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Honors and Awards

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News

FTC Uses Amended Biz Opp Rule in 70-Case Enforcement Sweep

On November 15, the Federal Trade Commission (FTC) announced an enforcement sweep including more than 70 enforcement actions. The sweep targeted companies marketing business opportunities to consumers that the enforcement agencies allege are fraudulent.

During the press conference David Vladeck, Director of the FTC's Bureau of Consumer Protection, mentioned that six of the cases alleged that marketers violated the FTC's new Business Opportunity Rule. The Rule, which became effective in March 2012, requires that companies marketing business opportunities to consumers make certain disclosures in a one-page document provided to consumers. Those disclosures include:

- The seller's identifying information;
- Whether the seller, its affiliates or key personnel have been involved in any civil or criminal action, including any FTC action, involving misrepresentation, fraud, securities law violations, or unfair or deceptive practices during the past 10 years;
- Whether the seller makes claims about the purchaser's likely earnings;
- Whether the seller has a cancellation or refund policy, and
- Names and contact information for 10 people who bought the business opportunity within the previous three years.

If the marketer makes earnings claims, has a refund policy or has staff who have been involved in legal actions requiring disclosure on the form, the marketer must provide separate disclosures detailing the conditions of its cancellation or refund policy, substantiating its earnings claims, and/or detailing the legal actions in which its staff were involved.

[Click here](#) to read the press release about the enforcement sweep and view the related complaints.

Analysis

A Clause a Day May Keep Class Action Plaintiffs Away

These days, marketers know that even if they've done nothing wrong, they can still be subject to a class-action lawsuit arguing that something about an advertising campaign was deceptive, writes Venable partner **Gregory J. Sater** in the November 2012 edition of *Electronic Retailer* magazine. Fortunately, he says, there is a new weapon against consumer class actions. And, although it is somewhat untested, this tool may be just the ounce of prevention that advertisers and marketers have hoped for.

Sater writes about what is commonly called a "class-action waiver clause." The clause is typically contained in a contract or within a set of terms and conditions to which a customer consents. It requires that any claim brought against the company must be brought in arbitration, rather than in court. In addition, Sater writes, action can be brought by only a single customer, because customers waive the ability to act as a class.



Law Firm of the Year, National Advertising, *U.S. News and World Report*, 2011-2012



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According to Sater, the extent to which different courts will enforce class-action waiver clauses remains to be seen; some may decline to enforce them because of perceived unfairness to the consumer. However, he believes the trend favors enforcement of the clauses so long as they are written clearly and presented to each purchaser fairly. The trick is to construct a clause that will likely be found enforceable when challenged.

[Click here](#) to read the full text of Sater's column and learn more about the construction of defensible class-action waiver clauses.

Disclosures and "Reasonableness" the Key to Sweepstakes Success

How much is a "lifetime supply" of gumballs? According to a recent sweepstakes from Gumball.com, the answer is exactly 22,082.5 gumballs, write Venable attorneys [Matthew R. Rabinowitz](#), [Maura A. Marcheski](#) and [Amy Ralph Mudge](#) in a recent post to Venable's advertising law blog, www.allaboutadvertisinglaw.com.

As with any sweepstakes or contest, the attorneys write, companies giving away a "lifetime" supply of something, or any other prize, must disclose certain information about the nature of the prize being offered. These disclosures include defining exactly what the prize is. This includes the prize's retail value, what constitutes the prize, when and how it will be delivered to the winner, and whether the winner must meet any requirements to receive the prize. Companies must also adhere to the FTC's generally applicable "reasonableness test" which, in this case, requires a reasonable person to agree that the amount awarded would last an average individual for the period stated.

[Click here](#) to read the full post on Venable's advertising law blog and learn more about sweepstakes disclosures and how Burger King delivered a lifetime supply of its food to one lucky winner.

Upcoming Events

Running Sweepstakes, Contests and User Generated Content Promotions on The Latest Social and Mobile Marketing Platforms

November 28, 2012

[Melissa Landau Steinman](#) will speak about how federal and state laws regulating sweepstakes and contests apply in the context of these new technologies, as well as how the rules adopted by the individual platforms will apply to the increasingly cutting-edge promotions being proposed by innovative and creative marketing departments. Join the Association of Corporate Counsel (ACC) and Venable for an informative discussion of how these promotions may be regulated, including some strategies for creating compliant promotions that are successful in the marketplace, too.

Venable is the proud sponsor of ACC's IT, Privacy & e-Commerce Committee.

To register, please [click here](#).

"Telemarketing, Email and Text Message Marketing: Tips to Avoid Lawsuits," LeadsCouncil Webinar

December 11, 2012

[Jonathan L. Pompan](#) will moderate this discussion with [Ari N. Rothman](#) and [Molly T. Cusson](#), two attorneys with extensive experience advising lead generators and affiliate markets on legal and regulatory matters. The session will address the effective management of legal and regulatory risks when marketing via telemarketing or email and text messaging. It will also provide pointers on negotiating contract protections, shoring up due diligence, minimizing compliance gaps, and what to do when your company is involved in a lawsuit.

Please [click here](#) for more information.

[Click here](#) to subscribe to Venable's Advertising and Marketing RSS feed and receive the Venable team's insight and analysis as soon as it is posted.

Visit Venable's advertising law blog at www.allaboutadvertisinglaw.com.

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