VENABLE® LLP

Brand Activation Association Government and Legal Affairs Committee Monthly Update

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AllAboutAdvertisingLaw.com - blog

Federal Developments: FTC and FCC

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ROSCA Suit against Skin Care Marketers

FTC v. BunZai Media Group, Inc.: FTC alleged violations of ROSCA, FTC Act, and EFTA.

- Defendants marketed "risk-free" trials of skincare products to consumers nationwide through online banners, pop-up advertisements, and websites.
- Although Defendants marketed the trial as "free," they charged consumers $97.88 for the full cost of the products included in the "risk-free" trials, and charged consumers for shipping and handling
- If consumers wished to cancel their subscription or return the risk-free trial, the marketers imposed difficult cancellation and refund procedures that were not adequately disclosed.

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GMS4
GMS5
GMS6

Mobile App and Online Currencies

FTC v. Equiliv Investments

- Equiliv settled charges that it violated Section 5 by luring consumers into downloading its "rewards" app, Prized, saying it would be free of malware, when the app's main purpose was actually to load the consumers' mobile phones with malicious software to mine virtual currencies for the developer.
- Case is part of the FTC's ongoing work to protect consumers taking advantage of new and emerging financial technology, FinTech, an effort by the FTC to protect consumers encouraging innovation.

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Slide 4

GMS4 Recommended Talking Points: In recent years, the TCPA has become a favorite of class action attorneys and telemarketers sought releif from FCC an onslaught of class actions. THe FCC's recent declaratory ruling addresses a number of TCPA issues and is set to be very controversial
Goodrich, Mark S., 7/20/2015

GMS5 As background, TCPA requires “prior express written consent” for autodialed or prerecorded message calls (robocalls) to cell phones
Goodrich, Mark S., 7/20/2015

GMS6 The most significant issue covered is the definition of "autodialer" for purposes of the TCOA
Goodrich, Mark S., 7/20/2015

TSR Enforcement

- FTC v. All Us Marketing LLC
  - Marketer robocalled consumers to offer consumers an opportunity to secure lower credit card interest rates for a payment between $300 and $5,000 by affiliating themselves with nationwide banks and stating they were from "Card Services," but failed to provide consumers with the promised interest rate reductions or savings, and instead provided consumers with a package of financial education information they did not request or applied for credit cards under consumers' names without their knowledge or consent.
- FTC v. Lifewatch Inc.
  - Lifewatch used robocalls to deceive older consumers into believing that an acquaintance purchased a medical alert system for them.
  - Ensured consumers that they could receive the system at no cost to them, but collected consumers' billing information to charge them a monthly monitoring fee, and enacted difficult refund and cancellation procedures.
- FTC v. E.M. Systems & Services, LLC
  - Defendants, falsely affiliating themselves with consumers' lenders, called consumers suffering from credit card debt to falsely promise that, for an up-front fee, consumers could save thousands of dollars by reducing their credit card interest rate, but never delivered on the promises

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Payday Lenders

FTC v. CWB Services, LLC

- CWB Services, LLC and others found liable for operating a payday lending scheme in violation of the FTC Act, TILA, and EFTA.
- The lenders targeted online payday loan applicants, deposited money into applicants' bank accounts claiming consumers had agreed to a loan with Defendants, and then withdrew reoccurring "finance" charges from the bank accounts.
- Consumers attempting to refute the loans could not avoid the reoccurring charges because the lenders provided banks and debt collectors with fabricated loan agreements with consumer information purchased from lead generators and data brokers.

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Dietary Supplements

FTC v. Keyview Labs, Inc.

- Marketers advertised and sold a supplement as a "solution" to memory loss and cognitive decline, and used fabricated scientific studies and deceptive expert endorsements to prove the product's efficacy.
- Marketers were found liable for deceiving consumers through false advertisements in violation of Sections 5 and 12 of the FTC Act.

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Phantom Debt Collection

FTC v. Centro Natural Corp.

- Phantom debt collection operation in which company cold-called Spanish-speaking consumers and threatened them with harsh consequences, such as arrest, legal actions, and immigration status investigations, if they failed to make large payments on fake debts
- After collecting over two million dollars through a debt collection scheme, the FTC alleged violations of the FTC Act, FDCPA, and TSR.
- Posed as government officials, used abusive debt collection practices, and called consumers on the National Do Not Call Registry.

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Car Cases

- In the Matter of TT of Longwood
  - Promoted specific sale prices, but required additional $3,000 to purchase the advertised vehicle;
  - Advertised incentives as generally available to consumers, but required consumers meet certain qualifications before obtaining the vehicle at the advertised price;
  - Advertised that vehicles are available for $0 down, $0 payments, and $0 interest when consumers were required to make a down payment and multiple monthly payments;
  - Promoted "sign and drive" lease offers indicating no down payment at lease signing, yet required a $3,000 down payment;
  - Misrepresented that vehicles were available for $99 when consumers could not purchase or lease vehicles for this amount.
  - Violations of Consumer Leasing Act: Did not disclose that it was a lease and security deposit was required.
- In the Matter of Matt Blatt Inc.
  - Advertised a "Biweekly Payment Plan" as an add-on service to consumers financing the purchase of one of Blatt's automobiles, but failed to disclose that: (1) the significant fees associated with the program would offset any savings; and (2) the total amount of fees can add up to more than $775 on a standard five-year auto financing contract.

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Car Cases

In the Matter of J.S. Autoworld, Inc. and In the Matter of T.C. Dealership, L.P.

- Alleged Violations of FTC Act, CLA, and TILA:
  - Advertised specific prices as generally available to consumers, yet required that consumers meet certain qualifications before obtaining the vehicle at the advertised price;
  - Represented that the advertised price was for purchases, not leases, when the price actually referred only to leases, and not purchases; and
  - Advertised that consumers could pay $0 at signing, yet required $2,000 at lease signing.
  - Failed to disclose that the advertised transaction was a lease and that a security deposit was required.
  - Failed to clearly and conspicuously disclose required credit information such as the amount of the down payment, the terms of repayment, and the annual percentage rate.
  - Advertised that consumers could pay $0 at signing, yet required consumers to trade in a vehicle with a value of at least $2,500 to receive the offer.

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GMS1
GMS2
GMS3

FCC Releases Telephone Consumer Protection Act Declaratory Ruling

On July 10, 2015, the FCC released a much-anticipated declaratory ruling addressing 21 requests for clarification on a number of TCPA issues.

- 3-2 vote by Commissioners
- It is controversial ruling that immediately resulted in a lawsuit filed by ACA International
- Order provides FCC position on these matters, but it us unknown how much deference state and federal courts will give to the Order

- Declaratory ruling establishes standard for definition of "autodialer"
  - Device has "capacity" to be an autodialer "even if it is not presently used for that purpose," meaning that any device that has present or future capacity to dial numbers on a random or sequential basis is covered by the statute
  - The standard reaffirms that predictive dialers fall under the TCPA
  - Order does not provide clarity on what constitutes sufficient "human intervention" to place call outside the scope of TCPA liability and thus it is still unclear whether "preview dialing," where operator selects a number and clicks to call, falls under the definition.
  - Litigation over these issues will continue

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Slide 11

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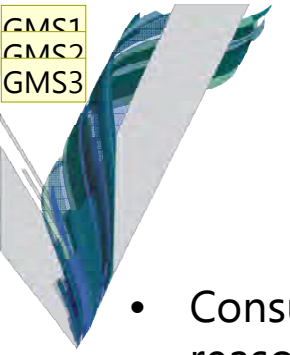

FCC TCPA Declaratory Ruling

- Consumers may revoke "prior express written consent" by "any reasonable means whether oral in writing."
  - Consumers have long had right to opt out of messages, but marketers generally could specify the method
  - Under new rules, the burden effectively falls on the merchant to prove that a consumer has not notified the merchant that consent is revoked
  - Could lead to more "he said/she said" contests in courts
- Reassigned numbers
  - "Called party" for purposes of the statute is the current subscriber
  - FCC permits a single call to a consumer before liability attaches
  - Given that telemarketer does not know that a persons number has changed if there is no answer, this "one-call" exemption provides little protection for callers

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Slide 12

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FCC TCPA Declaratory Ruling

- Order reaffirmed text messages are calls under the TCPA.
- Internet-to-phone text messages: Internet communications through texts incur liability under the TCPA.
- "On Demand" text messages: One-time text messages sent immediately after a consumer's request for the text does not violate the TCPA.
- Financial and Health-Related Messages: The new rules exempt certain financial and health-related communications.
- Call-Blocking Technology: The Order permits carriers or VoIP carriers to implement call-blocking technology for unwanted robocalls.

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Slide 13

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State Developments

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New York Attorney General Settles with Auto Dealers Over Jamming and Deceptive Advertising

- On July 14, 2015, the New York Attorney General announced a settlement requiring 22 dealerships affiliated with Atlantic Automotive Group ("Atlantic") to pay $310,000 in restitution and penalties to resolve false advertising claims.
- The NY AG stated that it received over 250 complaints regarding the dealerships and their advertising and sales practices.
- The NY AG alleged that
  - Atlantic dealerships participated in "jamming" (charging hidden purchases of items/services – such as extended warranties or vehicle maintenance contracts – of which the consumer is unaware).
  - Atlantic mailed advertisements that contained deceptive and misleading games.
    - The games stated that consumers could win a cash prize, a free vehicle, a flat-screen television or an Apple iPad.
    - A winning ticket did not explain what, if anything, the consumer won. Instead, the advertisements instructed consumers to bring the game card to the dealership during event times to claim their prize.
    - Virtually none of the consumers won a prize.
  - The dealership engaged in other deceptive practices, such as failing to give consumers all required documents are the time of purchase and refusing to refund consumer deposits.

Press Release: http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlement-atlantic-auto-group-over-misleading-advertising

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New Jersey Attorney General settles with Telebrands

- On July 13, 2015, the New Jersey AG and State Division of Consumer Affairs settled with Telebrands, Corp. ("Telebrands") regarding the company's "As Seen on TV" products.
- As part of the settlement, Telebrands agreed to revise its Interactive Voice Response ("IVR") merchandise ordering system and other business practices, and pay $550,000 to the state.
- Several issues with Telebrands marketing ordering process were alleged, including:
  - A lengthy ordering process;
  - No means for consumers to decline offers for additional products;
  - No opportunity to confirm the merchandise order prior to authorizing charges;
  - Inclusion of shipping and billing for additional products that consumers declined to purchase;
  - No information regarding the total cost of consumer's orders; and
  - No opportunity to speak with a live customer service representative
- Under the terms of the settlement, Telebrands is required to retain a Consumer Affairs Liaison for up to a two-year period, with the person subject to the approval of the Division of Consumer Affairs. The Consumer Affairs Liaison, will monitor Telebrands' compliance with the settlement terms. Telebrands also agreed to revise its IVR system, billing processes, and online advertising to comply with New Jersey law.

Press Release: http://nj.gov/oag/newsreleases15/pr20150713b.html\

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Florida Attorney General Joins FTC to Protect Seniors

- On July 7, 2015, the Florida AG and the FTC filed a complaint against several companies that promised to reduce credit card debt in exchange for an upfront fee.
- The AG and FTC allege that the defendants engaged in a debt relief telemarketing scam, including
  - Misrepresenting the benefits of the services
  - Falsely representing an affiliation with credit card issuers
  - Making unauthorized charges to consumers' credit cards for fees
  - Violating the National Do Not Call Registry and failing to honor do not call requests
- The Florida AG and the FTC allege that the companies systematically targeted elderly consumers.
- The complaint asks for:
  - Permanent injunctive relief;
  - Rescission or reformation of contracts;
  - Restitution, refunds and disgorgement; and
  - Civil penalties under Florida Deceptive and Unfair Trade Practices Act (FDUTPA).
- A growing number of AG offices are prosecuting and focusing on initiatives to protect the elderly, including asking financial institutions, banks and other organizations to have elder abuse prevention policies in place.

Press Release:
http://www.myfloridalegal.com/newsrel.nsf/newsreleases/14F0E3FC9A3F7B6885257E7B00515103

New York and Florida AGs Target Robocalls

- On June 29, 2015, the New York AG and PayPal announced that unless a consumer explicitly consents, PayPal will not robocall for marketing purposes.
- In response to a letter from the NY AG, PayPal asserted that it will only robocall consumers in instances of fraud, debt collection or in relation to account activity.
- Paypal also stated that it is working on additional opt-out features.

Press Release: http://www.ag.ny.gov/press-release/statement-ag-schneiderman-paypal%E2%80%99s-robocalling-commitments

- On June 30th, 2015, the Florida AG and the FTC filed a complaint against Lifewatch.
- The FL AG charged the Lifewatch with using illegal and deceptive robocalls to encourage older consumers in North America to signing up for medical alert systems with monthly monitoring fees and cancelation penalties.
- The AG also alleged that the company called seniors on the National Do Not Call Registry and offered products and services "at no cost to you whatsoever."

Press Release: http://www.myfloridalegal.com/newsrel.nsf/newsreleases/F2AE85601B9D44BD85257E7A00636735

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Minnesota AG Announces Savers Agreement On Donation Transparency

- On June 25, 2015, the Minnesota AG entered into settlement agreement with Savers, a retail thrift store chain that accepts donations and resells donated items, regarding the AG's claims that Savers misled donors and shoppers.
- The settlement agreement provides:
  - **Not A Non-profit:** Savers will disclose that it is a for-profit organization.
  - **No commingling:** Savers will track and segregate donations.
  - **Payment for non-clothing donations:** Savers will not solicit donations for which it does not compensate the charity on whose behalf the donation was made.
  - **Payment Disclosures:** Savers will prominently display in each store and disclose in written solicitations the actual amount it pays charities for donations.
  - **Registration:** Savers must register as a professional fundraiser with the AG office for each charity on whose behalf it intends to solicit donations.
  - **Tax receipts:** Savers will not distribute tax receipts to donors for one charity when the consumer intended to donate to another.
  - **Payments to charities:** Savers will pay a total of $1.8 million to certain charities.

- Press Release: http://www.ag.state.mn.us/Office/PressRelease/20150625SaversRegulatoryAgreement.asp

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8 AGs File Amicus Brief in *Spokeo*

- On July 9, AGs from eight states (Alabama, Colorado, Michigan, Nebraska, Tennessee, West Virginia, Wisconsin, and Wyoming) filed an amicus brief in *Spokeo, Inc. v. Robins* (concerning alleged violation of the Fair Credit Reporting Act.)
  - The plaintiff in the case sued Spokeo on the grounds that the company hurt his chances to obtain unemployment benefits by falsely reporting that he was wealthy and had a graduate degree, when he was actually struggling with unemployment.
- The AGs argued that the individual did not suffer injury-in-fact when Spokeo published inaccurate information about him online.
- The states argue that the Ninth Circuit's decision in *Spokeo* will impede state-level class action reforms:
  - The states stated that they have a strong interest in avoiding a return to the "Wild West" of abusive "no-harm" class actions resulting in windfall judgments.
  - The states cited reforms like heightened certification requirements and interlocutory appeals of certification orders.

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State AGs and Data Breach Laws

- On July 7, 2015 the National Association of Attorneys General ("NAAG") sent a letter signed by 47 AGs to congressional leaders urging them to ensure that federal data breach legislation preserves states' ability to enforce state laws related to data breaches and identity theft. Letter: http://www.naag.org/naag/media/naag-news/federal-data-breach-legislation-should-not-preempt-states1.php.
  - The letter states that ""Preempting state law would make consumers less protected than they are right now."
- States began adopting data breach laws in 2003, and recently, states have been updating their breach notification laws.
  - **Nevada:** (eff. July 1, 2015). Adds driver authorization card, medical or health ID number, and a user name/unique identifier or email address in combination with a password to the definition of PI.
  - **Wyoming:** (eff. July 1, 2015) Expands the definition of PII to include medical information, biometrics, and online account information.
  - **Washington:** (eff. July 23, 2015) Businesses must notify the AG within 45 calendar days of discovering a breach affecting more than 500 individuals; covers non-computerized data breaches as well as computerized data.
  - **North Dakota:** (eff. August 1, 2015) Organizations that experience a breach affecting more than 250 individuals are required to disclose such breach to the AG. The definition of PI adds an access code/password combination requirement to employer identification numbers.
  - **Rhode Island:** (eff. June 26, 2016) New data breach law requires notification to consumers within 45 days of confirming the breach and to the AG and consumer reporting agencies for breaches affecting more than 500 state residents. The law requires risk-based information security programs, including PII retention limits.
  - **Oregon:** (eff. January 1, 2016) Expanded definition of PII includes biometrics, health insurance identifiers, and medical information; notification must also be provided to the AG if there are more than 250 affected consumers.

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NAD/CARU Case Updates

Advertising Self-Regulatory Council

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MOTHERLOVE HERBAL COMPANY
More Milk Plus Case # 5865

- Challenger: National Advertising Division
- Select claims:
  - ***"I had already noticed a difference, now after a week of using it, I have more than doubled my supply!"***
  - ***"Within 3 days of taking More Milk Plus he stayed latched on longer, and I had a whole day's worth of bottles in the fridge the night before he needed them."***
  - ***"Effective herbal formula designed to quickly increase breast milk"***
- Issue: Whether the testimonial health claims were truthful, accurate, and fully substantiated
- NAD recommended the health benefit claims be discontinued, stating:
  - An advertiser cannot make claims in the form of a testimonial that it cannot support independently with competent and reliable scientific.
  - "Designed to" in claim does not reduce the burden
  - While these claims are not typical establishment claims (i.e. "clinically proven"), they are strong health and performance claims that require competent and reliable scientific evidence demonstrating that the totality of the product's ingredients will generate the claimed benefits
  - NAD, however, did find that the advertiser established a reasonable basis for the claim that More Milk Plus is "Motherlove's best selling herbal lactation formula."

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VOGUE INTERNATIONAL, LLC
Proganix Line of Hair Care Products, Case #5864

- Challenger: Procter & Gamble Co.
- Select express and implied claims:
  - ***"Performance Naturals (noun): 1. High performance extracts up to 200x more potent than their raw natural state."***
  - ***The natural ingredients in Proganix render the formula 200x more powerful in delivering the claimed benefit.***
  - ***"Salon Quality"***
  - ***"Science + Nature = Performance"***
- Issue: Whether the claim is puffery or objective requiring substantiation
- Puffs: Salon quality and Science + Nature + Performance
- Not puffs: "200X more *potent*" implied that the highly concentrated extracts were highly effective. Can claim 200x more *concentrated* than raw natural state.
  - In deciding whether a commercial message is puffery or makes an objective claim requiring substantiation, NAD evaluates whether the language in the claim is vague and fanciful and is not objectively measurable or whether it refers to specific attributes that are measurable.

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EURO-PRO OPERATING LLC

Shark Rotator Lift-Away Case #5860

- Challenger: Dyson, Inc.
- Select express and implied claims:
  - ***Shark receives "more 5-star online reviews than any other vacuum brand*" (*"based on an aggregate of verified online reviews at major retailers of leading uprights per NPD over $149, 6/2014.")***
- Issue: Whether Euro-Pro can use aggregated online review data to support the claim
- NAD found data was not both reliable and representative.
  - Euro-Pro used reviews of verified purchases in order to use only reliable reviews but in so doing set aside a number of reviews that may have been reliable, concluding the disclaimer contradicted the broader claim
  - NAD had concerns with differences across retail websites in how reviews were defined and how long sites archived older reviews
  - NAD felt the $149.99 price cut off was arbitrary
  - Found some reviews may relate to the shopping experience at a retail website and not the vacuum performance
  - Found disclosure not clear and conspicuous
  - Concluded claim using single platforms likely acceptable but not aggregating across sites
- Euro-Pro to appeal

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WALMART STORES, INC.
"Raise in Pay" Commercial, Case #5862

- Challenger: National Advertising Division
- Implied claims from video advertisement:
  - ***Walmart raised wages of its employees from minimum wage to $15 per hour.***
  - ***Walmart raised the wages of its employees to a living wage, allowing them to earn enough to support themselves and/or their family.***
  - ***Walmart's increased wages allows its employees to "build a future."***
- Issue: Whether NAD has jurisdiction over advertising of editorial content
- Walmart contended that NAD lacks jurisdiction since the advertisement is not a "typical commercial" in that it was only informing the public of the measures it has taken to boost associate pay.
  - Walmart stated that the commercial does not have the purpose of "inducing a sale or other commercial transaction or persuading the audience of the value or usefulness of a company, product or service" required for NAD jurisdiction.

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WALMART STORES, INC.
"Raise in Pay" Commercial

- NAD determined:
  - NAD's jurisdiction extends to evaluating "the truth or accuracy of national advertising." The point of the campaign was to show "*Walmart as a company that cares deeply about its workers welfare and, consequently, its stores as places where consumers who care about the welfare of working people should shop*."
    - Prior NAD cases have found NAD has jurisdiction when a commercial message intended to "persuade the audience of the value of a company."
  - NAD reviews highly technical matters on a consistent basis, including highly technical statistical analysis and claims across the U.S. population as a whole and is thus able to conduct a meaningful analysis of Walmart's claims.
  - It has jurisdiction over the matter and referred the matter FTC

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ASPIRE BEVERAGE CO.
ASPIRE Sports Drink, Case #5861

- Challenger: Stokely-Van Camp, Inc.
- Select Express and Implied Claims:
  - ***ASPIRE is the "clear choice for…health, and better performance."***
  - ***The antioxidants in ASPIRE make "…it easier to fight colds, flu, and infections."***
  - ***Gatorade and other sports drinks contain too much sugar, artificial dyes, and other ingredients, including high fructose corn syrup and, that are harmful to consumer health.***
  - ***ASPIRE is more healthful than Gatorade.***
  - ***All-natural***
- Issues:
  - Whether ASPIRE's health and performance claims were substantiated.
  - Whether ASPIRE's claim of overall and taste superiority over Gatorade was adequately supported.

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ASPIRE BEVERAGE CO.
ASPIRE Sports Drink

- NAD determined that there was no evidence that:
  - ASPIRE enhances health or that it enhances performance.
  - Sugar impacts athletic performance or that it is unhealthy for athletes.
    - ASPIRE's lower sugar content may support a narrower claim generally related to sugar's harmful effects.
  - Lack of artificial flavors and food coloring contributes to better health and performance.
  - That not all of ASPIRE's ingredients are natural. Therefore, ASPIRE cannot call it a "natural sports drink."
  - That Gatorade contains "empty calories" or provides "extra sugar" when it is used as energy replacement during vigorous exercise.
- NAD also recommended ASPIRE refrain from:
  - Use customer testimonials to make efficacy claims or denigrate competitors without substantiation.
  - Imply "other sports drinks" like Gatorade contain high fructose corn syrup
  - Compare nutrient information in different size servings of competitor information or imply Gatorade shows misleading nutrient information.
- NAD referred Aspire for not agreeing to certain recommendations

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SAWYER PRODUCTS, INC.
Hollow Fiber Membrane Water Filters, Case #5797C

- Challenger: Katadyn North America, Inc

- Claim/Issue:
  - Compliance proceeding regarding continuing use of claim that cartridge life of a water filter is "1,000,000 gallons."
- In December 2014 NAD found that:
  - The low volume monadic testing provided by Sawyer did not provide a reasonable basis for the claim that the cartridge life of "1,000,000 gallons" or the claim that it is the only filter that "easily and effectively" removes pathogens without using chemicals and the claim should be discontinued.
  - The claim that the filters had been "tested and verified" by the United Nations was unsubstantiated and should be discontinued.

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SAWYER PRODUCTS, INC.
Hollow Fiber Membrane Water Filters

- In May 2015, NAD found the continued use of the advertiser's "1,000,000 gallons" claim.
- NAD subsequently found some instances of the claim in third-party retailer advertising and in images of product packaging on the advertiser's website.
  - In response, Sawyer Products updated all references to the "1,000,000 gallons" claim and spent considerable resources changing the vast majority of its packaging to comply. Sawyer also notified retailers of the change in product guarantee and advertising claims.
- NAD determined that no further action was necessary

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TELEBRANDS, INC.
Amish Secret™ Furniture Cleaner, Case #5858

- Challenger: S.C. Johnson & Son, Inc.
- Select claims:
  - ***"Furniture polishes are a nasty, greasy mess, and over time attract dust like a magnet."***
  - ***"Forget oily sprays. Amish Secret™ cleans layers of built-up wax, revealing a fresh, lasting shine without leaving a sticky, oily residue."***
  - ***"Amish Secret™ keep[s] your wood furniture dust-free longer!"***
  - ***Amish Secret™ "removes months of built up wax."***
  - ***"Clean, polish and restore with Amish Secret™ for just $10."***
  - ***"We guarantee our handmade formula will nourish your wood and restore that fresh clean shine, or you'll get your money back."***
- Upon receiving NAD's letter opening this inquiry, the advertiser advised NAD rather than submit substantiation that it decided to permanently discontinue the challenged claims and advertising for business reasons and to do so in a timely manner.

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ABBOTT NUTRITION
Similac® Advance® with OptiGRO™, Case #5859

- Challenger: Mead Johnson & Company, LLC
- Select Express and Implied Claims:
  - *"Just remember to continue with breast milk or new Similac® with OptiGRO™ to help her get the nutrients she needs throughout her first year of brain and eye development."*
  - *"Similac® with OptiGRO™—our unique blend of DHA, Lutein, and Vitamin E…With the benefits of OptiGRO working for your baby, you'll see why choosing Similac – and staying with it – has never been more important…Not all formulas are the same."*
  - *" New 19-calorie formula is closer than ever to breast milk.*" (*Reformulated to better match the average density of breast milk, available in most Similac formulas.)*
  - *"#1 Infant Formula Brand.*" (based on Nielsen data)*
  - *Only Similac Advance with OptiGRO's infant formulas contain certain nutrients or provide certain benefits and is superior to Mead Johnson's Enfamil line of formulas.*
- Issues:
  - **Whether Abott's exclusivity and superiority claims are unsubstantiated.**
  - **Whether Abbot can claim Similac is "closer to breast milk"**
  - **Whether Abbot can claim that Similac is the #1 infant formula brand?**

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ABBOTT NUTRITION

Similac® Advance® with OptiGRO™

- NAD determined:
  - So long as Abbott refers to its "unique blend" of ingredients in a **"monadic context"** that does not refer to "competing formulas," its truthful claims are proper and do not imply comparative superiority.
  - Claims of similarity to breast milk can be supported so long as the claims are clearly compositional in nature and there is no implication of superior performance.
    - Claim formula is "closer than ever to breast milk" based upon a caloric density of 19 kcal/oz that falls within the range of human breast milk.
  - The claim that it is the #1 Infant Formula Brand is adequately supported by Nielson data.
    - A reasonable consumer will not think the claim pertains to other brands owned by the parent company and will understand the claim only pertains to Similac.
    - The advertiser's evidence in the form of its proprietary subscription to Nielsen, specifically targeting the sales of the leading brands of infant formula products in the United States on a 4, 13 and 52-week cycle, provided a reasonable basis for its "#1 Infant Formula Brand" claims

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UNIVERSAL PICTURES
Jurassic World, Case #5863

- Challenger: Children's Advertising Review Unit
- Concerns:
  - CARU expressed concern that a commercial aired during a children's program called *Adventure Time* at 6:00 p.m. CARU questioned the appropriateness of advertising a film rated PG-13 to children
- Issue:
  - Whether advertiser's content inappropriately advertised directly to children
- CARU referred advertising to the Motion Picture Association of America (MPAA) pursuant to contractual agreement
- MPAA found that the advertisement was appropriately placed within the guidelines of MPAA's
  - A few PG-13 rated motion pictures are considered by the Advertising Administration to be compatible with children's programs or networks, based on the content of the movie, the advertisement, and the program with which the advertisements are placed
  - The movie was a sci-fi action/adventure motion picture and the show was "Adventure Time," which was rated T-PG and geared to older kids and tweens.
  - Ads themselves also did not contain strong depictions of violence.

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HARLEM GLOBETROTTERS INC.
www.harlemglobetrotters.com, Case #5856

- Challenger: Children's Advertising Review Unit
- Concerns:
  - CARU expressed concern that the website did not effectively age screen before allowing visitors to provide personally identifiable information in its newsletter sign-up feature, when it used a checkbox that stated "You are 13 or older."
- Issue:
  - Whether website was directed to children (using COPPA rule)
  - Whether website complied with CARU Guidelines

- CARU held:
  - A portion of website was directed to children but children were not the primary audience. The website contained features expressly aimed at children such as a game section entitled "Kids Games Here!"
  - Website did not comply with CARU Guidelines on age-screening, which state that operators should ask screening questions in a neutral manner so as to discourage inaccurate answer from children trying to avoid parental permission. Simply asking a visitor to confirm that he or she over the age of 13 is not neutral
  - Recommended operator modify its age-screening method.

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Lanham Act and Class Action Litigation

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Lanham Act Litigation

Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GMBH, 2015 WL 4002468, No. 14–CV–585 (S.D.N.Y. July 1, 2015)

- SPD and C&D are competitors in home pregnancy test market; SPD sells and markets "ClearBlue Advanced Pregnancy Test with Weeks Estimator"
- Test estimates weeks since ovulation, not last menstrual period (LMP), the standard used by doctors
- False advertising claims under Lanham Act and NY state law
- Opinion and order after two-week bench trial
- Court noted that post *POM Wonderful v. Coca-Cola*, the FDCA did not preclude the Lanham Act claim

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Lanham Act Litigation

Figure 1

First Packaging

Figure 3

Second Packaging

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Lanham Act Litigation

Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GMBH, 2015 WL 4002468, No. 14–CV–585 (S.D.N.Y. July 1, 2015)

- Upon use, the first test would state: "Pregnant ___ weeks."
  - FDA reached out to SDP with concerns about its launch advertising. SDP subsequently changed both the language in its television ad and on its packaging.
  - Doesn't mention "ovulation" anywhere
- Upon use, the second test would state: "Pregnant ___", with "weeks along" displayed under the digital reading. But changes are minor.
- Television commercial stated that the test would estimate "how many weeks" (omitting the word "pregnant").
- Court concluded the ads were *literally false.* Revised package is still impliedly false.

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Lanham Act Litigation

Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GMBH, 2015 WL 4002468, No. 14–CV–585 (S.D.N.Y. July 1, 2015)

- Most notably, the deception was *intentional*, as shown by emails, trial testimony
- Rather than clarify its product advertising, SPD's staff sought to exploit the confusion: "My thinking is that we make the confusion a story"
- Evidence of actual confusion, woman wondering if her "baby was not developing correctly"

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Lanham Act Litigation

Spruce Environmental Technologies, Inc. v. Festa Radon Technologies, Co., 2015 WL 4038802, No. 15–11521 (D. Mass. July 2, 2015)

- Spruce and Festa are competitors who sell products for testing and reducing indoor levels of the gas radon.
- Festa issued a catalog comparing the two.
- Spruce filed suit per the Lanham Act because it alleged the catalog included false direct competitive ad claims. Spruce filed to enjoin Festa from continuing its advertising campaign.

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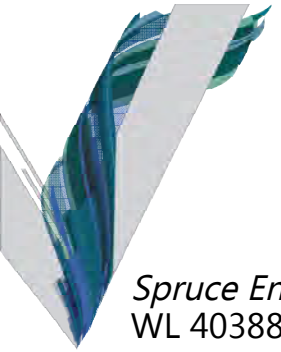

Lanham Act Litigation

Spruce Environmental Technologies, Inc. v. Festa Radon Technologies, Co., 2015 WL 4038802, No. 15–11521 (D. Mass. July 2, 2015)

- Motion for preliminary injunction, granted and denied in part

- Spruce's Lanham Act claims:

1. Festa depicted its products as HVI and Energy Star certified when they are not.
2. Festa claimed that its fans have solid motor lead wires even though they use stranded wires, like Spruce fans.
3. Festa claimed that the Spruce fan motors' label "Generic–No Manufacture Info" was misleading, since they did have a manufacture's label.
4. Festa's photograph misleadingly implied that the Spruce fan casing will degrade and change into a yellow color after five years.
5. Festa implied that Spruce's motor wires and capacitors are not factory sealed, which is literally false.
6. Spruce also alleged the false advertising was illegal because Festa admitted the catalog was issued after they learned that Spruce referred to Festa radon mitigation fans as "garbage" and "junk."

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Lanham Act Litigation

Spruce Environmental Technologies, Inc. v. Festa Radon Technologies, Co., 2015 WL 4038802, No. 15–11521 (D. Mass. July 2, 2015)

- The court found a likelihood of success on part of the plaintiff's allegations with respect to two issues:
  - HVI or Energy Star certification
  - Festa admitted that it photographed Spruce's fan with a flash, while it did not do so with its own fan – misleading and inaccurate comparison

- The court was less impressed with the other claims, finding the statements were not literally false, or finding lack of authority

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Lanham Act Litigation

Aliya Medcare Fin., LLC v. Nickell, No. CV 14-07806 MMM EX, 2015 WL 4163088, at *1 (C.D. Cal. July 9, 2015)

- Applies *Lexmark* to false designation claims
- Plaintiff CTB alleged that the defendant Aliya was sending and receiving e-mail communications using the 'ctbcollect.com' domain to confuse or trick recipients into believing that those individuals are interacting with the plaintiff when they were in fact interacting with the defendant.
- Allegedly done to "exploit the commercial advantages of CTB's trademark, service mark, and trade name, gain a competitive advantage over CTB[,] ... usurp its revenues and business opportunities, and sully CTB's business reputation."
- CTB and Aliya are competing in a specific service, even if they are not direct competitors in their primary line of business

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Class Actions

Zakaria v. Gerber Products Co., No. 15-cv-00200 (C.D. Cal. July 14, 2015)

- Gerber claimed its Good Start Gentle infant formula reduced infants' risk of developing eczema, which plaintiff alleged was false.
- California statutory and common law claims
- Plaintiff pointed to a study concluding there is no evidence that consumption of ingredient reduced risk of allergies, including eczema
- Gerber moved to dismiss under *In re GNC Corp.*, No. 14-1724, -- F.3d --, 2015 WL 3798174 (4th Cir. June 19, 2015) (applying CA law)

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Class Actions

Zakaria v. Gerber Products Co., No. 15-cv-00200 (C.D. Cal. July 14, 2015)

- *In re GNC*: so long as there is "reasonable difference of scientific opinion" as to merits of health claim, the alleged actual falsehood of the claim cannot be basis for claim under consumer protection laws incl. UCL, CLRA
- Court rejects *In re GNC*
- Court points out that there are no CA laws consistent with *In re GNC*, which relies primarily on the Lanham Act.
- But notes plaintiff may fail to carry burden of actual falsehood where science is inconclusive

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Class Actions

Aloudi v. Intramedic Research Group, LLC, 2015 WL 4148381, No. 15-cv-00882 (N.D. Cal. Jul. 9, 2015)

- Lanham Act "establishment claims" analysis does not apply to CA consumer protection laws
- JavaSlim box label claimed product was "clinically proven" to cause "significant reduction in actual body mass index (BMI)."
- Ads claimed that a clinical trial proved that ingredients caused significant reduction in body weight and BMI.

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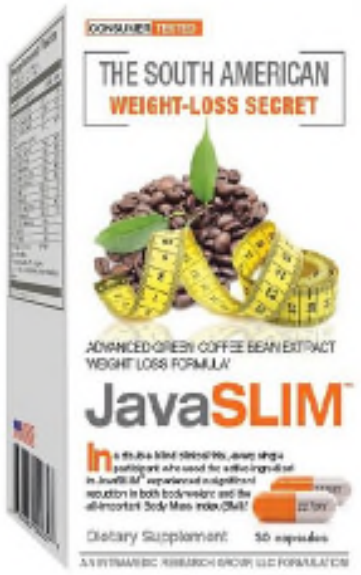
Class Actions

Aloudi v. Intramedic Research Group, LLC, 2015 WL 4148381, No. 15-cv-00882 (N.D. Cal. Jul. 9, 2015)

- Plaintiff attacked Defendant's clinical study by citing "scientific consensus," which court dismissed as conclusory
- "As a matter of law, plaintiffs cannot bring consumer protection claims solely on the basis of a lack of substantiation."



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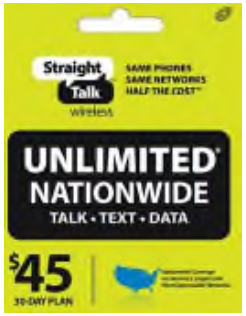
Class Actions

In Re: TracFone Unlimited Service Plan Litigation, No.13-cv-03440 (N.D. Cal. July 2, 2015)



- California federal judge approved TracFone Wireless Inc.'s $40 million settlement with a proposed class, ~$15-65 per affected phone line
- FL and CA statutory and common law causes of action
- Global settlement, settling 4 consolidated class actions and FTC enforcement action
  - 8 million class members
- "Straight Talk" brand advertised "unlimited" data plans
  - In fact, after reaching certain data caps, TracFone would "throttle" or suspend data service, or terminate phone service completely
- Court noted that customers' willing renewal of monthly plans despite throttling should mitigate damages

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Widener University Delaware Law School Class Actions

Harnish et. al. v. Widener University School of Law, No.12-00608 (D.N.J. July 1, 2015)

- Federal judge denied class certification in a suit brought on behalf of graduates of Widener University School of Law. The plaintiffs alleged that:
  - Widener routinely reported that 90 to 95 percent of graduates found work within nine months of graduation, without disclosing that these included part-time and non-legal jobs
  - Widener misrepresented graduates' mean salaries, failing to disclose that the figures provided represent a small and deliberately selected subset of graduates.

- Class certification was dismissed as predominance and typicality were not satisfied:

  - Predominance was not satisfied as some graduates obtained the type of full-time legal jobs they sought, even though other class members suffered ascertainable losses as a result of the school's alleged misrepresentation. Therefore “individual questions predominate over common questions about the loss each proposed class member sustained.”

  - Typicality was not satisfied since it was not clear whether all members of the proposed class were exposed to the misrepresentations claimed by the plaintiffs.

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Class Actions

Niloofar Saeidian v. The Coca Cola Co., No. 2:09-cv-06309 (C.D. Cal. July 6, 2015)

- Had been stayed while *Pom Wonderful v. Coca-Cola* was pending
- Federal judge denied Coca-Cola's motion to dismiss a class action lawsuit for false advertising of Minute Maid Enhanced Pomegranate Blueberry Juice. Plaintiffs alleged that:
  - Calling the product "pomegranate blueberry" juice and prominently displaying the two fruits next to each other on the front label, created a misleading impression that it contained more of the two juices than it actually does.
  - The juice contained only 0.3% pomegranate juice and 0.2 % blueberry juice, and 99.4% of the juice was composed of cheaper apple and grape juice.
- The court rejected Coca-Cola's argument that the class action should be dismissed as the claims were pre-empted by U.S. Food Drug and Cosmetic regulation.
  - "The Supreme Court's … opinion in Pom Wonderful, though addressing the issue of preclusion rather than preemption, explicitly rejected the '[assumption] that the FDCA and its regulations are at least in some circumstances a ceiling on the regulation of food and beverage labeling.'"
  - "While there are specific regulations regarding the labeling of juice-containing beverages, these regulations operate in addition to, rather than in place of, the [Food Drug and Cosmetics Act]'s prohibition of misleading labeling."

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Class Actions

Teamsters Local 237 Welfare Fund et al. v. AstraZeneca Pharmaceuticals LP et al., No. SN04C-11-191 (Del. Super. Ct. July 8, 2015).

- A Delaware court dismissed a class action against AstraZeneca. The plaintiffs, four union health and benefits funds, had alleged:
  - AstraZeneca engaged in consumer fraud by introducing an "essentially identical drug," Nexium, when the over-the-counter version of Prilosec became available. AstraZeneca falsely represented Nexium as superior to Prilosec to maintain market share after Prilosec's patent expired.
- Judge found insufficient allegations to support reliance, or even "some awareness" of the misrepresentations by consumers
- Dismissed with prejudice
  - Action had been filed in 2004, then been stayed pending parallel litigation; after stay was lifted in August 2010, case sat for over 3 years with no activity

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Class Actions

- *Cabrera v. Kenneth Cole Productions, Inc,* No. 1:15-cv-05107 (S.D.N.Y June 30, 2015).

  - Kenneth Cole hit with a $5 million false and deceptive advertising class action lawsuit under the California Consumers Legal Remedies Act and the FTC Act. Plaintiffs allege:

    - Kenneth Cole represents a fake “former price” on “outlet merchandise” that was never designed to be sold at a retail store.

    - “Kenneth Cole manufactures certain goods for exclusive sale at its Kenneth Cole Outlets, which means that such items were never sold—or even intended to be sold—at the ‘MSRP’ listed on its labels.”

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Consumer Financial Protection Bureau Developments

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Consumer Financial Protection Bureau Developments Defense Military Lending Act Final Rule

- Final Rule expanding types of credit products that are covered by a 36% rate cap and other military-specific protections under the Military Lending Act
- The rule generally covers "consumer credit" offered or extended to active-duty servicemembers or their dependents, as long as the credit is subject to a finance charge or payable by written agreement in more than 4 installments.
  - Excludes: residential mortgages and credit extended to finance the purchase of, and secured by, personal property, such as vehicle purchase loans.
- See also CFPB Guidelines issued on Sept. 2013.

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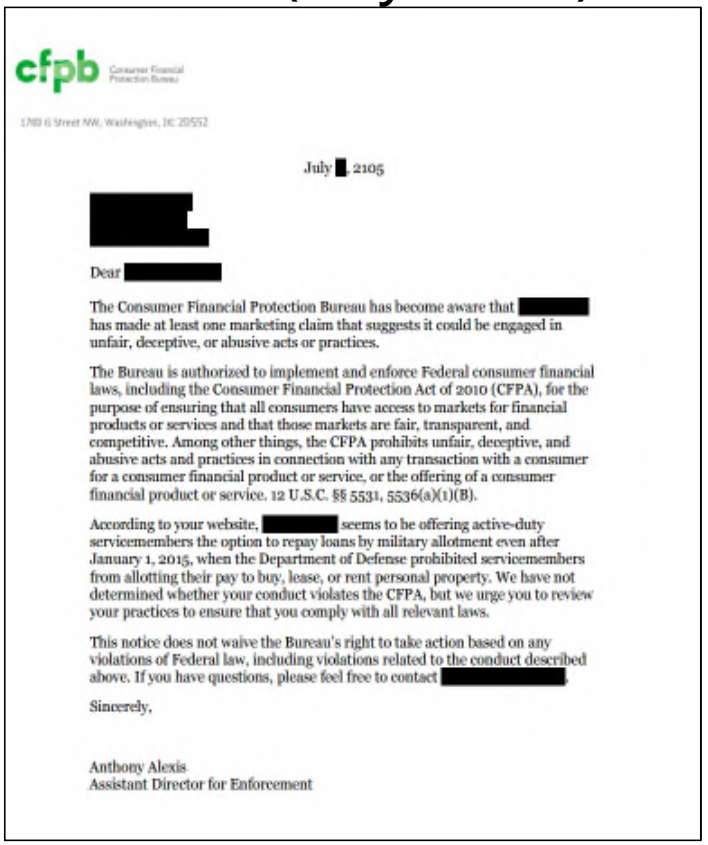
Consumer Financial Protection Bureau Developments Scrutiny of Military Allotment Practices (July 2015)

- CFPB sent letters to sellers of retail goods to military servicemembers advoiding them to review websites and other advertising for potentially misleading marketing and review other practices related to payment by military allotments.

- Active-duty servicemembers are not permitted to use allotments to pay for personal property such as vehicles, appliances, and consumer electronics.



cfpb Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

July [redacted], 2105

[redacted]

Dear [redacted]

The Consumer Financial Protection Bureau has become aware that [redacted] has made at least one marketing claim that suggests it could be engaged in unfair, deceptive, or abusive acts or practices.

The Bureau is authorized to implement and enforce Federal consumer financial laws, including the Consumer Financial Protection Act of 2010 (CFPA), for the purpose of ensuring that all consumers have access to markets for financial products or services and that those markets are fair, transparent, and competitive. Among other things, the CFPA prohibits unfair, deceptive, and abusive acts and practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. 12 U.S.C. §§ 5531, 5536(a)(1)(B).

According to your website, [redacted] seems to be offering active-duty servicemembers the option to repay loans by military allotment even after January 1, 2015, when the Department of Defense prohibited servicemembers from allotting their pay to buy, lease, or rent personal property. We have not determined whether your conduct violates the CFPA, but we urge you to review your practices to ensure that you comply with all relevant laws.

This notice does not waive the Bureau's right to take action based on any violations of Federal law, including violations related to the conduct described above. If you have questions, please feel free to contact [redacted].

Sincerely,

Anthony Alexis
Assistant Director for Enforcement

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Consumer Financial Protection Bureau Developments
Launch of CFPB Monthly Complaint Report (July 2015)

- The CFPB began accepting complaints as soon as it opened its doors 4 years ago in July 2011.
- CFPB accepts complaints on many consumer financial products, including credit cards, mortgages, bank accounts, private student loans, vehicle and other consumer loans, credit reporting, money transfers, debt collection, and payday loans.
- As of July 1, 2015, the CFPB has handled 650,700 complaints.
- Monthly Report - product spotlight: complaint volume, product trends, state information, most complained about companies.

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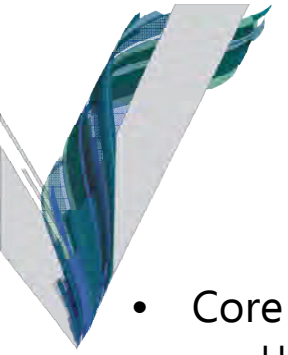

Consumer Financial Protection Bureau Developments Enforcement Against Bank and Other Providers of Add-on Services

- Core allegations:
  - Unfairly charging consumers for credit card add-on benefits that consumers did not receive.
  - Consumer Financial Protection Act (UDAAP), and Telemarketing Sales Rule (TSR).

- July 1, 2015 - Under two consent orders, a service provider would pay approximately $6.8m in monetary relief for eligible consumers who have not yet received refunds and $1.9m in CMP, while another service provider would pay approximately $55,000 in monetary relief to eligible consumers who have not yet received refunds and $1.2m in CMP.

- July 21, 2015 – Consent order for allegedly unfairly billing consumers for credit card add-on products, deceptively marketing those products, and deceptive collection practices. Bank has agreed to pay about $700 million in refunds on about 8.8 million accounts; and $35m in CMP.

- Background: See CFPB Bulletin 2012-06.

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Consumer Financial Protection Bureau Developments Additional CFPB Related Highlights (Summer 2015)

- Supervision:
  - Mortgage loss mitigation
  - Debt collection complaints disregarded
  - Accuracy problems with consumer reporting agencies
  - Fair lending
- Oversee Nonbank Auto Finance Companies
- Scrutiny of Reverse Mortgage Advertising

- Enforcement related to allegations of:
  - Deceptive debt collection practices
  - Violation of mortgage loan originator compensation rule (i.e., compensation of branch managers based on interest rates of loans closed).
  - Illegal mortgage assistance relief services and advertising false promises of mortgage savings
  - Payment processing for debt collection of small dollar/short term loans
  - Online credit product – sign up and billing practices
  - Cramming on cell phone bills -
    - $120 m in consumer redress
  - Mortgage advertising with false affiliation to government

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And It Takes a Village:

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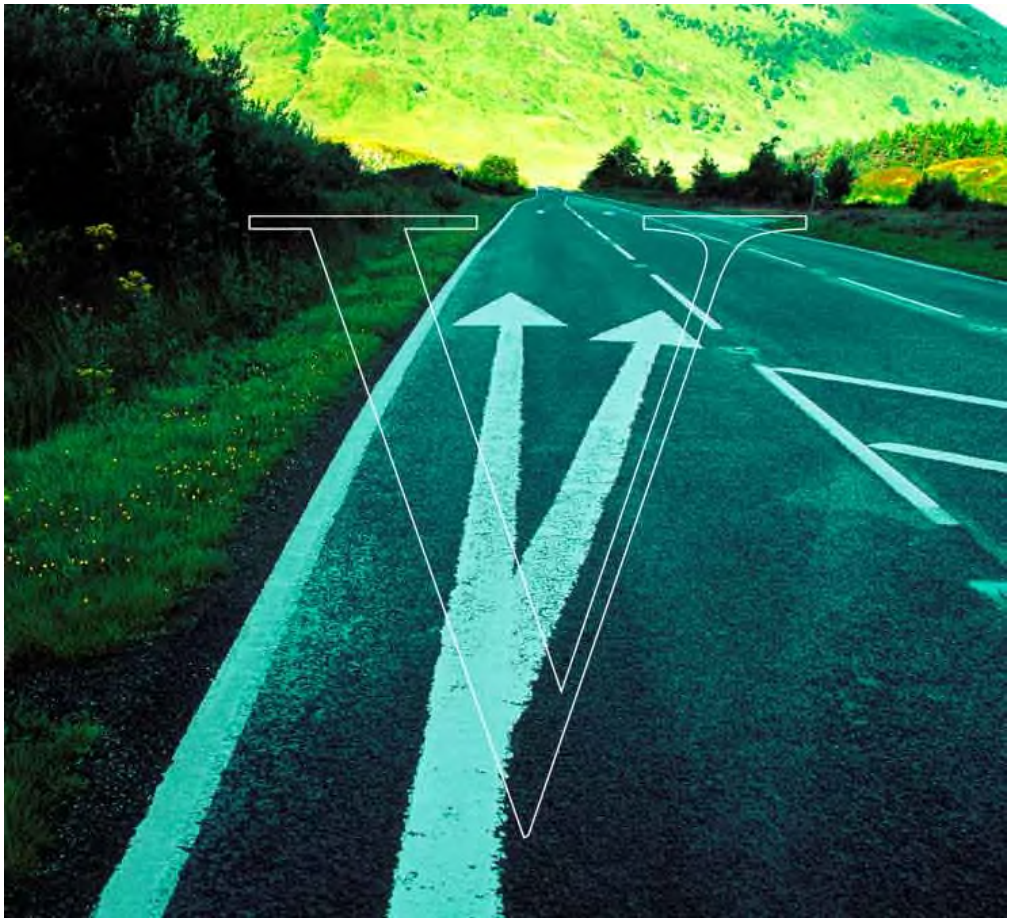
Shahin Rothermel

Jessica Talbert

John Terrell

THE END—THANKS FOR LISTENING!



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