Recent Developments in Retailing and Advertising Law

Karen F. Lederer

Troutman Sanders LLP

Eric L. Unis

Troutman Sanders LLP

December 6, 2011

TROUTMAN SANDERS

RECENT DEVELOPMENTS IN RETAILING AND ADVERTISING LAW*

I. RECENT CASES ON RETAILER PRICE CLAIMS

1. New York Attorney General Settlement with Michaels Stores, Inc. (Sept. 2011)

- The N.Y. AG alleged that Michaels continuously advertised its custom framing services as on sale at 50% off, 60% off and $50 to $150 off its "regular prices," for at least 104 consecutive weeks.
- Relying on the FTC Guides Against Deceptive Pricing, the N.Y. AG alleged that this was a fictitious former price comparison.
- To make matters worse, Michaels expressly represented, week after week, that these were limited time offers.
- The settlement provides that a regular price is presumptively bona fide when the item was offered for sale at the regular price more than 55% of the time during the prior business year *and* 30% of sales were made at the regular price during that period. The settlement goes on to require that if substantial sales have not been made at the regular price, then there must be a prominent and proximate disclosure that that price was an asking price only.
- Michaels paid $800,000 in civil penalties and made a contribution of $1 million worth of art supplies to schools located near its stores.

2. Jermyn v. Best Buy Stores, L.P. (Index No. 08CV00214, S.D.N.Y.)

- A nationwide class has been certified. The case is pending.
- The complaint alleges that Best Buy had a *de facto* policy of failing to honor its written policy of matching any local competitor's price and refunding the difference plus 10% if the item had already been purchased.
- *Of note,* in addition to the named plaintiff's first hand allegations, the complaint cites to half a dozen consumer blogs where consumers complain about this practice.

*The materials offer only a summary of the law and do not constitute nor are a substitute for legal advice concerning specific matters.

3. Rodman v. Safeway, Inc., 2011 U.S. Dist. LEXIS 126212 (Index No. C11-03003, N.D. Ca. Nov. 1, 2011)

- Nationwide putative class action. The case is pending.
- The complaint alleges that on its website for home delivery sales, Safeway falsely stated that consumers would be charged the same prices for products purchased online as was being charged in the local store where the groceries were being pulled from on the date of delivery. According to the complaint, Safeway marked up the items by 10%. There was no dispute that the website accurately disclosed a delivery charge of $7 to $13.
- Safeway moved to dismiss the complaint on the grounds that the language in its online agreement with consumers failed to provide an affirmative promise of price parity. In a decision issued last month, the court found that there was some ambiguity in this language and therefore considered the FAQ section of the online ordering system. The court found that the FAQ section clearly stated there was price parity and denied the motion.

4. Connecticut Attorney General Settlement with Best Buy, Inc. (Dec. 2010)

- The Conn. AG alleged that Best Buy engaged in an "internet bait-and-switch" by advertising low prices for some products on its website and then charging consumers higher prices in Best Buy stores.
- Consumers complained that they had been drawn into the stores after seeing the advertised deals online. At the stores, consumers used electronic kiosks where they were prompted to click a tab labeled "Bestbuy.com." That tab, however, did not bring customers to the actual Bestbuy.com site, but rather to a lookalike internal site that was identical, except that the prices displayed were the higher in-store prices rather than the lower prices that they had seen online for the same items.
- The AG charged that consumers were deceived because they were under the false impression that the online pricing was no longer available, and therefore paid higher prices in the stores than they would have by purchasing online.
- Best Buy agreed to pay Connecticut $399,000 and to pay restitution to affected consumers in the amount of the difference between the online prices and the in-store prices that they were charged.

5. Wal-Mart Stores, Inc. (NAD Case #5283, 1/31/11) Challenger: Staples, Inc.

- Staples took issue with a Wal-Mart television commercial that showed a mother attempting to work in her home office while her young children played with her office supplies. The voiceover stated, "When you buy all these items at Wal-Mart, you will save 30% or more versus the national office superstores ... With thousands of rollbacks, it's Rollback time. Save money. Live better. Wal-Mart."

- Staples argued that the commercial suggested that the advertised savings were typical of the savings that consumers would receive when they shopped at Wal-Mart. Wal-Mart argued that consumers would understand that the savings only applied to the 36 office supply items shown in the commercial.

- The NAD agreed with Staples, finding that the supplies themselves were not the visual focus of the commercials and that even on close inspection it would be difficult if not impossible to identify 36 distinct items in this fast-moving, 15-second scene.

- The NAD also expressed concerns about the use of savings claims based on national averages.

- Staples also challenged Wal-Mart back-to-school ads featuring a two-column back-to-school shopping list that compared the price of particular school supplies at Wal-Mart versus Staples. The ads claimed total savings of between 28% and 51%, depending on the local market.

- Staples argued that the list was cherry-picked, was not representative of a typical consumer's list, was mistaken about certain of Staples' prices, and compared Wal-Mart's sale prices to Staples' regular prices.

- The NAD found that consumers would understand that the savings related only to the items on the list; that advertisers are entitled to hand pick merchandise when comparing savings to other stores provided the basis of the comparison is made clear; and that it was permissible for Wal-Mart to base the comparison on its back-to-school sale prices since the ads were narrowly tailored to the back-to-school season.

- *Of note,* one radio ad directed consumers to "the ad in the August 3rd Dallas Morning News" for a list of the items. The NAD found that this was not adequate to identify the items.

6. Multi-State Attorney General Settlement with DIRECTV (Dec. 2010)

- All 50 states plus the District of Columbia entered into a settlement last year with DIRECTV to settle charges that in its advertising, DIRECTV, among other things:

  (1) failed to adequately disclose early cancellation fees

  (2) failed to adequately disclose that a special promotional price was only good for 12 months of an 18 or 24 month required term of service

  (3) failed to disclose that only consumers who paid by automatic charges or debits were eligible for certain special rates

  (4) failed to disclose that certain offers of "free installation with no equipment to buy and no start-up costs" required the consumer to pay a monthly service fee of $6.00 to $10.00 per month, beginning with the first month of service

  (5) failed to disclose that consumers who did not meet DIRECTV's credit requirements were required to post a deposit of $200 to $300

  (6) failed to disclose that in order to obtain the advertised promotional rate for a package, consumers must comply with the terms of a rebate program

  (7) failed to disclose that certain events, such as DIRECTV's repairing or replacing malfunctioning equipment, would automatically extend the consumer's term of service beyond the consumer's 18 or 24 month initial commitment

  (8) failed to disclose automatic renewals

  (9) failed to inform consumers that "free trials" would turn into a paid subscription if the consumer did not affirmatively cancel by the end of the trial.

- Directs agreed to pay the states $13.25 million for legal and investigative costs, to include new disclosures in its advertisements and when consumers sign up for service, and to resolve consumer complaints, including providing refunds if necessary as determined by a Claims Administrator to be hired by the company.

II. RECENT CASES ON COLLECTING ZIP CODES

1. Pineda v. Williams-Sonoma, 51 Cal. 4th 524 (Supreme Court of California, Feb. 10, 2011)

- The California Supreme Court found that the retailer violated California's Song-Beverly Act by requesting and recording a ZIP code from a consumer who paid for her purchase by credit card.

- The Court analyzed the language in Cal. Civ. Code. § 1747.08 and considered whether a ZIP code, without the rest of the consumer's address, was "personal identification information."

- Cal. Civ. Code. § 1747.08(b) defines "personal identification information" as "information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number."

- Cal. Civ. Code. § 1747.08(a)(2) states that businesses who accept credit cards shall not "Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder provide personal identification information, which [the business] writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise."

- Some case law from lower courts prior to Pineda had given retailers some comfort that collection of ZIP Codes at the point of purchase was not a violation of Song-Beverly. See Party City Corp. v. Superior Court, 169 Cal. App. 4th 497 (2008). Other courts had also issued decisions narrowing the scope of 1747.08 in other contexts, holding, for example, that it did not apply to online transactions (Saulic v. Symantec Corp., 596 F.Supp. 2d 1323 (S.D. Ca. 2009)) or to merchandise returns (The TJX Cos., Inc. v. Superior Court, 163 Cal. App. 4th 80 (2008). But see, Powers v. Pottery Barn, Inc., 177 Cal. App. 4th 1039 (2009) (leaving open the possibility that 1747.08 may apply to the collection of email addresses at the point of purchase).

- The penalties for violating 1747.08 are potentially steep; up to a $250 civil penalty for the first violation and up to $1,000 for each subsequent violation.

- In Pineda, the California Supreme Court reversed the appellate court's finding that ZIP codes were not "personal identification information." The Court found that the statutory prohibition on collecting addresses also applied to "components" of the address. The Court also considered

1747.08(d), which allows retailers to require positive identification, such as drivers licenses, as a condition of accepting a credit card "provided that none of the information contained thereon is written or recorded." Reasoning that ZIP codes were part of the information this subsection prohibited from being recorded, the Court stated that a broad interpretation of the statute was necessary.

2. Pineda's Aftermath

- The Pineda Court also stated that its decision would apply retroactively.
- With the floodgates opened, at least 200 lawsuits have been filed since, alleging the unlawful collection of ZIP codes. There have been a few reported decisions in those cases. See, e.g., Rothman v. General Nutrition Comp, 2011 U.S. Dist. LEXIS, cv 11-03617 (C.D. Ca. Nov. 17, 2011) (denying motion for class certification).
- The legislative "fix?" California A.B. 1219 recently passed and is now in effect. A.B. 1219 establishes a very limited exception for retail gas stations.

3. Pineda's Impact in Other States

- Outside of California, many other states have statutes that regulate the collection of personal identification information in credit card transactions.
- Tyler v. Michaels Stores, Inc., No. 1:11-CV-10920-WGY (D. Mass.). Explicitly relying on Pineda, a Massachusetts woman filed a putative class action alleging that Michaels requested and recorded her ZIP code in an electronic database at the time she made a credit card purchase, in violation of Mass. Gen. Laws ch. 93 § 105(a).
- Michaels has moved to dismiss the case, arguing that (1) ZIP codes are not personal identification information under the Massachusetts statute and (2) the Massachusetts statute applies only to information recorded on a "credit card transaction form" and not to information entered into a database. (In contrast, the California statute applies to information recorded upon "a credit card transaction form or otherwise.") The motion has been fully briefed and is awaiting a ruling.
- New York's equivalent statute, at GBL § 520-a(3), is similar to the Massachusetts statute. New York GBL § 520-a(3) prohibits "any personal identification information, including but not limited to the credit or debit card holder's address or telephone number" from being written "on the credit or debit card transaction form."

III. RECENT CASES APPLYING THE FTC ENDORSEMENTS GUIDES

1. FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 CFR Part 255.

- Originally issued in 1980; revised December 1, 2009 after three years of comment, consumer research and discussion focusing on: (i) the effectiveness of the standard "results not typical" disclaimer; and (ii) whether consumers are likely to recognize compensated endorsements that appear in new, consumer-generated media for what they are--compensated endorsements.

- Three legal principles underlying the Guides: Endorsements must reflect the honest opinions or experience of the endorser. An endorsement may not convey to consumers an express or implied objective performance claim that would be deceptive if made directly by the advertiser and any personal experience depicted must be typical or else the generally expected results in the depicted circumstances must be disclosed. And any connection between the endorser and the seller of the product that might affect the weight or credibility consumers would give the endorsement must be fully disclosed unless consumers would reasonably expect the connection.

2. Recent Cases

- FTC Division of Advertising Practices letter to Ann Taylor Stores Corp. (4/20/10)
  Ann Taylor Stores invited bloggers to an exclusive preview of the stores' 2010 summer collection and promised gifts to those who blogged about the event. The FTC found that failure to disclose the gifts in the blogs violated Sec. 5. *Of note,* there was a sign posted at the event telling the bloggers to disclose the gifts in any blogs they posted about the event. However, it was not clear how many bloggers actually saw it. The FTC did not pursue enforcement action because of the *de minimus* number of offending blogs and because the company had subsequently adopted a written policy to address this situation.

- FTC and State of Colorado v. Russell Dalby, Dalby Education Institute, LLC, Martha Kellogg, et al. (Index No. 11-cv-01396, D. Colo.)
  This case concerns a long-running multi-media advertising campaign for products and services claiming to teach consumers how to find, broker, and earn commissions on seller-financed promissory notes. Through the use of testimonials, the ads promise consumers they will easily earn hundreds of thousands of dollars at this. *Of note,* this was the first time the FTC charged a consumer with making false representations in a

testimonial. Defendant-testimonialist Marsha Kellogg paid no civil penalty but agreed to extensive cooperation and reporting obligations. The case against the other defendants is pending.

- FTC v. Reverb Communications, Inc. (FTC Docket No. C-4310, Aug. 2010) The respondent public relations agency for video game developers allegedly posted enthusiastic reviews of video games on iTunes to boost sales of its clients' products. The agency derived fees from the sales. The reviews appeared to come from ordinary consumers. The FTC charged that failing to disclose the posters' financial connections to the video game sellers and creating the false impression that the reviews came from independent disinterested consumers constituted unfair or deceptive trade practices. The matter was settled, with the agency agreeing to remove the postings and refraining from such conduct in any future endorsements.

- FTC v. Ambervine Marketing LLC (Index No. 11 C 2487, N.D. Ill.) This is one of ten pending federal court cases filed by the FTC against operators of websites that according to the FTC pose as fake news websites and feature fabricated stories about, and consumer or "reporter" endorsements of, acai berry weight loss supplements. The defendants engage in a form of "affiliate marketing," whereby the defendants—"affiliates"—place attention-grabbing banner ads on high-volume websites that display bogus URLs suggesting that clicking on the ads will take consumers to legitimate websites, but which in fact take consumers to the fake news sites, which in turn take consumers to a merchant website where the products are sold. The defendants earn a commission on sales. Also see Urban Nutrition, LLC (NAD Case # 219, 8/11/09)—a website entitled WeKnowDiets.com; which described itself as having "the largest weight loss database in America...whose goal is to give you a quick snapshot of what options are available to you;" which was owned by Urban Nutrition; which paid independent contractors $20 for each product review they posted; and which consistently ranked its own product #1, was found to be an advertisement masquerading as an independent product review site; NY Attorney General Settlement with Lifestyle Lift (July 2009)—a $300,000 civil penalty paid in a case believed to be the first case in the country challenging "astroturfing."

- FTC v. Legacy Learning Systems, et al. (FTC File No. 102-3055, Mar. 2011). Legacy entered into an administrative consent order pursuant to which it paid $250,000 to settle charges that it deceptively advertised its guitar-lesson DVDs using an online affiliate marketing program in which the affiliates, appearing to be ordinary consumers or independent reviewers, promoted the product through online endorsements which appeared in

close proximity to hyperlinks to Legacy's website. The affiliates received commissions from sales. The agreement also requires Legacy to monitor and submit monthly reports about its top 50 revenue-generating affiliate marketers, to make sure they are disclosing that they earn commissions and are not misrepresenting themselves, and to do the same for another 50 randomly selected affiliate marketers.

- Your Baby Can, LLC (NAD Case # 5313, 03/24/11) Challenger: LeapFrog Enterprises, Inc.
  The NAD found that consumer testimonials for the advertiser's "Your Baby Can Read" early language development program, conveyed that (i) the product will teach babies to read words not specifically taught in the program and (ii) there is a benefit to using the program prior to kindergarten. The NAD found that there was not adequate competent and reliable scientific evidence to support either claim.

- Coastal Contacts, Inc. (NAD Case # 5387. 10/25/11), Challenger: 1-800 Contacts, Inc..
  The ad on advertiser's Facebook fan page featured a woman wearing glasses and pointing to the "Like" button with the following text "like us!" with more arrows pointing to the 'Like' button) And you can get FREE frames !* conditions apply." The asterisk led to the following disclosure at the bottom of the webpage: "Offer valid daily starting at 9:00 am EST or until 10,000 glasses have been given away per stated day. Standard 1.5 index lenses included. Lens upgrades, shipping and handling extra. Coupon eligible frames only. Valid for first time free glasses recipients only. Limit one per household." The NAD found that the limit on the total number glasses to be given away should appear in the main claim and that the approximate cost of shipping and handling should appear right next to the main claim.

- With respect to the advertiser's claim of "save up to 70%" NAD recommended that the claim be discontinued because only three products were available at a 70% discount, there was no evidence that the number of sales of these products comprise a significant percentage (say 10%) of all products sold, and the majority of the retailers listed in the advertiser's comparison chart represented a small percentages of national market share, served atypically expensive urban markets, and had relatively few locations.

- With respect to the advertiser's use of an MSRP, the NAD stated that the advertiser could not demonstrate that the MSRP was the typical price charged. ***[TS Note:*** More to the point, a retailer cannot establish an MSRP for its private label brand product.]

- ***Of note:*** In what is apparently the first case to discuss Facebook "likes" as a possible endorsement, NAD found that the overall message conveyed by Facebook "likes" is one of "general social endorsement." NAD noted that "Facebook users are aware of the fact that people 'like' content for many reasons, one being to gain access to promotions, contests and sweepstakes offered through Facebook." ***[TS Note:*** This would mean that these coupons and such need not be disclosed as a material connection]. NAD also recommended that when referring to its Facebook "likes" outside Facebook, the advertiser make it clear when the number is based on all of its Facebook pages globally.

3. ***Query:*** **Is there a tension between the FTC Endorsements Guides and the Communications Decency Act, 47 USC §230, on the issue of whether an advertiser is responsible for positive statements about its product that are posted online by a consumer?**

- Under the FTC Endorsements Guides, the test is whether, viewed objectively, the relationship between the advertiser and the speaker is such that the speaker's statement can be considered "sponsored" by the advertiser and therefore an "advertising message."

- The CDA states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." "Information content provider" is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." Thus, the test under the CDA is whether the advertiser is responsible in whole or in part for the creation or development of the content.

- Liquid HCG Diet, LLC (ERSP Case # 246, 6/16/10)
  The ERSP determined that simply because the marketer did not know about a consumer making a particular claim, it is not absolved from responsibility about the accuracy of the claims; "the marketer should hardly be surprised that consumers are using social communities such as Facebook, Twitter and Myspace as the symbols for these websites are prominently featured on the "Share Your Success" section of the Liquid HCG Diet website." Because many Liquid HCG Diet users avail themselves of these social networking websites, ERSP determined that the marketer should be exercising due diligence in identifying the representations being made about its products on these websites.

- Cascade Sports (NAD Case # 5191C, 2/9/11)
  The NAD stated that although the CDA provides immunity from tort liability for computer service providers when publishing information originating from a third-party user of its service, the issue of whether statements on a message board constitute "advertising" "may be a proper issue for advertising self-regulation." NAD further stated that "to the extent advertisers of products (or their affiliates) are providing an online forum for third-party messages or discussion, there may be an obligation to disclose information concerning the relationship or role of the advertiser as an information content provider.

IV. RECENT CASES INVOLVING SOCIAL BUYING SITES

- "Deal of the Day" sites such as Groupon and LivingSocial have exploded in popularity in the last few years. The sites have partnered with all kinds of retailers, national and local.

- Are these kinds of offers gift cards? Are they coupons? The Credit CARD Act of 2009 applies to a "gift certificate," which is defined as an electronic promise that (1) is redeemable at a single merchant or an affiliated group of merchants that share the same name, mark, or logo; (2) issued in a specified amount that may not be increased or reloaded; (3) purchased on a prepaid basis in exchange for payment; and (4) honored upon presentation by such single merchant or affiliated group of merchants for good or services. 15 U.S.C. § 16931-1(a)(2)(B).

- State law definitions of "gift certificates" often speak of the certificate being a record of a promise to provide goods or services upon presentation of the record, which is paid in advance. See e.g., NY GBL § 396-i; Wash. Rev. Code § 19.240.010(5).

- Classifying the daily deals as gift certificates subjects them to prohibitions on expiration dates under the Credit CARD Act and state laws.

- Most deal of the day offers expired within a very short period of time and left no value if the offer was not redeemed before it expired.

- Groupon and LivingSocial are now both defending nationwide consumer class actions. In re Groupon Marketing and Sales Practices Litigation, 11-MD-02238 (S.D. Ca.); In re LivingSocial Marketing and Sales Practice Litigation, Misc. Action No. 11-0472 (ESH) MDL Docket No. 2254 (D. D.C.). The Groupon case appears to be heading towards a settlement.

- Groupon and LivingSocial have modified their terms so that the value paid for by the consumer does not expire prematurely.

V. CONDUCTING PROMOTIONS ON SOCIAL MEDIA

- Facebook Promotions Guidelines. (www.facebook.com/promotions-guidelines.php). Revised in May 2011.

  1) Must be administered within Apps on Facebook.com, either on a Canvas Page or an app on a Page Tab.

  2) Must not use Facebook features or functionality as a promotion's registration or entry mechanism. For example, the act of liking a Page or checking in to a Place cannot automatically register or enter a promotion participant.

  3) Must not condition registration or entry upon the user taking any action using any Facebook features or functionality other than liking a Page, checking in to a Place, or connecting to your app. For example, must not condition registration or entry upon the user liking a Wall post, or commenting or uploading a photo on a Wall.

  4) Must not use Facebook features or functionality, such as the Like button, as a voting mechanism for a promotion.

- The sponsor of a promotion conducted on Facebook must (1) include a complete release of Facebook by each entrant or participant; (2) include an acknowledgment that the promotion is in no way sponsored, endorsed or administered by, or associated with Facebook; and (3) disclose that the participant is providing information to someone else (usually the sponsor) and not to Facebook.

- Previously, Facebook required approval from Facebook before a sponsor could conduct a promotion on Facebook.

- Guidelines for Contests on Twitter. (https://support.twitter.com/entries/68877-guidelines-for-contests-on-twitter). These are mostly to discourage spamming. For example, sponsors are discouraged from allowing people to create multiple accounts or from posting the same tweet repeatedly.

- Common conditions for entry in social media promotions, likely not consideration:

  -Registering for Facebook, Twitter or YouTube -Liking a Page
  -Following on Twitter
  -Tweeting or Retweeting

- Twitter contests should include abbreviated link to Official Rules.
- In social media promotions, be especially wary of cheaters.
- Make sure there are controls on submission or posting of user generated content.