Advertising Law

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Class Certified in Abercrombie & Fitch Gift Card Case

On March 7, 2012, the United States District Court for the Northern District of Illinois certified a class action lawsuit against popular clothing retailer, Abercrombie & Fitch, alleging that it engaged in deceptive marketing tactics with respect to a promotional holiday gift card.

Named plaintiffs Tiffany Boundas and Dorothy Stojka filed the action seeking certification of the following class: "All people who received Abercrombie & Fitch Stores, Inc. promotional gift cards in hard copy stating 'no expiration date' issued as part of a 2009 winter holiday in-store promotion and voided by Abercrombie & Fitch Stores, Inc. on or after January 30, 2010 despite having credit remaining on the gift cards."

Upon examination of whether or not the gift card represented a "contract" between the parties, District Court Judge Gary Feinerman certified a modified class.

In December 2009 Abercrombie & Fitch offered $25 promotional gift cards to customers who spent $100 or more in one transaction. On the back of the cards was the following disclosure: "This gift card is redeemable at all Abercrombie & Fitch locations ... No expiration date." Nonetheless, in April 2010, when Plaintiff Boundas attempted to redeem $75 worth of promotional gift cards, she was told the cards had expired January 30, 2010. According to Abercrombie & Fitch, the "no expiration date" clause on the back of the cards was preempted by a contrary note that appeared on the sleeve the cards were enclosed in when they were given to qualifying consumers. Abercrombie relied on the note, which read "$25 gift card expires 1/30/10," when it chose to void close to 200,000 outstanding gift cards.

The District Court granted class certification, notwithstanding Abercrombie's objection to certification on the grounds of "commonality." The court concluded that "The commonality requirement is easily satisfied here." The contract claim for putative class members

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Upcoming Events

May 17, 2012
Response Expo 2012
Topic: "Counterfeits, Knockoffs and Digital Reputation Management"
Speaker: Linda Goldstein
San Diego, CA
For more information

June 12, 2012
Celesq CLE Advertising Law Webinar
Topic: "Privacy Update: Formulating Privacy Policies and Practices for Compliance with the FTC's Final Report and Guidelines"
Speaker: Jeff Edelstein
For more information

June 12, 2012
ABA Section of Litigation's 2nd Annual Food & Supplements Workshop
Topic: "So How Did Walnuts Become Drugs? Compliance Issues for Companies that Sell Supplements & Functional Foods"
Speaker: Ivan Wasserman
Downers Grove, IL
For more information

June 19-20, 2012
ACI's 3rd Annual Conference on Litigating and Resolving Advertising Disputes
Topic/Speaker: "Buckle Up: We're Headed to Trial," Chris Cole
Topic/Speaker: "Defining Advertising Injury: Protecting Coverage Rights When the Company is Sued for False or Misleading Advertising," Steve Raptis
Topic/Speaker: "Developing a Strategy to Combat the Uptick in Litigation Challenging the Marketing and Labeling of Food Products," Linda Goldstein
New York, NY
For more information

July 24–27, 2012
15th Annual Nutrition Business Journal Summit
Topic: "NBJ State of the Industry"
Speaker: Ivan Wasserman
Dana Point, CA
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presented at least two common questions, including whether the gift cards were contracts between Abercrombie and customers receiving the card, and whether the terms of those contracts were the disclosures on the card, or on the sleeve, or both. If both disclosures were terms of a contract, then a third common question was "whether the card trumps the sleeve or vice versa."

In its opposition to class certification, Abercrombie argued that no common questions exist since each customer would have entered into a different contract based on his or her varying transactions. Specifically, Abercrombie argued that many customers learned about the gift card through in-store or online advertising that mentioned the January 30, 2010, expiration date; other customers entered their original purchase transaction without knowing about the promotional gift card; and yet a third group of customers discovered the promotional gift cards from other customers or Abercrombie's sales people. Thus, Abercrombie claimed classwide relief was not appropriate, even assuming the cards represent contracts, as the terms of each particular contract would vary based on these different factual circumstances.

The court disagreed, holding that "Where there are objective indicia of the contract's terms—here, the text on the cards, the text on the sleeves, or both—the manner in which parties become aware of a contractual opportunity and their subjective perceptions of the resulting contract are not relevant…. Accordingly, when Abercrombie customers made qualifying purchases and received promotional gift cards, contracts—*identical* contracts—were formed." The court even held that a person receiving a promotional gift card from a customer who obtained one during a sales transaction was an assignee, and took the card subject to all of the rights and obligations of the assignor.

The court also rejected Abercrombie's commonality argument that not all customers may have received their promotional gift card in a sleeve. Abercrombie's own evidence contradicted this assertion since it was clear that all employees were *required* to place the cards into the sleeves with the January 30, 2010, expiration date. And Abercrombie did not present any evidence that employees disobeyed this requirement.

In addition, the court noted that "Abercrombie made no effort to show that variations in state contract law would require that the claims of card holders in different States be resolved differently, the same result holds here. Abercrombie will not be foreclosed from again pressing this issue before trial, but only if it can actually show a material variation in how different States would resolve the contract issues posed by this case."

The court certified the class as "primarily of individuals holding an Abercrombie promotional gift card whose value was voided on or around January 30, 2010. That criterion is as objective as they come. The class also includes individuals who threw away their cards because they were told that the balances had been voided. That criterion is not as objective as actually holding a physical card, but anybody claiming class membership on that basis will be required to submit an appropriate affidavit, which can be evaluated during the claims administration process if [plaintiff] prevails at trial."

To view plaintiffs' first amended class action complaint, click here.

To view the court's Memorandum Opinion and Order, click here.

Why it matters: The court held that "a class action would be superior to other methods of resolving [the] controversy between Abercrombie and those allegedly injured when promotional gift cards saying 'No expiration date' were voided on January 30, 2010." Although it is generally acceptable for companies to hand out gift cards with short expiration dates to consumers as an incentive, retailers must be very careful to clearly include the expiration date of any promotional gift card on the face of the card. Printing contradictory expiration dates on sleeves or other documents associated with the card is a surefire way to create confusion among consumers. Such a practice provides no benefits to the retailer, and only leads to unnecessary and costly class action litigation.

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Prize Promotion Business Is No "Prize"

In an effort to crack down on schemes that prey on financially strapped consumers, the Federal Trade Commission shut down a network of companies that allegedly duped hundreds of thousands of consumers into paying money to collect a fictitious sweepstakes prize.

The settlement orders impose over $35 million in judgments on the defendants, bar them from the prize promotion business, and permanently ban them from making misrepresentations about any product or service. In addition, the defendants are prohibited from selling or otherwise benefitting from customers' personal information, and must properly dispose of all customers' personal information within 30 days of its receipt.

The FTC's amended complaint alleges that defendants Tully Lovisa, Steven McClenahan, Geovanni Sorino, and Jorge A. Castro, along with their independently owned companies, sent personalized letters to consumers which led them to believe they had won a sweepstakes prize that could only be claimed upon receipt of a $20 processing fee. The mailings contained statements such as "WINNERS AMOUNT CONFIRMED AS DOCUMENTED IN REPORT $677,519.00" and "This is not an eligibility letter or preliminary qualification announcement. YOU HAVE WON A CASH PRIZE." The defendants allegedly added a sense of authenticity to some letters by incorporating official-looking artwork and seals and claiming to be affiliated with a fictitious government agency, such as the "State of Illinois Commissioners of Regulation" and "OFFICE OF THE PRESIDENT OFFICIAL NOTIFICATION."

According to the FTC, recipients were told their prize would be delivered once they paid a $20 "processing fee" by a certain deadline. However, instead of a prize, many consumers merely received information on how to enter other sweepstakes. Although the mailers did include fine-print language which vaguely claimed the operation was a reporting service that provided information on various sweepstakes, the FTC alleged that consumers were not clearly informed they had not won any prizes.

The settlement order imposes a judgment of almost $15.5 million against Tully Lovisa and his two companies, the International Award Advisors Inc. and Spectrum Caging Service Inc. In addition, Lovisa's wife, who also allegedly profited from the sweepstakes scheme, must pay a $170,000 judgment. The $15.5 million judgment against Tully Lovisa and his companies will be suspended when they have relinquished control to nearly $196,000 held by third parties and when they have turned over more than $6,000 in cash, and the proceeds from the sale of their Las Vegas home and personal property to the FTC.

In addition, a judgment of almost $15.5 million was imposed against Steven McClenahan and his four companies: Prize Registry Bureau Inc., Consolidated Data Bureau Inc., Registered Data Analytics Inc., and Lloyd Brannigan Exchange Inc. As with Lovisa's judgment, McClenahan's will also be suspended once he has surrendered more than $97,000 in corporate bank accounts and paid $7,800.

The court also imposed a suspended judgment of more than $5.5 million on Geovanni Sorino, Jorge A. Castro, and two companies they control, the National Awards Service Advisory LLC and Central Processing of Nevada LLC. Under this and all orders rendered in this case, the full judgments will become due immediately if the defendants are found to have misrepresented their financial condition.

To read the FTC's news release on its settlement with defendants, click here.

To read the FTC's news release on its complaint against the defendants, click here.

For more information about prize offers, click here.

Why it matters: Organizations that target financially strapped consumers and/or other vulnerable individuals must be particularly careful in how they market goods and services. As the FTC stated on its Web site, "When economic times are tough and large numbers of consumers are struggling with unemployment, debt, and even foreclosure, some con artists see an opportunity to take advantage of financially distressed consumers and try to take their last dollar." In response, "The FTC has redoubled its efforts to stop these scams through law enforcement actions, and by educating consumers about how to avoid being victimized."

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Reebok Firms Up EasyTone Marketing Claims After FTC Settlement

Reebok doesn't give up easily—especially when it comes to the toning shoe business.

After resolving allegations that it made unsupported advertising claims about its EasyTone and RunTone shoes in a $25 million settlement with the FTC, Reebok took measures to revitalize the shoes by introducing a more rigorous testing protocol and a new marketing campaign.

At issue in the prior FTC lawsuit were Reebok's claims that walking in its EasyTone shoes and running in its RunTone running shoes would strengthen and tone key leg and buttock (gluteus maximus) muscles better than regular shoes. In early 2007 the company began running print, television, and Internet advertisements which maintained that users would see a 28% increase in the strength and tone of the butt, and an 11% increase in that of the hamstrings and calf muscles. According to the FTC's complaint, Reebok violated the FTC Act by failing to substantiate these claims at the time they were made, in violation of the FTC Act.

Last September Reebok entered into a settlement agreement with the FTC whereby it agreed to pay a $25 million judgment and make no claims about its toning products unless they were "non-misleading, and backed by scientific evidence." In settling the case, Reebok did not admit any wrongdoing or accept the FTC's allegations. In fact, the company, on its Web site, indicated that the settlement was a "business decision" made "in order to avoid protracted litigation and to move our focus back to where it belongs: to our customers."

Rather than walk away from the EasyTone and RunTone products, Reebok decided to conduct a rigorous study on the performance and exercise benefits of its toning shoes. Reebok's 12 week independent study tested EasyTone against a control shoe with a flat bottom. Women between the ages of 22 to 39 wore the shoes while participating in supervised aerobic walking three times a week. Although the women wearing EasyTone shoes did not lose weight, the results did show an average 2.5% reduction in body fat as opposed to those women in the control group.

Martina Jahrbacher, the head of Reebok Women's Sport division, was quoted in an April 23, 2012, article published in *Advertising Age*: "We are 100% convinced, and have done more consumer insights to identify, that there is still a market for toning." Ms. Jahrbacher went on to say that this case "has shown us how we can be even better in talking about new testing protocols that we've done. [The FTC] would never approve a testing protocol ... but our experts have learned all the questions and pushbacks and deep dives [the agency might have]. We're in a very confident spot."

Details of the study appear in fine print on EasyTone's advertisements, which now carry the tagline: "A beautiful way to reduce body fat." The campaign, now running in Europe and Asia, is expected to go global in the near future.

To read the FTC's settlement orders, click here.

To read the FTC's complaint, click here.

To read "Reebok Bounces Back in Toning Category After FTC Settlement," *Advertising Age*, April 23, 2012, click here.

To read FAQs regarding the EasyTone settlement, click here.

Why it matters: Instead of cutting its losses after the $25 million settlement with the FTC, Reebok learned from its mistakes and conducted testing to comply with the law and hopefully bolster consumer trust.

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Chipotle Substantiates Claims in “Back to the Start” Campaign

The National Advertising Division (NAD) has concluded that popular food chain Chipotle Mexican Grill can substantiate its claims of serving *naturally raised* meat in its restaurants.

Chipotle implied that it served naturally raised meat in an animated video, *Back to the Start*, which aired on Chipotle’s Web site, its Facebook page, on YouTube, on television, and in movie theaters before feature films. The animated video portrayed a farmer going back to sustainable farming—raising healthy food in a manner that does not harm the animals or the environment.

Under its inquiry, NAD asked Chipotle to substantiate two implied claims that: “Chipotle’s goal is to exclusively use ‘naturally-raised’ meat in its restaurants, [and] Chipotle has already achieved this goal and all of the animals which provide the meat (pork, chicken and beef) for Chipotle products are, in fact, ‘naturally-raised.’ ” NAD inquired because even an advertiser’s “aspirational claims”—striving toward and communicating “a goal of sustainability”—must be substantiated.

NAD stated it “appreciates the challenges faced by advertisers who wish to communicate information to consumers about sustainability measures taken by a company. NAD recognizes the positive role that advertising can play in raising consciousness about sustainability and informing consumers of the activities and commitments made by the company. Nevertheless, because images and terms suggestive of sustainability can give rise to so many different meanings and expectations on the part of consumers, such claims can be difficult to substantiate.”

Chipotle, however, was in fact able to substantiate both claims based on detailed information about its “Food with Integrity programs” that is set forth on the company’s Web site, marketing materials, and in filings with the SEC. This included evidence of how much meat is “naturally-raised” according to Chipotle’s definition, which is “a more stringent definition than the one established by the U.S. Department of Agriculture.” Chipotle also established how much produce is “organic or locally sourced, and how much dairy comes from pasture-raised cows.” Based on the evidence, NAD concluded that Chipotle “provided a reasonable basis for the two messages implied in the [video]—both its aspirational message and the message that all of the animals which provide the meat for Chipotle are, in fact, ‘naturally-raised.’ ”

But NAD also noted that advertisers must substantiate their advertisements at the time they air. At the time of Chipotle’s video (August 2011), 100% of its pork was naturally raised, as compared to 80% of its chicken and 86% of its beef. NAD advised that Chipotle must be prepared in the future to substantiate “all express and implied claims before disseminating its advertising messages.” In October 2011, Chipotle reached its goal of serving meat in its restaurants that is 100% naturally raised.

To read NAD’s press release, click here.

To watch Chipotle’s “Back to the Start” video, click here.

Why it matters: NAD's decision highlights the importance for advertisers to substantiate both aspirational as well as actual claims. Advertisers must periodically review their advertisements for accuracy due to changing conditions. In this regard, NAD noted that although Chipotle's "implied messages are currently substantiated, to the extent that supply constraints result in shortages of 'naturally-raised' meats in particular markets, future advertising may need to disclose this fact." As such, advertisers should periodically review their advertisements to prevent stale advertisements from stepping into the realm of deception, especially when the products or services offered to consumers are subject to change.

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Blockbuster Settles Class Action Alleging Violations of the Video Privacy Protection Act

According to a notice of settlement filed in the United States District Court for the District of Minnesota, Blockbuster has reached a settlement in a class action filed by plaintiff and class representative, Baseem Missaghi, for alleged violations of the Video Privacy Protection Act. The parties anticipate that they will file formal settlement papers with the court in June 2012.

Plaintiff filed his class action lawsuit against Blockbuster in September 2011, alleging that the Company violated the Act by keeping certain records of video rentals for millions of consumers.

These records contained personally identifiable information, credit card and billing information, and a history of video rentals. According to plaintiff, "Blockbuster maintains a virtual digital dossier on millions of consumers nationwide."

The Act, passed in 1988 after a newspaper printed video rental records of Supreme Court nominee Robert Bork, prohibits movie rental companies from disclosing a consumer's movie rental history without the consumer's consent. The Act also requires these companies to destroy personal information about their customers as soon as practicable.

Instead of complying with these obligations, Blockbuster allegedly kept its customer's personal information and video rental histories "for an indefinite period of time." In particular, Blockbuster was maintaining these records well after subscribers canceled their memberships with the Company.

According to the notice of settlement filed with the court on April 2, 2012, the parties participated in a mediation in March of this year and, shortly afterwards, "agreed on the principal terms of a non-binding term sheet for a class action settlement." The parties anticipate filing the settlement papers "within sixty (60) days."

To view a copy of the class action complaint, click here.

To view a copy of the notice of class action settlement, click here.

Why it matters: Other video companies have been sued for allegedly violating the same law. Although the details still haven't been made public, one of these companies, Netflix, agreed to a $9 million settlement of its matter in February. The others, however, are still fighting their cases.

Providers of video services must ensure their compliance with the Video Privacy Protection Act. They will limit their exposure if they conduct a periodic review and updating of internal policies and procedures to make sure that personal information and video rental histories are only maintained for legitimate business purposes and are destroyed as soon as practical. Routine training of employees on the requisite policies and procedures will also help to reduce any liability exposure. Otherwise, providers may find themselves embroiled in needless class action litigation for something as simple as failing to implement sufficient procedures to properly destroy records.

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Noted and Quoted...*Electronic Retailer* Calls Upon Linda Goldstein for Insight on FTC's Recent Enforcement Trends

In the May 2012 issue of *Electronic Retailer* Magazine, Linda Goldstein, Chair of Manatt's Advertising, Marketing & Media Division, was quoted extensively in an article highlighting the key issues the direct-to-consumer industry is currently monitoring on Capitol Hill and beyond. One of the issues that is being watched most closely is the changing enforcement role of the Federal Trade Commission and the increased use of aggressive financial settlements and recording requirements to deter consumer fraud.

"It's a very clear warning bell to members of our industry, especially members who make health and weight-loss claims, that relying on scientific studies and claims that others have made will not pass muster," said Ms. Goldstein. "The FTC is looking for independent double-blind clinical studies. It's more important than ever for companies in our industry to do their own studies before going to market."

According to Ms. Goldstein, the bottom line for the direct response industry is: "[F]irst and foremost...all aspects of a claim need to be supported. Most companies get sued because of implied claims, so marketers need to take a hard look at their advertising -- not just literal claims but also implied messages -- and make sure their substantiation is buttoned up. If you're making health and safety claims, it's risky to go forward today without those studies for backup."

To read the full article, click here.

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Noted and Quoted...*DRMA Voice* Turns to Ivan Wasserman to Discuss Cosmeceuticals

On May 8, 2012, *DRMA Voice,* a publication of the Direct Response Marketing Alliance, published commentary by Ivan Wasserman, a partner in Manatt's advertising practice, concerning the increased legal and regulatory scrutiny toward cosmetic products, particularly due to the proliferation of so-called "cosmeceuticals," for example, products containing

ingredients to bolster collagen production and other significant results.

Mr. Wasserman noted that in March 2012, Michael Landa, the director of the FDA center that regulates cosmetic products, testified before Congress about the challenges facing the FDA due to the rise of these types of products and the FDA's limited regulatory oversight. The following month, Rep. Leonard Lance (R-NJ) introduced the Cosmetic Safety Amendments Act of 2012.

According to Mr. Wasserman, "whether or not this particular bill is ultimately passed into law, it seems inevitable that the scrutiny of these products, at both the federal and state levels, is likely to increase."

To read the full article, click here.

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