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Buying Smart / Selling Smart – The 10 Biggest Legal Pitfalls in Lead Generation

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***Jonathan L. Pompan, Esq.
Venable LLP, Washington, D.C.***



Agenda for Today

- Introduction:
 - Legal Framework for Advertising and Marketing
 - Legal Issues – “Similar Issues, New Platforms”
- Top Ten Legal Pitfalls
- Wrap-Up



This presentation is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to specific fact situations.

#1: Failing to Consider the Legal Implications of a Particular Advertising Campaign



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#1: Failing to Consider the Legal Implications of a Particular Advertising Campaign

- Advertising and Marketing Liability
 - Federal Trade Commission Act
 - State “mini-FTC Acts”
 - Medium Specific Statutes (e.g., CAN-Spam Act, Telemarketing Sales Rule)
 - FTC Guidance (e.g., Endorsements and Testimonials)
 - New Bureau of Consumer Financial Protection / Consumer Financial Protection Act of 2010 **JUST PASSED**
- Copyright and Trademark Ownership/Infringement
- Complying with Terms of Social Media and Online Platforms
- Mobile Marketing / Payments
- Vertical Specific Federal and State Laws and Regulations
 - e.g., debt relief, mortgage, edu, payday, health and beauty, etc.
- Sweepstakes, Contests, and Other Promotions



#2: Ignoring the Basics of Advertising Law



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Federal Trade Commission Act – Some Basics

- Sections 5 & 12 of the FTC Act:
 - “Unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful.”
 - “It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement . . . by any means . . . for the purpose of inducing . . . directly or indirectly, the purchase . . . of food, drugs, devices, services, or cosmetics.”
 - “The dissemination or the causing to be disseminated of any false advertisement . . . shall be an unfair or deceptive act or practice . . . under section 5.”
- Deceptive Advertising
 - If it contains a representation or omission of information
 - that would be material to consumers
 - and that would mislead consumers acting reasonably under the circumstances.
- Unfair Advertising
 - If it is likely to cause substantial consumer injury [physical or economic]
 - That is not reasonably avoidable by consumers themselves
 - And is not outweighed by benefits to consumers or competition.



The Basics of Advertising Law (cont'd.)

- All express/implicit claims that reasonable consumers take from ad must be truthful and not misleading
- Ad may be literally truthful yet still deceptive
- Ad may be deceptive by omission
 - BEFORE running ad, advertisers must have "competent and reliable scientific evidence" to support all health/safety/ efficacy claims.
 - Fine-print disclosures won't cure an otherwise deceptive ad!
 - If disclosure needed to prevent ad from being deceptive, must be "clear and conspicuous," effectively convey correct net impression.
- Health and Beauty Claims / Children's Advertising Get Special Treatment
- Additional sources: FTC Telemarketing Sales Rule, Guidelines and Enforcement Actions



#3: *Not Recognizing the Legal Risks and Consequences of Noncompliance*



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#3: Not Recognizing the Legal Risks and Consequences of Noncompliance

- Consequences of Unfair and Deceptive Advertising and Marketing Practices
 - Cease and desist orders with 20-year reporting requirements
 - Refunds for consumers
 - Bans and bonds
 - Informational remedies, such as disclosures in future ads or corrective advertising
- Commercial Disputes



The FTC and State Attorneys General Are Taking Notice

- FTC first sued affiliates directly in May 2009, alleging that defendants purchased “sponsored links” that appeared on results pages of Internet search engines when consumers search for “making home affordable.” Defendants’ ads, which prominently displayed the full govt. URL “www.MakingHomeAffordable.gov,” then appeared among the search engines’ results.
- Consumers who clicked on ads were not directed to govt. program site, but were diverted to sites that sell paid loan modification services. These commercial sites, not affiliated with govt., required consumers to enter personally identifying and confidential financial info, and then either offered loan modification services or sold consumers’ information to companies that market them.
- Although FTC did not name these commercial loan modification websites as defendants or allege they were engaged in deception, it did allege that the affiliate defendants were attempting to defraud homeowners trying to use the govt. site, by falsely implying through search results that visitors were being sent to the govt’s website.
- Several recent enforcement actions only underscore perils of affiliate marketing: various state AGs have cited lead generation in their latest actions against online promotions, and these may be followed by other AG actions against merchants, affiliates and/or networks that engage in deceptive advertising or knowingly assist and facilitate it.



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#4: Ignoring the Law Specific to the Vertical



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#4: Ignoring the Law Specific to the Vertical

- **Debt Relief Services**
 - Unprecedented Enforcement Focus by FTC, states Attorneys General and private plaintiffs against fraudulent companies
 - FTC Rulemaking to Amend the Telemarketing Sales Rule to Address Debt Relief Services
 - State Debt Adjusting Statutes
 - State Credit Services Organizations Acts
 - Industry Guidelines (e.g., AICCCA, TASC, USOBA)
- **Mortgage**
 - Real Estate Settlement Procedures Act
 - State Mortgage Brokerage and Loan Origination Statutes
 - State Mortgage Foreclosure Consultant Acts (i.e., loan modification)
- **Education**
 - Incentive Compensation
 - Gainful Employment
 - Disclosures
 - Industry Guidelines
- **Payday Lending**
- **Health and Beauty / Nutritional Supplements**
- **Auto Service Warranties**
- **Insurance**
- **and More...**



#5: Not Knowing Your Lead Source



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How to avoid not knowing your lead source...

- Qualification of Vendors/Customers
 - Who are you buying from?
 - Who are selling to?
 - Where did the lead originate from?
 - What was said to solicit the lead?
- Qualification Procedures
 - Develop a Qualification Program
 - Develop a Standard Operating Procedures
 - Reporting and Audit
 - Legal Protections (e.g., terms and conditions, legal review)



#6: Calling a Consumer on the “Do-Not-Call” List Without Permission



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The Telemarketing Sales Rule's "Do-Not-Call" List and Lead Generation

- National Do-Not-Call Registry is Managed by the FTC
- It is a violation of the Telemarketing Sales Rule to initiate any outbound telemarketing call to a person when that person's telephone number is on the National Do-Not-Call Registry unless the seller has an established business relationship ("EBR").
- The central issue is whether the exemption applies to a lender that initiates a telephone call to a consumer based on contact information the purchaser obtains from a lead generator.
- Whether there is an EBR depends on the actions of the lead generator.
- Entity Specific Requirements
- State Licensing May be Applicable
- FTC Enforcement Example:
 - In 2007, the FTC charged a leading mortgage company with improperly calling consumers on the DNC whose numbers had been obtained from third-party lead-generators.
 - Lead generator used Web sites that offered information on financial and other products.
 - The FTC's complaint stated that because consumers whose numbers were on the lead lists were not reaching out to the mortgage company in particular, the company had not developed an EBR with them, making calls to registered numbers illegal.
 - Company also allegedly also ignored consumers' requests to be placed on its entity-specific do not call list.
 - Matter settled for \$1 million civil penalty and requirements that any lead generators it uses disclose to consumers, before they provide their contact information, that they will receive a phone call, the maximum number of sellers who may contact them, and, if possible, the identity of any seller that might call them as a result of their inquiry.



#7: Upsells/Cross Sells and Negative Option Marketing Require Careful Planning



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#7 Upsells/Cross Sells and Negative Option Marketing Require Careful Planning

- Advance Consent Marketing
 - marketing plans where the consumer gives consent to receive and pay for goods or services in the future on a continuing or periodic basis, unless and until the consumer cancels the plan.
- Negative Option
 - offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.
- Chairman Rockefeller's (D-WV) Investigation
- Senate Commerce Hearing
- FTC's Prenotification Negative Option Rule Review
- FTC, State AG Enforcement & Legislation



#8: Contractual Relationships



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#8: Contractual Relationships

- Written lead contracts typically include all sorts of provisions about ownership, exclusivity, payment, terms and legal liability.
- Sometimes the documents are standard and there is little opportunity for negotiation.
- Even when the main terms of the agreement are not negotiable there are certain key provisions that can work to everyone's favor.
- Have you considered what you're contractually liable for in the event of a dispute or a government investigation / enforcement action?



#9: Failure to Protect and Safeguard Private Information



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#9: Failure to Protect and Safeguard Private Information

- The failure to not adequately protecting personally identifiable (“PPI”) information that is governed under federal and state law.
- Purchasers need to take an interest in all promises that are given to consumers regarding their personal information throughout the lead generation process.
- Generally, such information would need to stay encrypted to at least industry-level standards all the way down the chain from generation to use.
- Don’t ignore disposal issues, which may trigger certain legal requirements.
- Be cognizant of all promises that are given to consumers regarding their personal information throughout the lead generation process.
- Make sure any PPI stays encrypted to at least industry-level standards all the way down the chain from generation to use.
- Failing to protect PPI was one of the claims in the FTC ValueClick case that was settled for record amounts in 2008. The FTC charged that ValueClick and its subsidiaries Hi-Speed Media and E-Babylon provided online privacy policies which stated they encrypted consumer information but either the encryption was not up to industry standard or was not used at all.



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#10: Endorsements and Testimonials Require Caution



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- **FTC Guides for Endorsements and Testimonials**
 - Consumer Endorsements are interpreted as representing that the endorser's experience is representative of what consumers will generally achieve.
 - If the advertiser cannot substantiate that the endorser's experience is typical, the advertisement must clearly and conspicuously either:
 - (a) disclose what the generally expected performance would be in the depicted circumstances; or
 - (b) clarify the limited applicability of the endorser's experience.



FTC Guides for Endorsements and Testimonials (cont'd)

- **Expanded Liability**
 - Endorsers, as well as marketers, may be liable for statements made in the course of their endorsement.
- **The Death of the Disclaimer**
 - A statement by a consumer about his or her experience with the product is deemed to be a representation that other users of the product can expect the same experience.
 - Many marketers do not have the facts necessary to support such a claim so they merely state that the experience of the testimonial is unique and that "Your Experience Will Vary."
- **Disclosure of Connections: The New Frontier**
- **Social Media and Blogs**



FTC Guides for Endorsements and Testimonials (cont'd)

- Both advertisers and endorsers are potentially liable for statements disseminated through new media channels;
- The endorser is responsible for disclosing a material connections with an advertiser;
- Advertisers have a responsibility to advise endorsers of their disclosure obligations; and
- Advertisers should monitor an endorser's statements to ensure they comply with the Guides and take corrective actions if they are not.



The Top Ten...

- #1: Failing to Consider the Legal Implications of a Particular Advertising Campaign*
- #2: Ignoring the Basics of Advertising Law*
- #3: Not Recognizing the Legal Risks and Consequences*
- #4: Ignoring the Law Specific to the Vertical*
- #5: Not Knowing Your Lead Source*
- #6: Calling a Consumer on the “Do-Not-Call” List Without Permission*
- #7: Upsells/Cross Sells and Negative Option Marketing Require Careful Planning*
- #8: Contractual Relationships*
- #9: Failure to Protect and Safeguard Private Information*
- #10: Endorsements and Testimonials Require Caution*



For Additional Information:

Jonathan L. Pompan, Esq.

jlpompan@Venable.com

(202) 344-4383



VENABLE[®]_{LLP}

575 7th Street, N.W.

Washington, DC 20004

www.Venable.com

1-888-Venable

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