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

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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 VanGelderen, Supervising Deputy Attorney General at the California Attorney General's Office.

Reyneri discussed basic concepts of advertising law, highlighting the recent endorsement guides amendments which were discussed in more detail in a later panel. He also pointed to recent FTC developments such as its use of notice of penalty offense authority in an effort to obtain monetary relief post-*AMG*. Reyneri reminded the audience that the .com Disclosures are in the process of being updated, and also highlighted the rulemaking for Junk Fees.

VanGelderen started her presentation by noting that marketers are increasingly spending money on behavioral research, which she explains shows that people use decision-making shortcuts when overloaded with information, have time pressures, or are making trivial decisions relying on heuristics to simplify decisions. She said that people choose the first product that minimally meets needs. VanGelderen then went on to describe some of their office's positions on recent advertising cases.

Senate Bill 478 (Junk Fees)

Likely the hottest topic discussed during the panel, VanGelderen provided some insight into how the California AG's office views the new junk fee law, which we covered here. She reminded the audience that the legislative intent was to prohibit drip pricing and that bait and switch and unbundling of prices was already deceptive under the AG's previous authority. The purpose of the new law was to prevent ambiguity.

VanGelderen provided several examples of fees that California would find deceptive:

- A 4% sustainability fee on all transactions would be deceptive if disclosed separately from the rest of the price.
- Advertising a $0 delivery fee when there is actually a $3 service charge that helps operations

would also be deceptive where the service itself was delivery.

- A 5% surcharge to help pay for increased costs due to a government mandate (she framed as a "protest fee") would also be deceptive if not included with the total price.

In a question by AG staff from Illinois, it was mentioned that a similar junk fee law may be considered in that state as well, so clearly deceptive fees continue to be on the minds of more than just California.

Labeling

VanGelderen discussed multiple recent labeling cases and the office's view of the rulings:

- The California AG's office wrote an amicus brief in a 2018 case on appeal related to the vitamin brand "One a Day," but which included a recommended dosage of two gummies for certain products. VanGelderen agreed with the court's ruling that this was an issue because reasonable consumers were unlikely to review all the details on the bottle before purchasing.

- VanGelderen highlighted another case, in which white baking chips were shown on a bag; even though the bag didn't say the chips were made of white chocolate, VanGelderen's and the appellate court's view were that this was misleading in part because consumers don't look at ingredient labels.

- Finally, she described a case where Manuka honey was labeled as 100% despite only being 60-70% Manuka honey. The court found the label permissible in part because FDA guidelines allowed it and that consumers would understand it is impossible to make a honey 100% derived from one source. But VanGelderen said she disagreed with this outcome -- though she admitted it is currently the law, she alluded that it may have come out differently in state court.

Nontraditional Marketing

VanGelderen described some of the more recent actions by the California AG's office that shed light on the office's views of advertising claims. For instance, in *People v. Johnson & Johnson, et al.*, she described the company's surgical mesh "surround sound marketing campaign" to create demand from patients. California considered these education awareness events and brochures to be marketing materials because the intent was to sell mesh, and alleged the company downplayed or concealed serious health risks obtaining a $362 million verdict.

In *People v. Ashford et al.*, California said that using telemarketers branded as admission counselors was deceptive where the sales environment incentivized representatives to mislead consumers (potential students) about the costs of attendance, ability to obtain certain jobs, and transferability of credits.

Bottom line: To stay in line with California (and many other states) positions on advertising, remember:

- Consumers may not look at the entire label – so consider accordingly.

- Advertising can take many forms, including consumer education.

- Don't mislead customers about existence of fees, or what a fee is for.