August 12, 2010

In This Issue

Washington State AG Reaches Settlement with Intelius for Deceptive Upsell Marketing Practices

This week the Washington State Attorney General announced that it had settled claims against Intelius, an online phone search service for deceptive post-transaction upsell marketing practices and its failure to honor cancellation and refund requests.

The State claimed to have received thousands of consumer complaints alleging that Intelius enrolled consumers in its own and third-party recurring billing programs following transactions for Intelius's search services without the consumer's express informed authorization. The AG alleged that Intelius continued marketing these programs and not changing its cancellation and refund policies despite a significant increase in the number of consumer complaints filed with the company and the BBB, as well as an outside consultant's belief that the advertising practices were causing confusion and a staff recommendation to make it easier for consumers to cancel. The settlement requires Intelius to pay $1.3 million and prohibits the company from contracting with certain club membership programs. While many of the settlement's injunctive terms are typical of these types of matters, certain provisions, discussed in more detail below, are particularly onerous and noteworthy for marketers.

The AG complaint alleged that in 2007 Intelius had contracted with Adaptive Marketing, a division of Vertrue, to sell Adaptive's recurring billing club membership programs to Intelius customers. As an

UPCOMING EVENTS

August 15-17, 2010

inducement to enroll, consumers were offered $10 back on their Intelius purchase if they answered a two-question survey. By responding to the survey, these consumers were enrolled in the Adaptive program. The State alleged that Intelius provided consumers' personal and account information used for the Intelius service to Adaptive for billing without the consumers' authorization as the marketing techniques used for such enrollment were fraudulent and deceptive, thus rendering any alleged "authorization" by the consumer "meaningless and void." The State also alleged that Intelius marketed its own Identity Protection Service using similar marketing techniques and through the bundling of its core search product.

The settlement requires Intelius to pay $1.3 million, of which $300,000 will go to the State for its costs and $1 million will be earmarked for a consumer redress fund. In that regard, Intelius is required to send a letter to consumers who enrolled in its Identity Protect Service prior to August 2009, who did not receive a full refund, and who did not use the service, informing them of their ability to receive a refund. All funds not disbursed will go to the State.

The settlement also requires Intelius to disclose the terms and conditions of all free trial and automatic renewal programs clearly and conspicuously and to obtain consumers' "express verifiable acceptance" by electronic or written signature prior to being enrolled in a program. Intelius is prohibited from passing consumer account information to any third party. In addition, for all third party offers, Intelius is required to ensure that the offer discloses the full true name of the entity offering and servicing the program and that such offer not misrepresent, explicitly or implicitly, Intelius's affiliation with the membership program. Also, for third-party post-transaction offers, consumers are required to provide their full account information for the upsell. For Intelius-hosted membership programs, Intelius is not required to re-collect the account number from the consumer, provided Intelius received it directly from the consumer for an underlying Intelius transaction, and the offer is not presented in an interstitial advertisement.

This settlement is particularly noteworthy in that it contains certain provisions of first impression that should be of concern to marketers if the state of Washington or other regulators choose to adopt these approaches as they review all marketing offers. First, the definition of "free to pay" includes offers for which consumers may receive a product or service "for free or for a nominal amount for an initial period." This definition would appear to frustrate and conflict with a marketer's ability to charge a shipping or small service fee for a free trial of a product or service. Interestingly, this did not appear to be a material issue in the state's investigation, but it nevertheless signals a belief by the state that charging a nominal amount for a free trial may be used to avoid certain requirements for free-to-pay offers, such as

Affiliate Summit East

Topic: "How to Avoid Becoming a Regulatory Target"

Speaker: Linda Goldstein

New York, NY

for more information

August 26, 2010

Thompson Audio Conference

Topic: "Dietary Supplements and Functional Foods: What You Need to Know About 2010 Enforcement"

Speakers: Ivan Wasserman and Christopher Cole

for more information

September 21-23, 2010

2010 ERA D2C Convention

Topic: "Best Practices in Advance-Consent Marketing"

Speaker: Linda Goldstein

Las Vegas, NV

for more information

September 24, 2010

ACI Conference

Topic: "Sweepstakes, Contests, and Promotions"

Speaker: Linda Goldstein

New York, NY

for more information

November 18-19, 2010

32nd Annual Promotion Marketing Law Conference

Topic/Speaker: "To Tweet or Not to Tweet: How to Stay Current as Technology Changes the Game," the Telemarketing Sales Rule's requirements for such offers where pre-acquired account information is used. It remains to be seen if and how the state adopts this thinking to other offers.

Second, the settlement defines "membership program" as "any program, product or service that includes recurring charges, whether or not the program is offered on a free-to-pay conversion basis." This definition is broadly written to cover not only traditional membership clubs, but any program that charges consumers on a recurring basis, such as an automatic renewal magazine or newspaper subscription, cable service, coffee, book or movie delivery service, or satellite radio service.

Third, the settlement requires Intelius to provide a mechanism on its Web sites for consumers to cancel and/or request refunds for any membership program it owns or administers. This provision mirrors a similar requirement included in the Rockefeller committee's proposed bill (S-3386) intended to regulate online post-transaction upsell offers. Interestingly, the settlement places more stringent requirements on third-party membership programs that may be offered by Intelius. For these offers, the terms must provide a "toll free number and an e-mail address or another convenient and easily accessible online method for the consumer to use to cancel." It is unclear whether the State intends to impose this requirement solely on Intelius's third-party partners purely as punitive "fencing-in" relief or signals a belief that all recurring billing programs should make these methods available to consumers for cancellation. Regardless, companies that want to offer a recurring billing program through Intelius are on notice that these requirements exist.

Last, the settlement prohibits Intelius from taking any advertising from Vertrue, Webloyalty and Affinion, the three targets of the Rockefeller investigation, and any of their successors, subsidiaries or affiliates. This prohibition is interesting in that it prohibits Intelius from contracting with only these three membership companies but allows it to contract with other similar programs.

Why it matters: This settlement sends a strong message to online marketers that state regulators do not intend to take a back seat to the Rockefeller investigations, as they continue to examine and pursue companies that sell their own membership programs or provide the means for others to promote theirs. Based on the settlement terms in this case, companies that want to avoid similar scrutiny are well advised to comply with all laws and industry guidelines applicable to the marketing of these programs and carefully follow developments and proposed legislation emerging from the Rockefeller investigation.

back to top

Linda Goldstein

Topic/Speaker: "Negative Option/Advance Consent/Affiliate Upsells," Marc Roth

Topic/Speaker: "Children's Marketing," Christopher Cole

Chicago, IL

for more information

Newsletter Editors

Jeffrey S. Edelstein
Partner
jedelstein@manatt.com
212.790.4533

Linda A. Goldstein
Partner
lgoldstein@manatt.com
212.790.4544

Our Practice

Whether you're a multi-national corporation, an ad agency, a broadcast or cable company, an e-commerce business, or a retailer with Internet-driven promotional strategies, you want a law firm that understands ... more

Practice Group Overview
Practice Group Members

Info, Resources & Links

House Committee Approves Internet Gambling Bill

The House Financial Services Committee made a major step to legalize online gambling by approving, with bipartisan support, the Internet Gambling Regulation, Consumer Protection, and Enforcement Act.

The legislation, first introduced by Committee Chairman Barney Frank (D-Mass.) in 2009, legalizes and regulates Internet gambling activity in the United States.

Under the bill, H.R. 2267, accepting bets or wagers from an unlicensed person in the United States would be illegal. Instead, it authorizes the Secretary of the Treasury to issue Internet gambling licenses, provided applicants meet certain criteria.

To be granted a license, an applicant would need to provide the Secretary with criminal and credit histories of its senior executives, directors, or anyone deemed "to be in control" of the organization; a financial statement; a document describing its corporate structure, including the structure of all related businesses and affiliates; a plan setting forth how underage and problem gamblers will be protected, why its games will be fairly operated, and how the applicant will address any law enforcement concerns that may arise; and an agreement from an offshore applicant that it accepts U.S. jurisdiction and applicable U.S. laws.

Applicants must also pass a background check and convince the Secretary by "clear evidence" that he or she is a person of good character, honesty and integrity, does not pose a threat to public interest, will not operate using unfair or illegal business methods, and has adequate business competence and financing.

Licenses will not be issued to those who have been convicted of an offense punishable by imprisonment of more than one year or are delinquent in their federal or state tax obligations.

The Secretary's authority is not absolute, however. He cannot issue a license to conduct sports betting, and states or Indian tribal regulatory bodies may opt out completely or impose limitations on the kinds of gambling activity they will permit within their borders.

The proposed legislation also requires the Secretary to adopt safeguards to guard against fraud, money laundering, and terrorist financing before he issues licenses, and he must adopt procedures designed to protect against compulsive gambling, including developing a "Problem Gambling, Responsible Gambling, and Self-Exclusion Program."

The Secretary must also establish a list of persons excluded from

Internet gambling activity, who may not recover any winnings or losses as a result of gambling with a licensee, and persons who "self-include" themselves on the list cannot hold the United States liable if it fails to exclude them from gambling activity or otherwise permits them to gamble while they remain on the list.

The legislation provides that violators are subject to federal criminal and civil proceedings, and state attorneys general may also institute civil action against a licensee if they believe the interests of their citizens have been adversely affected.

To read the bill, H.R. 2267, click here.

Why it matters: The proposed legislation is estimated to generate $42 billion in revenue over the next ten years and create roughly 32,000 jobs over five years. These statistics have helped to increase support for the bill since its introduction, including approval from groups such as the Federal Credit Unions, the Financial Services Roundtable, and the U.S. Chamber of Commerce. The bill does include a safe harbor provision for financial transaction providers (such as credit card issuers and financial institutions) that provide financial services to licensees who conduct their gambling activities in full compliance with the legislation and other federal or state laws. This protection is of critical importance to banks and credit card companies that will provide the machinery for the placing of bets and the distribution of winnings. Some aspects of the legislation could be problematic, however. Because the law does not preempt state law, many states may seek to protect their lotteries, their licensed brick-and-mortar casinos, and other licensed gambling locations, especially as it appears that the states will not share the licensing revenue realized by the Department of the Treasury. A patchwork quilt of gambling laws could be a result. Final passage is far from guaranteed, and much congressional debate is likely to follow in the wake of this watershed piece of legislation.

back to top

Privacy Update: Senate Bill and FTC "Do-Not-Track" List?

The push for governmental regulation of privacy continued with Senator John Kerry (D-Mass.) announcing his intention to introduce Senate legislation next term and testimony by Federal Trade Commission Chairman Jon Leibowitz indicating that the agency is considering the creation of a "Do-Not-Track" registry.

Leibowitz testified before the Senate Committee on Commerce, Science, and Transportation about the FTC's efforts to protect consumer privacy, referencing a recent enforcement action against Twitter and a series of roundtables on privacy held by the Commission over the winter.

Based in part upon what the Commission learned during the roundtables, Leibowitz said that the FTC plans to issue a report on privacy later this year, addressing issues such as how to improve privacy policies and increase transparency for consumers, possibly by the "use of standardized terms or formats."

Leibowitz also told legislators that the Commission is considering the creation of a registry similar to the Do Not Call list that would give consumers the ability to opt out of all behavioral targeting.

While consumers would still receive online advertisements, they would not be targeted based on their browsing history. Leibowitz described the "Do-Not-Track" program as a "universally easy-to-use mechanism for consumers [that] could be run through the FTC or could be run through some sort of private entity." He did not provide any other details on how the program would be implemented.

In other privacy news, Senator Kerry said he plans to introduce an online privacy bill early next year and hopes to see legislation enacted.

In a statement, Kerry indicated that his bill would create standards for collecting consumer information and its use for marketing. He also said consumers should have greater control over how their Internet activity and profiles are accessed by advertisers and Web sites.

To read the text of Chairman Leibowitz's Senate testimony, click here.

Why it matters: Privacy remains in the news with the push for some form of government regulation increasing. With two pieces of legislation from the House for legislators to debate (only one bill has actually been introduced), the addition of a Senate bill would signal strong congressional support for some form of data privacy law. Combined with its roundtables on the subject and its heightened scrutiny of the privacy practices of companies such as Twitter, the potential for a Do-Not-Track registry signals the continuing focus of the FTC on privacy issues.

back to top

Cranberry Wars: From the Courtroom to Social Media

Rival cranberry product producers Decas Cranberry Products and Ocean Spray Cranberries have moved their spat from the courtroom to social media.

Ocean Spray Cranberries filed suit against Decas, alleging that the company is infringing on an Ocean Spray patent that covers the process of making sweetened dried cranberry products.

While that case is pending, Decas decided to launch a counterattack outside of the courtroom. Accusing Ocean Spray of mislabeling its sweetened dried cranberry product called "Choice" by listing cranberries as the primary ingredient, Decas took to social media.

Decas launched a "consumer education" Web site, a Facebook page, and a YouTube video, all dedicated to "exposing" the Choice product.

Specifically, Decas claims that Ocean Spray should list sugar as the primary ingredient in Choice, not cranberries, especially since the product only "retains the cranberry's skin" and doesn't use the entire cranberry.

The YouTube video goes further, accusing Ocean Spray of succumbing to corporate greed.

"When companies abandon their values, stray away from their mission, and focus blindly on profits, they affect all of us. Sometimes greed happens on a grand scale, and sometimes – with something so small and so precious as the cranberry," according to the narration in the video.

Ocean Spray has fought back, arguing that its product is correctly labeled and that the social media campaign is itself deceptive because there is no mention that it is run by a competitor.

John Isaf, a spokesperson for Ocean Spray, said the Web site and YouTube video left consumers with the impression that the content was created by a nonprofit advocacy group because there was no mention in the content that a rival cranberry company – Decas – had created it. "They pursued deceptive tactics," Isaf said of Decas.

To visit Decas' site, click here.

To watch its YouTube video, click here.

Why it matters: The cranberry wars are an example of companies using social media to launch a PR campaign, for good or for bad. Decas' campaign was originally launched with no ties to the company, which only took credit for it after several days of attacks by Ocean Spray; the company's name still does not appear on the site.

back to top

FTC Report on Food Marketing Regs Overdue

A final report from the Federal Trade Commission and other federal agencies on regulations for marketing food to children is now overdue to Congress.

The Obama Administration has made healthful eating a priority as part of its campaign against childhood obesity. Last year, Congress ordered the FTC, the Food and Drug Administration, the Agriculture Department, and the Centers for Disease Control and Prevention to recommend standards for children’s food advertising.

A proposal released in December was met with criticism by the food and advertising industries, which expressed First Amendment concerns and instead backed a self-regulatory plan.

The report was to include nutritional definitions for foods advertised to children.

The preliminary report limited cereals to only eight grams of sugar per serving and drastically cut the level for saturated fats. It also proposed that all foods would have to contain significant amounts of wholesome ingredients – such as fruits, vegetables, low-fat milk, or whole grains – in order to qualify for advertising to children.

“The proposal was extraordinarily restrictive and would virtually end all food advertising as it’s currently carried out to kids under 18 years of age,” said Dan Jaffe, executive vice president for government regulations of the Association of National Advertisers.

The delay in the submission of the final report could signal that changes are being made in response to the criticism, he suggested.

The food and advertising industries have instead backed a self-regulatory program called the Children’s Food and Beverage Advertising Initiative.

The Initiative, launched in 2007 by the Council of Better Business Bureaus, includes more than a dozen large companies that control roughly 75 percent of the food and beverage ads on children’s television.

Each participating company establishes the nutritional criteria for the food it determines is appropriate to advertise and agrees to feature only those foods in ads that appear during programming predominantly aimed at children under 12.

Why it matters: The report was due to Congress in July but speculation has the final product months away. A spokesperson for the FTC said she could not predict when the report would be finished, but said it would be released for public comment prior to its submission to Congress.

back to top

Copyright Office and Library of Congress Allow “Jailbreak” of iPhones

The Library of Congress and Copyright Office gave the go-ahead to users of smartphones – including the iPhone – to engage in “jailbreaking” by installing third-party software and modifying the operating systems.

Every three years, the Copyright Office considers petitions seeking to circumvent the Digital Millennium Copyright Act and makes recommendations to the Library of Congress.

This year, the agencies decided to grant a petition filed by the Electronic Frontier Foundation to allow for antipiracy measures on smartphones, which means that users can install third-party software and modify the smartphone's operating system.

Apple had vigorously fought the "jailbreaking" petition, arguing that it would harm the company's reputation by opening it up to bugs and allow for more opportunities for piracy. In a brief opposing the petition, Apple said that the "iPhone is much more than just a telephone," and warned of the potential for hackers to crash cell coverage around the world.

But the Copyright Office and Library of Congress rejected Apple's challenge.

"On balance . . . when one jailbreaks a smartphone in order to make the operating system on that phone interoperable with an independently created application that has not been approved by the maker of the smartphone or the maker of its operating system, the modifications that are made purely for the purpose of such interoperability are fair uses," the decision said.

The decision also allowed educators and documentarians to break encryption on DVDs for the specific purpose of criticism and comment, a petition the Motion Picture Association of America had fought against, arguing there were less intrusive ways to gain access to clips.

To read the decision, click here.

Why it matters: The decision was a blow to Apple, which had fought the exemption. "Case law and congressional enactments reflect a judgment that interoperability is favored," the decision said.

back to top