

Ad Law News and Views - May 22

May 22, 2024



Did you know that the month of May is *Get Caught Reading Month*? What are you currently reading? Mystery? Science fiction? Biography? History? Humor? Here are some top picks from our Ad Law attorneys:

The Women by Kristin Hannah, *Lead with Influence* by Matt Norman, and *The Extraordinary Life of Sam Hell* by Robert Dugoni, which I really enjoyed! (Katie Rogers)

Table for Two by Amor Towles (Donnelly McDowell)

Radical Candor by Kim Scott. Highly recommend – very good so

far! (Ioana Gorecki)

Just for the Summer by Abby Jimenez and *Look Closer* by David Ellis (Abby Stempson)

Leviathan Falls by James S. A. Corey (Alex Schneider)

Burn Book by Kara Swisher (Laura VanDruff)

People Magazine and *E! News* – so that I can try out for the Pop Culture focused spin-off of *Jeopardy!* (Darby Hobbs)

Good Omens by Terry Pratchett and Neil Gaiman and *1493* by Charles C. Mann (Beth Chun)

We hope our Ad Law Access blog is on your reading list. If you are not plugged in, you may check it out [here](#) for advertising law and privacy law trends, issues, and developments.

UPCOMING EVENTS

A Conversation with First Assistant Attorney General Brent Webster

May 23 | 2:00 p.m. - 3:00 p.m. ET

Join Kelley Drye’s State Attorneys General Ad Law team in our upcoming webinar led by Co-Chair, [Paul Singer](#), Special Counsel [Abby Stempson](#), and Senior Associate [Beth Chun](#).

This month will feature **First Assistant Attorney General Brent Webster**, of the state of Texas, as our esteemed guest. First Assistant Webster was appointed by Attorney General Ken Paxton in 2020 and previously served as a criminal prosecutor, civil litigator, and criminal defense attorney. During our webinar, First Assistant Webster will share several key consumer protection updates and issues facing the state of Texas. Listen in as we discuss:

- Texas investigative and enforcement tools
- Big tech enforcement in areas such as biometrics, digital advertising, and general deceptive practices
- Enforcement in the area of “junk fees,” the most affected industries, and why it matters
- A breakdown of recent cases including case types, theories, and settlements
- Investigations and the path to litigation
- Multistate collaboration

[Register Here](#)

IN THE NEWS AND LATEST UPDATES

Get these and other stories in real time when you subscribe to the Ad Law Access blog [here](#) or visit the Advertising and Privacy Law Resource Center [here](#).

[NY Case Addresses Publicity Rights for People in the Background of Social Media Photos](#)

This month, we [posted](#) about a lawsuit that an NBA Hall of Fame player filed against a company that allegedly used his image to sell products without his permission. Regardless of how that case turns out, it’s pretty clear you shouldn’t use a celebrity’s image in an ad without written consent. But what about cases that are less clear, such as a person in the background of a photo that your company posts on its social media account? A recent NY appeals court [decision](#) touches on this issue.

[Arizona Turns Up the Heat in Amazon’s Legal Battles](#)

General Kris Mayes recently [filed two new lawsuits](#) against Amazon.

The first accuses Amazon of using “dark patterns,” or digital design tricks, that make it difficult for consumers to cancel their Prime subscriptions. According to the lawsuit, Amazon used misleading graphics and wording and emphasized the benefits of Prime before allowing consumers to cancel their subscriptions to the service, among other hurdles designed to exploit cognitive biases and influence a user’s choices.

[NAD Reviews Green Claims for Trash Bags](#)

HoldOn makes trash bags that are certified by the Biodegradable Products Institute (“BPI”) and TÜV Austria as compostable in commercial and home composting settings. The company advertises that the bags are great for trash, composting, recycling and that they are more “sustainable” than competing bags that are resistant to biodegradation. A competitor filed an NAD challenge arguing that HoldOn overstates the benefits of its bags. The decision covers a lot of ground, but here are some highlights.

[Supreme Court Upholds CFPB Funding Mechanism as](#)

Constitutional, Quelling Uncertainty and Reinvigorating the CFPB's Docket

In a long-awaited [decision](#) with profound implications for the future of the agency, the Supreme Court held 7-2 today that the Consumer Financial Protection Bureau (CFPB) is constitutionally funded. CFPB officials can breathe a sigh of relief as a contrary decision would have called into question many longstanding enforcement, investigative, and regulatory efforts. With the Court's decision today, more than a dozen pending CFPB cases that had been paused pending the decision will now move forward.

CFPB Report and Hearing with DOT Highlight Risks with Rewards Programs

Yesterday, the CFPB released a [report](#) on rewards programs that traces the rise of such programs and warns that it views certain practices as unfair, deceptive, or abusive acts and practices ripe for investigation and enforcement. While the report addresses credit card rewards programs specifically, there are important takeaways for co-branded partners and any company offering a loyalty or rewards program to mitigate risk of enforcement and litigation.

California Issues FAQs on Hidden Fee Law

This week, the California AG's office released a set of [FAQs](#) on California's law addressing hidden fees. As a reminder, the law states that the following practices will be unlawful under the Consumer Legal Remedies Act ("CLRA") starting on July 1, 2024.

California DOJ Dispels Myths on New Hidden Fee Law

Last year, California [enacted](#) a law which will generally require companies to include all mandatory fees when they advertise prices.

FTC Staff's Revised MLM Guidance—More Content, Less Clarity

Yesterday FTC Staff released updated [Business Guidance Concerning Multi-Level Marketing](#) that provides a detailed account of their current perspective on applicable standards governing the direct selling and multi-level marketing (MLM) industry. The new Guidance updates guidance from January 2018 (that we covered [here](#)) and lays out several principles and issues that Staff intend to consider in evaluating whether MLMs constitute illegal pyramid schemes and/or are otherwise engaged in unfair or deceptive acts or practices, including through misleading earnings and lifestyle claims and potential agency liability.

Proposed Federal Legislation Would Require Warning Labels and Advertising Prohibitions on "Junk Foods"

On April 19th, Sen. Bernie Sanders (I-Vt.), Sen. Cory Booker (D-N.J.), and Sen. Peter Welch (D-Vt.) introduced The Childhood Diabetes Reduction Act (the "Act"). In a press release that positions the Act as having the same urgency as Congress's efforts to take on the tobacco industry 30 years ago, the sponsors' stated aim is to combat growing trends in childhood diabetes and obesity.

NAD Finds Disclosures for Comparative Claims Aren't Clear

Glad advertises that its ForceFlex MaxStrength bags are “25% more durable.” More durable than what? If you follow an asterisk, you’ll learn that they are 25% more durable than Glad’s own 13-gallon ForceFlex bags. A competitor – presumably worried that consumers would think that Glad was making a comparison to its bags – brought a challenge before the NAD, questioning whether the basis of comparison was sufficiently clear. NAD didn’t think so.

Update on TSR Amendments and Recordkeeping Requirements

As an update to our earlier [blog post](#) detailing the FTC’s amendments to the Telemarketing Sales Rule, the changes have since been published in the Federal Register, with an effective date of [May 16, 2024](#). However, with respect to the expanded recordkeeping requirements for telemarketing call details, the FTC had previously announced a 180-day grace period to give affected businesses time to implement systems, software, or procedures necessary to comply with the new requirements. As such, businesses will have until [October 15, 2024](#) to adhere to that particular provision of the rule.

NAD Determines a Money Back Guarantee Conveys Performance Claim

The Princeton Review advertises its MCAT preparation courses with the following copy: “Score a 515+ on the MCAT or add 15 points depending on your starting score. Guaranteed or your money back.” Blueprint Test Preparation filed a challenge before the NAD arguing that The Princeton Review must be able to substantiate that its students will score 515+ or add 15 points. The Princeton Review argued that it wasn’t making a performance claim – it was simply offering a money-back guarantee.

California Publishes New Regulations Governing Charitable Campaigns

Doing good just got a little more complicated for companies that run charitable campaigns in California.

A Viewer’s Guide to FTC’s Vote on Banning Noncompete Clauses

The Federal Trade Commission will hold the most important meeting of this administration at 2 PM EDT Tuesday April 23, 2024. Commissioners will decide whether to issue a rule that declares most noncompete clauses in employment contracts unfair methods of competition. Kelley Drye published my backgrounder on the proposal [here](#). The deliberation and decision will be streamed live from www.FTC.gov. We will be watching and posting updates on [LinkedIn](#) and [\(Twitter\)X](#).

Court Finds that Sunshine Reveals Puffery

Two consumers walked into supermarkets on a mission to find “nutritious, healthy snacks” that “would not likely increase [their] risk of disease” and later walked out with Fruit Bowls in Gel, Fruit Bowls in Juice, Canned Fruit in Juice, Canned Fruit in Heavy Syrup, Canned Fruit in Light Syrup, and Canned Fruit Juice. Perhaps those wouldn’t be your first choices, given that mission statement, but the consumers were swayed, in part, by Dole’s “promise to provide everyone, everywhere with good nutrition.”

Maine to Require Telemarketers to Check Reassigned Number Database

The governor of Maine recently signed an [amendment](#) to the state's telephone solicitation law that will make it mandatory for telephone solicitors to check against the Federal Communications Commission's (FCC's) reassigned number database "to verify that a consumer's telephone number has not been reassigned prior to initiating a telephone sales call to that consumer." Callers will also be required to demonstrate that they check against the database in order to avail themselves of the state's existing safe harbor for telemarketing violations. The amendment, which will become effective on July 16, 2024, makes Maine the first state to adopt such a requirement.

AGs Protect Children from AI (and Chainsaws)

Last week in South Carolina, AGs, staff, and members of the community gathered for the AI and Preventing Child Exploitation Seminar, presented jointly by the Attorney General Alliance (AGA) and the National Association of Attorneys General (NAAG). Sessions focused on robocalls, online platforms, youth digital wellness and mental health, and the potential benefits of AI.