

April 2009  
Consumer Protection Update  
ABA Antitrust Section -- Consumer Protection  
Committee

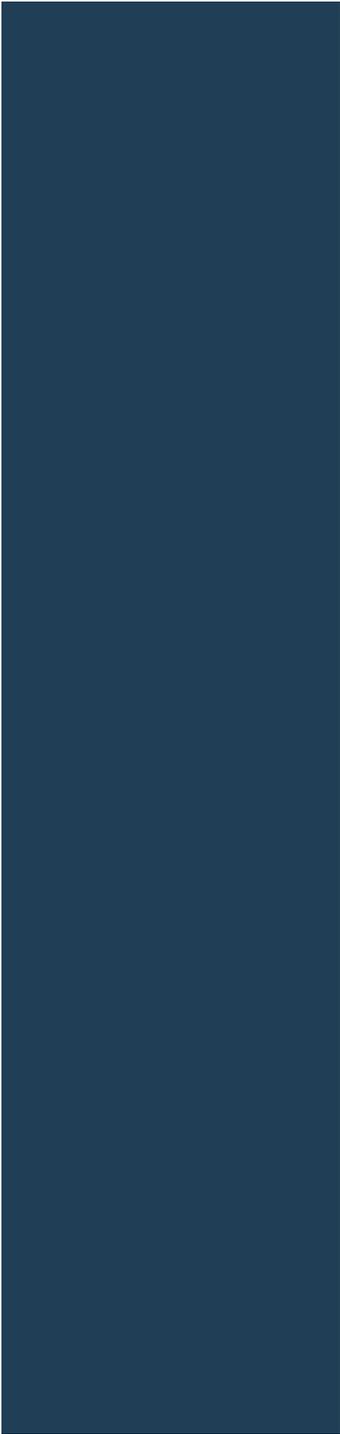
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# I. Obama Administration Update

- Administration Cracking Down on Foreclosure Scams and Loan Modification Fraud
  - Obama Administration announced a coordinated effort between the FTC, DOJ, HUD, Department of Treasury, state governments and the private sector to target foreclosure scams and mortgage modification fraud. Effort includes FTC working with large national loans servicers to distribute consumer alerts.
    - FTC has filed five new cases to halt such practices and has sent 71 warning letters. FTC focusing on use of terms like “guarantee” and “X% success rate,” as well as the charging of up-front fees and web sites that appear to be non-profit or government related.
    - DOJ is prosecuting five defendants for a mortgage fraud scheme that allegedly promised to pay off homeowners’ mortgages on their “Dream Homes.”
      - Indictment alleges that defendants used marketing to convince victims to invest at least \$50,000 by refinancing their existing homes or buying new homes at inflated prices while claiming that Metro Dream Homes would repay the mortgages with revenue from profitable businesses.

# Obama Administration Update

- Administration Cracking Down on Abusive Credit Card Lending Practices
  - President Obama met with executives from credit card companies to underscore Administration's focus on ending some abusive credit card practices.
  - Congressional Democrats reached out to Federal Reserve to make recently implemented credit card regulations permanent and effective immediately. The regulations restrict retroactive hikes on credit card interest rates.
  - House committee has approved a "Credit Cardholder's Bill of Rights" that addresses the practice of universal default, whereby lenders raise interest rates on an account if the borrower misses a payment on any bill.

## II. FTC and Federal Agency Update

- **Chairman Leibowitz Appoints Senior Staff**
  - David C. Vladeck -- Director of the Bureau of Consumer Protection.
    - Professor of Law at Georgetown University Law Center focused on federal courts, government processes, civil procedure, First Amendment.
    - 30 years with Public Citizen Litigation Group, argued number of First Amendment and civil rights cases before Supreme Court.
  - Richard A. Feinstein -- Director of the Bureau of Competition.
    - Former Assistant Director in Bureau of Competition's Health Care Services and Products Division.
  - Joseph Farrell -- Director of the Bureau of Economics.
    - Professor of Economics at the University of California.
    - Former Dep. Asst. Attorney General and Chief Economist for the Antitrust Division at DOJ.
  - Susan S. DeSanti -- Director of Policy Planning
  - Jeanne Bumpus -- Director of the Office of Congressional Relations.
  - Joni Lupovitz -- Chief of Staff to the Chairman.

# FTC Enforcement Actions/Settlements (Advertising)

- In the Matter of Kellogg Company.
  - Settled charges that its national advertising campaign for Frosted Mini-Wheats – including television, print, Internet, product packaging – contained false claims that a breakfast of Frosted Mini-Wheats was “clinically shown to improve kids’ attentiveness by nearly 20%.”
  - Complaint alleged that the study showed that only about half the children who ate Frosted Mini-Wheats for breakfast showed any improvement in attentiveness, and only about one in nine improved by 20 percent or more.
  - Complaint also challenged the claim, made in a different television ad, that a breakfast of Frosted Mini-Wheats was clinically shown to improve children’s attentiveness by nearly 20 percent when compared to children who ate no breakfast. In fact, the study showed that the children who ate the cereal for breakfast averaged just under 11 percent better in attentiveness, by comparison, and that relatively few were nearly 20 percent more attentive.

# FTC Enforcement Actions/Settlements (Advertising)

- In the Matter of Kellogg Company (cont.)
  - Proposed settlement bars deceptive or misleading cognitive health claims for Kellogg’s breakfast foods and snack foods and bars the company from misrepresenting any tests or studies.
  - Chairman Leibowitz noted that “it’s especially important that America’s leading companies are more ‘attentive’ to the truthfulness of their ads and don’t exaggerate the results of tests or research. In the future, the Commission will certainly be more attentive to national advertisers.”

# FTC Enforcement Actions/Settlements (Telemarketing)

- FTC and Kentucky v. Direct Connection Consulting, Inc., et al.
  - Complaint alleged defendants mislead consumers into thinking they were calling from a major retailer or from consumers' credit card, and made bogus pitches for "free" products. Telemarketers also asked consumers to listen to "pretend" pitches that were in fact real pitches.
  - Settlement requires defendant to post \$5 million bond and prohibits violations of FTC's Telemarketing Sales Rules. Monetary judgment of \$15,707,917.86 (suspended). Defendants agreed to turn over assets worth \$1.3 million.

# FTC Enforcement Actions/Settlements (Telemarketing)

- United States of America (for the FTC) v. DIRECTV, Inc., et al.
  - DIRECTV and Comcast agreed to pay \$3.21 million to settle separate FTC charges that they violated Do Not Call provision of the Telemarketing Sales Rule.
  - DIRECTV had previously paid \$5.3 million under a 2005 Do Not Call order.
  - FTC complaint against Comcast was the first to have as its sole allegation that the company called consumers who had specifically asked it not to call them – the so-called “entity specific” provision.

# FTC Enforcement Actions/Settlements (Dietary Supplement Claims)

- FTC v. David J. Romeo (Nutraceuticals International, LLC)
  - FTC has charged the suppliers of supposed Hoodia gordonii, also known as hoodia, with deceptive advertising for claiming that using their product would lead to weight loss and appetite suppression.
  - FTC alleges that the defendants not only made false and deceptive claims about what hoodia could do, but also, on one or more occasions, claimed that their product was Hoodia gordonii when it was not. The defendants allegedly made false and deceptive claims when advertising their fake hoodia to trade customers who manufactured and marketed supplements, and provided trade customers with deceptive advertising and promotional materials.
  - FTC seeks to permanently bar the defendants from deceptively advertising hoodia, and to obtain disgorgement of the defendants' profits from their hoodia sales.

# FTC Enforcement Actions/Settlements (Dietary Supplement Claims)

- In the Matter of Mary T. Spohn and In the Matter of Native Essence Herb Company
  - Administrative complaint alleged that the respondents were advertising their products as curing many different types of cancers.
  - FTC order prohibits representing that any dietary supplement, food, drug, etc. is effective in curing cancer, unless the representation is true, non-misleading, and supported by scientific evidence.
  - With these two cases concluded, all but two of the 11 cases brought by FTC under Operation False Cures have been resolved. (Operation False Cures is a program designed to investigate deceptive claims of cancer cures)

# FTC Enforcement Actions/Settlements (Dietary Supplement Claims)

- FTC v. Robert Chinery
  - Case was originally brought in 2005. FTC alleged that the marketers of Xenadrine EFX, purported weight-loss product, made false and unsubstantiated claims that the product was clinically proven to cause rapid and substantial weight loss.
  - Only remaining issue was liability of managing member of the company.
  - Under final order, all three defendants, including managing member, are barred from making any claims about the health benefits, etc., of any weight-loss product or dietary supplement.
  - Under a 2006 settlement, defendant company had paid \$8 million in consumer redress.

# FTC Enforcement Actions/Settlements (Fraud)

- FTC v. B.C. Ltd. 0763496, d.b.a. Cash Corner Services, Inc., et al
  - Federal court ordered permanent halt to lottery and prize promotion scam that used counterfeit checks and false promises of large cash prizes. Court's order includes a \$1 million judgment.
  - Defendants had mailed letters to consumers congratulating them for winning a lottery or sweepstakes and enclosing a fake check.
  - Consumers were told to deposit the check in their bank account and send a MoneyGram wire transfer to the company to cover fees and taxes.

# FTC Enforcement Actions/Settlements (Fraud)

- FTC v. Network Services Depot, Inc.
  - At request of the FTC, the U.S. District Court for the District of Nevada imposed a judgment of \$18.9 million against operators of “Internet kiosk” business opportunity scam, allowing the FTC to distribute more than \$2 million to the victims of the Ponzi scheme.
  - Court agreed with the FTC that the venture was a Ponzi scheme because payments sent to investors each month did not come from the kiosk businesses, but from the infusion of money paid by new investors. The operators violated the FTC Act and the agency’s Franchise Rule by duping hundreds of consumers into buying Internet kiosk business opportunities with promises of lucrative earnings.
  - Key principals were subject to criminal prosecutions and sent to prison.
  - Court previously found that some funds that the defendants paid to their attorneys should go to victims of the scheme as well.

# FTC Programs and News

- FTC Red Flag Rule
  - FTC has launched a website to help entities covered by the Red Flags Rule. The rule requires creditors and financial institutions to develop written programs to identify the warning signs of ID theft, spot them when they occur, and take appropriate steps to respond to those warning signs.
  - Rule has been effective since Nov. 2008, but FTC has delayed enforcement until August 1, 2009
- FTC to Expedite Review of Children's Online Privacy Protection Rule
  - FTC announced at symposium sponsored by CTIA and Family Online Safety Institute that it will speed up the regulatory review of the Children's Online Privacy Protection Rule. FTC will focus on whether the rule should be modified to address changes in the wireless marketplace. Review of the rule will start next year instead of in 2015.

# Opportunities for Public Participation

- FTC Proposed Breach Notification Rule for Electronic Health Information
  - FTC has published a notice in the Federal Register seeking public comment on a proposed rule that would require entities to notify consumers when the security of their electronic health information is breached. Comments must be received by June 1, 2009
  
- FTC Seeks Public Comment on Revised Proposed Rule Prohibiting Petroleum Market Manipulation
  - Comments must be received by May 20, 2009.
  
- FTC Seeks Public Comment on Cooling-Off Rule
  - Rule makes it an unfair and deceptive practice to engage in door-to-door sale of consumer goods or services with a purchase price of \$25 or more without providing buyer with oral and written disclosures regarding the buyer's right to cancel within three business days.
  - FTC seeking comments on the costs and benefits of the rule. Comments must be received by June 22, 2009.
  
- FTC to Hold Public Workshop on Proposed Business Opportunity Rule Changes
  - On June 1, 2009 FTC will hold public workshop exploring proposed changes to the Business Opportunity Rule. Will focus on the effectiveness of a one-page Disclosure Form that sellers of business opportunities would be required to provide to prospective purchasers.

# FTC Reports

- FTC issued “Beyond Voice: Mapping the Mobile Marketplace” focusing on consumer protection issues arising in the mobile commerce marketplace.
  - Cost disclosures about mobile services continue to generate consumer complaints. FTC staff will continue to monitor.
  - FTC will continue to monitor impact of unwanted mobile text messages.
  - FTC will expedite regulatory review of the Children’s Online Privacy Protection Rule to determine whether the rule should be modified to address changes in the mobile marketplace.

# FTC Rule Amendments

- FTC adopted as final the interim rules amending Parts 3 and 4 of FTC Rules of Practice.
  - Eliminated Rule 3.11A (Fast Track Proceedings).
  - Changed Rule 3.25 to clarify procedures for the FTC to consider possible settlements while a matter is in administrative litigation.
  - Rule 3.31(g) has been amended to be consistent with a new federal rule of evidence regarding how parties must deal with documents subject to privilege that another party claims were inadvertently produced.
  - Amended Rule 4.2 requires a party to file a redacted public version of a petition for certain types of Commission action (such as a petition to quash a subpoena) in non-Part 3 matters if it requests confidential treatment for the petition.
- Interim rules remain in effect and continue to apply to all FTC adjudicatory proceedings commenced after January 13, 2009.
- In a letter sent to FTC in December, a group of eight U.S. senators expressed concerns about the FTC's proposed rules.

# Consumer Product Safety Commission

- Mega Brands America Inc. (formerly Rose Art Industries Inc.) agreed to pay \$1.1 million civil penalty to settle allegations that the company failed to provide the CPSC with timely information about dangers to children associated with the Magnetix building sets.
- Federal law requires firms to report to CPSC within 24 hours of obtaining information reasonably supporting the conclusion that a product contains a defect which could create a substantial product hazard.
- Company had submitted several reports from 2005-2006, but the reports did not contain sufficient information. CPSC issued a subpoena and learned that the company had received far more consumer complaints than previously reported.

### III. State Attorney General Update

- Iowa Legislature Adopts New Consumer Fraud Legislation
  - On April 20, Iowa legislature approved HF 712, which will allow consumers to file fraud claims directly against liable corporations. Iowa was the only state that prohibited its citizens from filing lawsuits directly. The new bill should help alleviate the Attorney General's current backlog of suits.
- Bill prohibits practices or acts that the person knows or reasonably should know are unfair, deceptive, fraudulent, etc. with the intent that others rely on such in connection with the advertisement, sale, lease of consumer merchandise, or the solicitation of contributions for charitable purposes.
  - Consumers will still need to seek approval from the Attorney General to file class actions.
  - Exemptions for banks, attorneys, insurance providers, doctors, cable companies, veterinarians, and architects.

# State Attorney General Update

- Florida
  - Chinese Dry Wall
    - Attorney General has issued a warning concerning Chinese drywall. Concerned about bogus tests and promises of quick cures.
  - Long Distance Phone Calling
    - Attorney General settled with Magic Jack LP over allegations that the company marketed a free 30 day trial for long distance equipment but actually charged and debited customers.
    - Company agreed to pay \$125,000 in costs and resolved 500 consumer complaints.

# State Attorney General Update

- Florida
  - Automatic Renewal Programs
    - Attorney General reached settlement with Matthew Bender and related company Reed Elsevier over automatic subscription renewal policy and automatic shipment plans (LexisNexis contributes to the advertising and sale of Matthew Bender products).
    - Matthew Bender sent new editions and updates of publications automatically to customers who had previously purchased the publications, sometimes several years prior, and renewed annual subscriptions automatically, allegedly without specific consent from consumers.
    - As part of the settlement, refunds will be offered to all Florida customers who paid for automatic shipments or who received their first automatic shipments of certain types of publications after February 13, 2005. Companies will also pay \$275,000 to the Florida State University Law School.
    - Companies will pay \$2 million to the Attorney General for attorneys' fees and costs and for future investigation and enforcement.

# State Attorney General Update

- Missouri
  - Mortgage Fraud
    - Attorney General has announced a “zero tolerance” campaign against mortgage scams and has filed lawsuits against two businesses that sent allegedly misleading direct-mail advertisements for mortgage refinancing to consumers.
    - One of the advertisers sent direct-mail to consumers with the consumers’ own bank on the top of the letter.
    - The other advertiser allegedly made deceptive representations regarding refinancing opportunities under the Stimulus Bill.

# State Attorney General Update

- New York
  - Madoff Fall Out
    - Attorney General has charged J. Ezra Merkin with concealing \$2.4 million with Madoff. Customers included several prominent charities and non-profits.
  - Home Warranty Plans
    - Attorney General filed suit against National Home Protection, Inc. (NHP) and three principals for a deceptive home warranty scheme. Complaint charges NHP and its principals with making multiple misrepresentations and deceptive advertising, including claims that NHP would replace customers' systems and appliances "regardless of age, make or model" with "no home inspection required to enroll." It also charges NHP with fraudulently failing to honor its home warranty plans and deceptively advertising that consumers would receive a free \$50 gift card "today" when, in fact, that gift card was a rebate offer subject to undisclosed and restrictive wait periods.
    - Temporary restraining order froze bank accounts and other assets of the company and principals, and prevented NHP from selling any more home warranty plans.

# State Attorney General Update

- New Jersey
  - Car Dealership Settlement
    - Car dealership that failed to comply with trade-in and credit advertisements agreed to pay \$300,000 in civil penalties and \$450,000 for consumer restitution, investigation costs and fees.
  - Debt Collectors
    - Proposed bill would require debt collection agencies to provide debtors with additional information about their accounts, a copy of the Fair Debt Collection Practices Act, and would increase fines.

# State Attorney General Update

- Texas
  - Work at Home Products
    - Attorney General charged GoogleMoneyTree.com with operating a fraudulent work-at-home scheme and is seeking up to \$20,000 per violation under state law.
    - Company promised big payouts to convince buyers to spend \$3.88 on shipping and handling for a “free kit” to make money at home. Those who purchased the kit were actually charged \$72 a month pursuant to a monthly membership.
    - Company used blogs and testimonials to advertise products.
    - Company also failed to deliver product.

# State Attorney General Update

- Texas
  - Gas Marketing Schemes
    - Attorney General obtained a temporary restraining order that shut down Media Dime Marketing LLC's efforts to market a "cheap gas" product, which it claimed would save customers money on fuel. The Defendants targeted Hispanic customers in television advertising.
    - Defendants' advertisements assured customers that the product was scientifically proven to increase fuel efficiency and therefore save customers money. The defendants also advertised that the product protects the environment by reducing "90 percent of the toxic gas emissions." Advertisements also claimed that the product increased vehicles' engine lives by 30 percent.
    - According to the Attorney General, there is no scientific basis for the defendants' claims.

# State Attorney General Update

- Washington
  - New Consumer Protection Laws
    - Legislature passed HB 1215, Lemon Law, to address issues of warranties and other changes in the automotive industry.
    - Legislature passed SB 5221, Mortgage Law Fix, updating last year's foreclosure rescue law to make sure that homeowners—who want to sell their homes rather than face foreclosure—are able to find a real estate agent.
- West Virginia
  - Pay Day Lenders
    - Attorney General investigating whether payday lenders are dodging regulators by claiming affiliations with Indian tribes.
  - Debt Settlement
    - Attorney General filed suit against Able Debt Settlement, Inc. seeking injunctive relief and restitution for consumers. Attorney General alleged that company charged fees higher than permitted by state law.

# State Attorney General Update

- Wisconsin
  - Internet Sales
    - Attorney General alleged that TV Marketplace LLC and related companies that sold “As seen on TV products” failed to deliver goods, misrepresented delivery times, and failed to provide refunds.
    - Attorney General obtained a consent judgment against a Wisconsin-based internet company and its two owners, requiring restitution for complaints and \$40,000 in forfeitures, fees and costs.

## IV. Private Actions

- U.S. Fidelis
  - Company offers extended vehicle protection for consumers whose original warranties have expired. Most consumers assume it will cover all repairs, similar to dealer-provided warranties. The lawsuit alleges that consumers are unaware of the many exceptions in the contract fine print.
  - Lawsuit also alleges that the company misrepresented the level of coverage and pressured consumers to sign up quickly or risk losing special benefits.
  - The lawsuit follows a March 2008 complaint filed by the Missouri Attorney General alleging that the company engaged in deceptive marketing and violation of telemarketing laws. A settlement is reportedly being negotiated with Missouri.

# Private Actions

## ■ Pepsi/Coke

- PepsiCo has filed suit against Coca-Cola in federal court in New York. The lawsuit alleges that Coke's advertisements for PowerAde on its website contain false advertising by suggesting that Pepsi's Gatorade is an "incomplete sports drink."
- Coke claims that Gatorade doesn't have all the electrolytes a sports drink should have, such as calcium and magnesium.
- PepsiCo argues that PowerAde contains calcium and magnesium in trace amounts that are meaningless.

## ■ Credit Cards

- The 11<sup>th</sup> Circuit has reinstated a consumer class action alleging that several merchants violated the Fair Credit Reporting Act (FCRA).
- A district court had dismissed the lawsuit on the grounds that the FCRA was unconstitutionally vague because it allows plaintiffs to collect between \$100 and \$1000 for willful violations, but does not provide criteria to allow a judge to determine an award.
- The 11<sup>th</sup> circuit held that the statute is not unconstitutionally vague because other laws contained similar provisions and because the law did not give juries an excessive amount of discretion in awarding damages.

## V. NAD Update

- Nature's Healthy Supplements, Inc. (NAD – March 11, 2009)
  - The Council for Responsible Nutrition, as part of a joint initiative with NAD, challenged print advertisements disseminated by Nature's Health Supplements, Inc. (NHS) for its Best Prostate dietary supplement.
  - Product was comprised of Beta-sitosterol, intended to relieve symptoms of benign prostate hyperplasia.
  - NAD's main concern was that the advertising included claims about the efficacy of the product, when, in fact, the evidence was for the key ingredient, Beta-sitosterol. NHS modified its website by discontinuing several of the challenged claims and clarifying that many of the claims were based on Beta-sitosterol.
  - NHS substantiated many of its claims regarding Beta-sitosterol by providing evidence based on scientific studies.
  - NAD rejected claims where there was no support, such as "World's most prescribed product for an enlarged prostate."
  - Example of benefits of voluntary participation in NAD initiatives.

# NAD Update

- Dispoz-o products (NAD – March 27, 2009)
  - Issue was whether the advertiser’s biodegradability claims about utensils and tableware were supported by competent and reliable scientific evidence. NAD began by noting the recent resurgence in environmental advertising claims.
    - FTC Green Guides states that a “claim that a product or package is degradable, biodegradable or photodegradable should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature ....”
  - The products at issue were not tested and the advertiser was relying on scientific studies of pellets that were structurally different from the utensils.
  - The advertiser did not establish that the products would completely break down. NAD recommended that the following claims be discontinued:
    - “Enviroware is formulated to degrade in months when buried or discarded in a landfill.”
    - “Enviroware cutlery, straws, hinged containers, plates, bowls and trays are 100% biodegradable and come with a certificate of biodegradability.”

# NAD Update

- Kraft Foods Global, Inc. (NAD – April 6, 2009)
  - Challenger alleged that Kraft’s packaging for its condiments All-Out Squeeze bottle conveyed misleading message that 100% of the product could be extruded from plastic squeeze container.
  - NAD rejected the challenge.
    - NAD is reluctant to require an advertiser to change the name of a product absent extrinsic evidence that consumers have been confused or misled.
    - Challenger did not present any consumer perception evidence. In the absence of reliable consumer perception data, NAD will use its experienced judgment to determine the reasonable messages conveyed by an advertisement.
    - NAD determined that the “All-Out” claim was adequately qualified by the phrase “Great Taste, Less Waste.”
    - Advertiser submitted a study showing evacuation rates of approximately 96% to 99%. Once an advertiser provides a reasonable basis for its claims, the burden shifts to the challenger to show that either there was a material flaw in the advertiser’s evidence or that it has more reliable evidence demonstrating a different result. Challenger was unable to meet this burden.

# NAD Update

- Artix Entertainment, LLC (NAD – April 14, 2009)
  - Children’s Advertising Review Unit (CARU) challenged several websites that allowed users to create free user accounts in order to play different online games. CARU was concerned with the following:
    - Lack of neutral age-screening process;
    - Lack of tracking mechanism in accordance with neutral age screening process;
    - Collection of personally identifiable information from children under 13 without parental consent;
    - Allowing children to post PII on the site’s forums without prior parental consent.
  - Under CARU’s Guidelines, if there is a reasonable expectation that a significant number of children will visit a website, the operator should use age-screening tools to determine whether verifiable parental consent or notice and opt-out is necessary. Age-screening questions should be neutral so as to discourage inaccurate answers from children trying to avoid parental permission requirements and should prevent children from being able to go back to circumvent the age screening process.