

Top Advertising Law Developments in 2022

December 14, 2022

If you follow our blog, you already know that there have been a number of significant developments in the world of advertising law over the past 12 months. In this post, we highlight ten of those developments and consider what they might mean for the future.

- **Dark Patterns:** Any practices that could manipulate or mislead consumers into taking actions they wouldn't otherwise take will continue to receive maximum scrutiny from the FTC and state AGs. Over the past year, we saw a new FTC [staff report](#) on "dark patterns," as well as enforcement actions against [Vonage](#) and [Fareportal](#). Private plaintiffs (see [here](#) and [here](#)) as well as [consumer advocates](#) are taking note. Companies should give serious consideration in their product interfaces, disclosure and notice design, purchase flows, cancellation methods, auto-renewals, and other consumer communications to any "nudge" activities that could be interpreted as problematic "dark patterns."
- **Individual Liability:** The FTC isn't backing down from its commitment to hold individuals liable in its cases, and did so in numerous matters in 2022 ([Drizly](#), [Passport Auto](#), [Napleton](#), [Electrowarmth](#), [Roomster](#)). At the same time, it's worth noting the absence of individual liability in several recent high-profile cases ([Twitter](#), [Facebook](#), [Google](#), [Vonage](#)), suggesting, perhaps, that the agency recognizes there are some challenges and trade-offs to inclusion in certain cases. In any case, given Chair Khan's repeated remarks emphasizing the need for executive accountability (see [here](#) and [here](#)), we expect to see a continued effort to include individuals in FTC complaints and orders. This same theme has been echoed by the CFPB, with Director Chopra [recently outlining](#) his vision for increased individual accountability and encouraging State Attorneys General to take the same approach.
- **Post-AMG Money Woes.** The FTC continues to scramble for dollars post-AMG. Some creative initiatives include using its [penalty offense authority](#) to extract civil penalties for practices it claims are covered by prior administrative orders ([Walmart](#), [Kohl's](#), [DK Automation](#)). The agency is also turning to Section 19 where possible and has initiated several new Mag-Moss rulemakings to codify certain unfair or deceptive practices (more on that in a separate bullet). In addition, the FTC is partnering with states to obtain monetary relief using state statutes ([Google](#)). We can expect to see more creative avenues for obtaining monetary penalties or relief in the new year.
- **Green Claims:** As more companies develop Environmental, Social, and Governance ("ESG") goals and advertise their progress towards those goals, we're starting to see more challenges to those ads. Although defendants have scored some notable victories this year (such as [these](#)), NAD often looks at green claims with a more critical eye. (Click [here](#), for example.) We expect this trend to continue in 2023, though the biggest development may be the FTC's long-awaited [update](#) to its Green Guides.

- **Automatic Renewals:** Programs that automatically renew have been under a lot of scrutiny. Much of the focus has been on the sign-up process and whether companies have used deception or “dark patterns” (see above) when enrolling consumers in recurring billing. Lately, regulators and plaintiffs’ attorneys have also been paying attention to how people cancel. (Click [here](#), for example.) [Some regulators](#) have indicated this will be an enforcement priority next year. And [big settlements](#) in class actions suggest more of those will be on the way.
- **Endorsements and Reviews:** This year, the FTC announced its [first case](#) involving the failure to post negative reviews. Since then, they have announced [proposed updates](#) to the Endorsement Guides, a [proposed rule](#) to combat fake reviews, and teamed up with states to challenge misleading endorsements and reviews. (Click [here](#), for example.) Meanwhile, NAD has also focused on how companies advertise reviews. (Click [here](#), for example.) We expect these trends to continue in 2023.
- **Mag-Moss Rulemakings:** Undeterred by the [cumbersome Mag-Moss process](#), the FTC announced several new ANPRs in 2022: [commercial surveillance](#), [earnings claims](#), [reviews and endorsements](#), and [junk fees](#). New rules may benefit industry by providing clarity and certainty, but they may also do more harm if they turn out to be very prescriptive or unclear (see, for example, our recent [write-up](#) regarding the pitfalls of the proposed impersonation scam rule). We’ll be watching to see how much progress the agency is able to make on this ambitious effort in 2023.
- **State Attorneys General:** While State AGs have always been a major player in advertising enforcement, they continue to gain attention and prominence as part of the post-*AMG* fallout as the primary regulator who can seek significant monetary remedies for violations of state unfair and deceptive trade practice laws. AGs have collaborated throughout 2022 in pursuing some of the priorities otherwise identified in this list, notably in settling with Google over allegations of dark patterns in its [collection of geolocation information](#), and settlements with Google and iHeartMedia over the use of [misleading endorsements](#) for the Pixel mobile phone. But looming in the background is ongoing criticism, largely from Republican Attorneys General, about the [National Association of Attorneys General](#) and [multistate enforcement generally](#), that may result in less coordinated multistate activity and more individual state action in 2023. That said, [we still predict bipartisan efforts](#) to dominate AG enforcement in particular with high profile consumer protection initiatives, but we will continue to monitor developments in and out of NAAG for any changes in trends.
- **Right to Repair:** The FTC is focused on ensuring that consumers have options when it comes to repairing products. In 2019, they held a [workshop](#) to discuss manufacturer restrictions on repair rights, including provisions that void a warranty if the consumer uses third-party parts or independent service centers. In a 2021 [report](#), they concluded there was “scant evidence to support manufacturers’ justifications for repair restrictions.” After that, they issued a [Policy Statement](#) calling for more aggressive enforcement against manufacturers that impose these restrictions. Since then, they entered into [three settlements](#) over this issue. While the FTC took action under existing law, federal and state legislatures continue efforts to pass legislation specific to right to repair. Expect these efforts to continue in 2023.
- **NAD Jurisdiction:** Following [a move from CARU](#), NAD announced that it would expand its jurisdiction to include “resolving complaints or questions concerning national advertising that is misleading or inaccurate due to its encouragement of harmful social stereotyping, prejudice, or discrimination.” So far, we haven’t seen any decisions involving this provision. It will be

interesting to see what standards NAD applies and what will happen if advertisers decide not to comply with NAD's recommendations.

Keep following us in 2023, and we'll keep you posted on how these trends develop.