertisements (messages that encourage recipients to purchase a product or service) if the sender has not first obtained prior express consent. In January, Distributed agreed to settle with the class and to pay \$150,000, which includes a \$150 payment to each member of the class.

Health And Weight Loss Advertising

While the U.S. public continues to crave new weight loss methods, the FTC continued this year to bring actions for false claims related to weight loss and dietary supplements. Most notably, the FTC recovered \$25 million to settle allegations of deceptive marketing for Xenadrine EFX, CortiSlim, TrimSpa, and One-A-Day WeightSmart. The FTC alleged in four separate cases that weight-loss and weight-control claims were not supported by competent and reliable scientific evidence.

The FTC is not the only one cracking down on unsubstantiated weight loss claims. Earlier this year, the Center for Science in the Public Interest (“CSPI”) filed a lawsuit over calorie-burning claims made by Enviga, a carbonated canned green tea jointly marketed by the Coca-Cola Company and Nestle Switzerland. CSPI claims that if Coca-Cola and Nestle stop marketing the product as a calorie-burner, it would drop the potential litigation. The beverage makers responded that they have deliberately avoided claims that Enviga is a weight-loss product, and that independent research substantiates the effects of the product.

Rebates

Earlier this year, the FTC hosted a workshop, entitled the *Rebate Debate*, which provided the opportunity to discuss consumers’ perspectives on rebates, explore best practices in the offering and fulfillment of rebates, and address the government’s past and future role in improving consumers’ experiences with rebates. During the *Rebate Debate*, the FTC announced enforcement actions against two advertisers, Soyo, Inc. and InPhonic, for their allegedly unfair and deceptive rebate practices, including misleading consumers regarding the documentation necessary for receipt of a rebate, and failing to timely deliver rebate checks and provide consumers with materials necessary to submit a complete rebate application.

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The regulatory trends for 2007 are certainly consistent with those of 2006 – privacy and data protection, predatory Internet activity, weight loss, children’s advertising, CAN-SPAM, and telemarketing. Look for these trends to continue well into 2008 with further focus and scrutiny on social networking sites, video game consoles, and mobile marketing. We also anticipate increased use of viral, buzz and stealth methods of advertising. However, if the “Aqua Teen Hunger Force” scare is any indication, we can expect regulators to start taking a closer look at these new marketing devices.

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