

Ad Law News and Views: November 21, 2023

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JOIN KELLEY DRYE FOR AN UPCOMING WEBINAR

A Conversation with NAAG and AGA Executive Directors December 14 | 2:00 p.m. – 3:00 p.m. ET

Join Kelley Drye State Attorneys General practice Co-Chair [Paul Singer](#), Special Counsel [Abby Stempson](#), and Senior Associate [Beth Chun](#) and the executive directors of [The National Association of Attorneys General](#) (NAAG) and the [Attorney General Alliance](#) (AGA) for a discussion on the significance of these organizations and state attorneys general to the business community. Guest speakers [Brian Kane](#), Executive Director of NAAG and [Karen White](#), Executive Director of AGA will highlight:

- The importance of businesses understanding AG priorities which include hot topics such as:
 - Data privacy, artificial intelligence, consumer protection, organized retail crime, and cannabis
- Each organization's history, membership, and leadership
- How businesses can use NAAG and AGA as a resource
- State AG elections and other items of interest in the new year

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FTC Sends Warning Letters to Companies and Influencers Over Disclosures in Posts

Earlier this year, we [examined](#) how changes to the FTC's Endorsement Guides might affect influencer campaigns and suggested that companies may want to monitor FTC actions in this area to see what types of conduct grab the FTC's attention. Yesterday, we got some initial clues when the FTC announced that it had sent warning letters to two trade associations – the American Beverage Association and The Canadian Sugar Institute – and 12 health influencers over their posts.

Diagnosis: Fake Reviews = Refunding Copays, Destroying Patients

on Social Media, and Everything in Between

Like we previously reported, [reviews matter](#). The New York Attorney General (NY AG) announced a \$100,000 [settlement](#) out of its Bureau of Internet and Technology with a Manhattan-based orthopedic doctor for manipulating patient reviews on multiple websites such as RateMDs.com, ZocDoc, Google, Yelp, Vitals, Advise, Healthgrades, MD.com, and the Better Business Bureau. The doctor's wife also settled separately but with no monetary penalties.

NAAG 2023 CP Fall Conference: Advertising – Honing in on California's Views

We return to NAAG's 2023 Consumer Protection Fall Conference for "Advertising Psychology and Law Primer." While it lived up to its name covering many basic advertising law concepts, the panel also covered specific perspectives from California on junk fees and other advertising principles that are valuable tips to help stay off their radar. This panel was moderated by Nick Akers, Senior Assistant Attorney general at the California Attorney General's Office and Beth Blackston, Consumer Fraud Bureau, Chief of the Southern Bureau of the Illinois Attorney General's Office. Panelists included Rafael Reyneri, an attorney in the Division of Advertising Practices at the FTC and Michele VanGelderens, Supervising Deputy Attorney General at the California Attorney General's Office.

NAAG CP Fall 2023: Dark Practices?

On November 7, the National Association of Attorneys General (NAAG) 2023 Consumer Protection Fall Conference held its public day with a number of substantive and interesting discussions about the current state of consumer protection enforcement by the FTC and, of course, state AGs. We will be bringing you a series about the conference panels, each of which discusses a hot topic of enforcement for the coming year.

Chargebacks911 Settlement Highlights FTC and AG Scrutiny of Chargeback Mitigation Practices

This week, the FTC and Florida AG [announced a settlement](#) with Chargebacks911, a chargeback mitigation company that touted its ability to help companies respond to and reverse consumer credit card disputes. The FTC and Florida AG [sued the company](#) in April 2023, alleging that Chargebacks911 used deceptive techniques to contest chargebacks and lower clients' chargeback rates.

CFPB Issues Proposed Rule to Expand Supervisory Authority, Conduct Examinations of Digital Wallets and Mobile Payment Apps

Yesterday, the Consumer Financial Protection Bureau (CFPB) [released a notice of proposed rulemaking](#) that would allow the agency to supervise and conduct examinations of certain non-bank providers of digital wallets and payment apps. The move is intended to address perceived "regulatory arbitrage by ensuring large technology firms and other nonbank payments companies are subjected to appropriate oversight," according to CFPB Director Rohit Chopra.

Know Your Fake Reviews: State AGs Signal Enforcement

Reviews matter. In a survey conducted by Yelp, 83% of consumers who read reviews say they trust

online reviews about local businesses. However, fake reviews may mislead consumers. Recently, there was media attention around a [one-night-only restaurant in New York City that arose from fake reviews](#). The idea for a restaurant spawned from a joke. A group of friends had renamed (on Google Maps) the house they lived in to “Mehran’s Steakhouse” and left reviews about the “restaurant.” It was not an established “restaurant” at the time, though some of the reviews suggested otherwise. “Mehran’s Steakhouse” had 91 reviews and a near-perfect Google rating. The friends set up a website and created a waiting list, where over 900 people signed up. Eventually, the friends put together a one-night-only dining experience. They obtained a liquor license, food handling permits, printed menus, and set up a number of “fake”-themed performances (e.g. fans of the artist, Drake, stood outside the restaurant holding posters to get Drake’s attention, though Drake was not there; a fake proposal occurred in the dining room).

NAD Decision Provides Guidance on Disclosures for Endorsements

NAD recently issued a decision in a challenge that Bath & Body Works (or “B&BW”) brought against Goose Creek that touches upon a number of common issues advertisers face. The decision covers a lot of ground, and yesterday we focused on issues related to comparative claims against unnamed competitors. In this post, we’re going to focus on a few issues related to disclosures for endorsements.

FTC Alleges FinTech Provider Engaged in Dark Patterns, Concealed Fees for Cash Advances in Reaching \$18 Million Settlement

The FTC yesterday filed a complaint and stipulated order against Bridge, It (dba “Brigit”), a fintech company that operates a personal finance mobile application that advertises cash advances to consumers. According to the complaint, Brigit targeted low income consumers with offers for short-term cash advances of “up to \$250” if they enrolled in a \$9.99 per month membership program. The FTC alleged that only approximately 1% of customers actually received access to the \$250 advance and approximately 20% were denied access to cash advances entirely.

Safeguards Snafu? The Anomalous New Provision in the FTC’s Gramm-Leach-Bliley Safeguards Rule

Last week, the FTC announced that it had finalized its rulemaking to add [data breach notification provisions](#) to the Gramm-Leach-Bliley Act (GLBA) Safeguards Rule. As expected, the new provisions require non-bank financial institutions to provide notice to the FTC of data incidents meeting certain thresholds and detail the trigger for, and content and timing of, the notice. The FTC’s proposal elicited only 49 comments, perhaps because most stakeholders thought that the new requirements were inevitable and would be fairly routine. After all, the federal banking agencies have long required data breach notification under GLBA, every state in the country has a data breach law, and the Commission was only proposing that notice be given to the FTC, not to consumers.

Health Data Coding Error Costs Inmediata \$1.4 Million with AGs

We posted just last week about the [Blackbaud multistate settlement](#), and as we have [discussed](#), health privacy remains a hot topic and is already back in the news. On October 17th, 33 AGs led by Indiana, [announced](#) a multistate settlement in the form of a judgment with a Puerto Rico-based health care clearinghouse, Inmediata, for what the AGs alleged was a failure to appropriately safeguard data and a delayed and flawed notification to consumers of a coding issue. As a result, the

states said protected health information (PHI) of approximately 1.5 million consumers was exposed to public online searches for almost three years. The AGs alleged, among other things, violations of the Health Insurance Portability and Accountability Act's (HIPAA) Security Rule and its Breach Notification Rule.

California: Changes to Consumer Protection Authority

California has a new tool in the toolbox when it comes to remedies available for certain consumer protection law violations. The governor of California recently signed [legislation](#) adding the remedy of disgorgement for AG actions under [false advertising](#) and [unfair competition](#) laws (Consumer Laws), which would require a party to repay all amounts obtained through illegal or wrongful acts. In addition, the law created a Victims of Consumer Fraud Restitution Fund (Fund) to help make victims whole in consumer protection lawsuits brought by the California Attorney General. The Fund is funded through payments made by those who violate consumer protection laws, and not through taxes or fees charged to law-abiding businesses.

New Gmail Marketing Requirements Will Impact Most Advertisers

This month, Google [announced](#) that it would soon implement new requirements for "bulk senders" – defined as senders who send more than 5,000 messages to Gmail addresses in one day – that will likely impact most companies that send marketing emails.