

Ad Law News and Views - April 17

April 17, 2024

April is here! Springtime. Flowers blooming. Long walks outdoors. And...National Pet Parents Day! Cheers to all of you pet parents out there. Here are some of our furry family members that bring so much joy to our lives.

UPCOMING WEBINAR

The Expansion of Health Data Privacy Regulation: Washington's My Health My Data Act and Beyond

Thursday, April 18 | 12:00 p.m. - 1:00 p.m. ET

The development of health data privacy regulation is accelerating. With all eyes on Washington's My Health My Data Act (MHMDA), retailers, advertisers, and adtech companies are looking at the broad implications of regulating consumer health data. As MHMDA ramps up, and other regulators are focusing on the collection, use, and sharing of health data, all stages of health data governance warrant a closer look.

Join Kelley Drye's Privacy & Information Security practice chair [Alysa Hutnik](#) and partner [Aaron Burstein](#) for a discussion of practical strategies to address some of the key challenges under health data privacy laws:

- Determining what is “consumer health data” or health-related “sensitive” data under comprehensive state privacy laws
- Developing sustainable and holistic processes to manage health data classifications over time
- Preparing health privacy notices and other disclosures
- Understanding consent requirements and the scope of different types of consent
- Building and documenting a health data privacy program

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[NAD Recommends More Prominent Disclosures on Influencer Posts](#)

Crème Fatale is a drag artist who is famous for her baby-doll looks and pastel-colored skin. See the picture below. I tend to go for a more natural look myself, so I can't imagine how long it takes to apply that makeup or how long it takes to remove it, but I bet the numbers are high on both sides of the project. Luckily, Fenty Skin makes a product that makes the removal phase a little easier.

10th Circuit Decision at Odds with FTC over “American Made” Claims

I Dig Texas and Creager Services both sell construction equipment called skid steer attachments. I Dig Texas urged customers to buy its products instead of Creager Services' products by appealing to their sense of patriotism. I Dig Texas claimed that its products are “American Made” while its competitor's products are “110% Made in China.” Creager Services didn't dig those claims and filed a lawsuit alleging, among other things, that the “American Made” claims were literally false. (It missed an opportunity to argue that a product can't be “110%” made in any location.)

Courts and NAD Come to Different Conclusions on Package Disclosures

Federal courts and NAD are coming to different conclusions on whether disclosures on the back of packages can effectively qualify claims that appear on the fronts of the packages. Some courts – such as courts in the Ninth Circuit – have held that disclosures on the back of a package can help to qualify a claim on the front, as long as that claim is ambiguous, as opposed to false. NAD, on the other hand, tends to think those disclosures are too far-removed to be effective.

What We Learned From ... NAAG's Director of the Center for Consumer Protection

What trends are shaping consumer protection in 2024?

From kids on social media to fake reviews and junk fees, state AGs are working across state (and partisan) lines on initiatives that promise to mold the consumer protection landscape for years to come. In this post, we reflect on our conversation with Todd Leatherman, who works at the forefront of these issues as Director of the National Association of Attorneys General (NAAG) Center for Consumer Protection.

Federal Court Unpacks Challenge to Fishy Environmental Claims

Breaded fish fillets were the latest target of an ESG class action lawsuit examining sustainable certifications, traceability claims, and broad environmental benefit claims for ConAgra's fish fillets and similar seafood products. The Northern District of Illinois decided on a motion to dismiss that although “certified sustainable seafood” claims may be permissible in this case, general “good for the environment” claims require further review and so the Court partially denied ConAgra's motion to dismiss.

Attorney General Alliance Meeting Recap: Focus on Director Chopra's Remarks

Last week, state attorneys general (AGs) gathered to discuss Nevada Attorney General and Attorney General Alliance Chair Aaron Ford's Initiative, focusing on consumer protection education. Attendees

heard from many panels discussing topics ranging from consumer financial literacy, digital literacy, and cybersecurity, to the continued hot topic of AI. We are highlighting the fireside chat between AG Ford and CFPB Director Rohit Chopra, as they discussed a variety of important topics and collaboration with State AGs.

NAD Decision Addresses Expert Recommendations

Does Hyaluronic Acid Help to Fight Signs of Aging? At Ad Law Access, we are known just as much for the naturally youthful appearance of our writers as we are known for the quality of our content, so we don't have any personal experience in this area. But this very question prompted a new NAD decision that involves a number of areas where we do have relevant experience.

Proposed New York Restrictions on Food and Beverage Advertising Threaten to Open Litigation Floodgates

On March 12, the New York State Senate voted to include food and beverage advertising restrictions in its proposed budget, NY [S8308-B](#). These restrictions were originally introduced as [NY S213-B](#), which characterizes advertising unhealthy foods as "inherently misleading." S213-B aims to protect children from the "disastrous health outcomes that follow the overconsumption of" unhealthy foods, but instead carries far-reaching implications that will impact nearly all food and beverage advertising.

Company Complies with NARB Decision on Review Disclosures After FTC Intervenes

Smile Prep operates a website that provides reviews of clear aligners (or "invisible braces") based on an "extensive five-point analysis." Because Smile Prep's sole source of revenue consists of commissions from some of the companies it reviews, Smile Direct Club (or "SDC") filed an NAD challenge suggesting that the company "slants its rankings and reviews to favor those companies that make payments to it at the relative expense of those companies that don't."

Washington State Poised to Launch Artificial Intelligence Task Force

As we have [previously reported](#), state attorneys general (AGs) have [great interest](#) in [artificial intelligence \(AI\)](#) and we do not see this stopping anytime soon. This time, our focus is on a bipartisan legislative proposal from [Washington Attorney General Bob Ferguson](#) to create an AI task force, which the Washington State Legislature passed ([Senate Bill 5838](#)) and now awaits the governor's signature.

Court Holds Reasonable Consumers Won't be Misled by Sephora's "Clean" Claims

Last week, we [posted](#) about an NAD decision that provides some helpful guidance for advertisers who want to use the word "clean" to describe their products. One day later, a New York federal court issued a decision in another case involving the same word. Luckily, the court's analysis is generally consistent with NAD's analysis and bolsters the tips we outlined last week.

New York Weight Loss Supplement Law Has Stakeholders

Scrambling But Faces Legal Challenges

On October 25, 2023, New York enacted GBL 391-00, which bans the sale of over-the-counter diet pills and dietary supplements intended for weight loss and muscle building to individuals under the age of 18. Covered products include diet pills and dietary supplements that are “labeled, marketed or otherwise represented for the purpose of achieving weight loss or muscle building.” The law requires retailers, both physical stores and online vendors, to verify the age of individuals prior to sale or at the point of delivery. At present, the law is set to take effect on April 22, 2024.

FTC Staff Doubles Down on Rejected Koscot Standard for Pyramiding Claims, Challenges DSSRC IDS Guidance

Over the past two years, we have seen FTC staff express its opinions on the state of the law in multiple ways. In December 2022, for example, staff issued its Health Products Compliance Guidance, intended to supersede the FTC’s 1998 guidance, “Dietary Supplements: An Advertising Guide for Industry,” as we covered [here](#). We also have seen a slew of proposed guides and rules on endorsements and testimonials, junk fees, earnings claims, negative option and automatic renewal plans, and environmental marketing, among many others – all intended to explain FTC staff’s view of the law as it currently sees it.

NAD Decision Addresses Influencer Disclosures

Last week, NAD announced a decision involving a challenge that a competitor brought against Wonderbelly involving (among other things) an influencer campaign.

NAD Provides Guidance on “Sustainable” Claims

Yesterday, we looked at an [NAD case](#) involving claims by Amyris Clean Beauty that it used “clean ingredients and clean formulas” and considered what lessons other advertisers who want to make “clean” claims should take away from the decision. As part of that same case, NAD also looked at various “sustainable” claims made by the advertiser. Today, we’ll consider what lessons advertisers should take away from that part of the decision.

NAD Provides Guidance on “Clean” Claims

In a recent decision, NAD notes that “clean” claims are “ubiquitous in the beauty industry.” Despite that, the term doesn’t have a clear definition and reasonable minds can disagree over exactly what it means. That creates a challenge for advertisers who are generally required to be able to substantiate all reasonable interpretations of their claims. Although NAD doesn’t take a position on what “clean” should mean, the decision provides some helpful guidance for advertisers who want to use the term.

Health Data Privacy: What We’re Hearing

U.S. privacy developments are moving quickly, but *health* data privacy is racing forward. Companies that come into contact with consumers’ health data need to track and respond to a variety of developments. Most notably, these include Washington’s [My Health My Data \(MHMD\) Act](#), a similar law in [Nevada](#), “sensitive data” and “sensitive personal information” requirements under comprehensive state privacy laws, and FTC [enforcement actions](#) and [guidance](#) that assert that a broad range of health data is sensitive. How a company responds to these developments is likely to

be iterative given the lack of clarity or harmonization with these requirements, and substantial resources required to implement changes.

TSR Updated to Expand Recordkeeping Obligations; Cover B2B Telemarketing Representations; May Expand to Inbound Tech Support Service Calls

The beginning of 2024 has brought with it a decided regulatory focus on telemarketing. In the past couple of months, we've written about several important FCC actions related to the Telephone Consumer Protection Act (TCPA), namely the adoption of a [one-to-one consent requirement](#), a ruling that calls to consumers using [AI technologies](#) are considered "artificial or prerecorded" messages subject to regulation under the TCPA, and rule changes intended to [expand consumers' ability to revoke consent](#) to receive calls and texts.

NY Attorney General Sues JBS Over Greenwashing

Last year, a trade association challenged aspirational claims that JBS – the world's largest producer of beef products – was making about its commitment "to be net zero by 2040." NAD [determined](#) that although the company had taken steps that may be helpful towards achieving its goal, those steps weren't enough to support the implied claim that JBS was currently implementing a plan that would achieve that goal. On appeal, NARB [agreed](#) with NAD's decision.

Senate Confirms New FTC Commissioners Holyoak and Ferguson; Reconfirms Slaughter

After nearly a year without a Republican Commissioner after [Christine Wilson's resignation](#), the FTC will again have a full slate of five Commissioners – with two new Republican Commissioners in Melissa Holyoak and Andrew Ferguson confirmed last night. Shortly before the President's State of the Union address, the Senate voted unanimously via voice vote to confirm Holyoak and Ferguson along with reconfirming current Democratic Commissioner Becca Slaughter to a new term.

PFAS Grease-Proofing Agents Officially Slip Out of U.S. Market

Rest assured, you can stop worrying about ingesting "forever chemicals" when you use fast-food wrappers, microwave popcorn bags, and take-out paperboard containers. Last week, FDA announced [here](#) that so-called "grease-proofing" food packaging products containing PFAS will no longer be sold in the U.S. According to FDA, these types of food-contact paper products are the highest contributors of PFAS dietary exposure among all FDA authorized uses of food-contact products containing PFAS.

FCC Adopts Changes to TCPA Consent Revocation Rules

At its most recent open meeting on February 15, 2024, the Federal Communications Commission (FCC or Commission) voted unanimously to adopt yet another round of rule changes related to the Telephone Consumer Protection Act (TCPA). These [rule changes](#), focused on expanding consumers' ability to revoke consent to receive calls and texts, build on the FCC's other recent TCPA actions – namely the adoption of a [one-to-one consent requirement](#), and a ruling that calls to consumers using [artificial intelligence technologies](#) are considered "artificial or prerecorded" messages subject to regulation under the TCPA.

What Comes Around...How Chanel's Win May Help Brands Protect their Rights in the Resale Market

On February 6, 2024, Chanel emerged victorious in its trademark infringement and false advertising lawsuit against luxury reseller What Goes Around Comes Around ("WGACA"). A jury in the U.S. District Court for the Southern District of New York awarded Chanel a unanimous verdict on all counts of liability, plus \$4 Million in statutory damages for willful trademark infringement in connection with the sale of counterfeit bags that were never authorized for sale by Chanel. The case will now proceed for Judge Louis Stanton to decide what equitable relief Chanel may be entitled to, including a potential injunction and disgorgement of WGACA's profits.

A Group of 19 State AGs Support the FTC's Proposed Rule on "Junk Fees"

Another week, another flag on so-called junk fees.

The FTC is in the midst of a months-long rulemaking targeting "unfair or deceptive fees" that would fundamentally alter the way businesses can advertise their prices to consumers. Recently, a bipartisan coalition of 19 state AGs (led by General Michelle Henry of Pennsylvania and General Josh Stein of North Carolina) filed a [comment letter](#) supporting the FTC's efforts.

FCC Declares TCPA Restrictions Apply to AI-Generated Calls

On February 8, 2024, the Federal Communications Commission (FCC or Commission) released a [Declaratory Ruling](#) to clarify that telemarketing and other calls made to consumers using certain types of artificial intelligence are subject to restrictions set forth in the Telephone Consumer Protection Act (TCPA), and therefore are unlawful unless the caller has the requisite consent from the consumer recipient.

New Jersey and New Hampshire Set the Pace with 2024 State Privacy Legislation

New Jersey and New Hampshire are the first states out of the gate in what promises to be another busy year in state privacy legislation.

State AGs Focus on Social Media and its Impact on Youth

As we have [discussed](#), the NAAG President, Oregon Attorney General Ellen Rosenblum, formally announced her 2024 Presidential Initiative focusing on America's youth. As we noted, this was consistent with a broader priority for 2024 among many state attorneys general (AGs) across the country.