



**ABA Section of Antitrust Law
Consumer Protection Committee**

**September 2009 Consumer Protection Update
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Presented by Loeb & Loeb LLP



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Agenda

This presentation will discuss selected consumer protection developments that took place in September, 2009, in the following areas:

- Federal Trade Commission and other federal developments
- State Actions
- NAD Decisions
- Private Litigation

The Federal Trade Commission and Other Federal Developments

FTC

Inadequate substantiation for advertising claims

- Settlement with CVS Pharmacy, Inc., over claims that its AirShield dietary supplement can prevent colds, fight germs and boost immune systems.
- CVS agreed to pay nearly \$2.8 million in the form of refunds to consumers to settle the case. The FTC alleged that CVS had no evidence that its product could boost the immune system or prevent colds.
- CVS marketed AirShield products by touting their similarity to widely advertised Airborne, which last year settled FTC charges for making the same kind of claims.

FTC

Continued enforcement of Do Not Call Law

- Court-approved settlement with two authorized dealers of the satellite television provider Dish Network, formerly known as EchoStar, for allegedly calling consumers whose numbers are on the Do Not Call Registry.
- The court orders impose a \$ 1.2 million civil penalty against the defendants. However, the penalties have been suspended because of the defendants' inability to pay.

FTC

Mortgage foreclosure and loan modification scams

- Two new law enforcement actions filed in a continuing crackdown on mortgage foreclosure rescue and loan modification scams, bringing to 22 the number of these cases the FTC has filed since the housing crisis began.
- The FTC charged the defendants with falsely claiming that they would obtain a mortgage modification in virtually all cases; after charging homeowners large up-front fees, the defendants often did little or nothing to help them renegotiate their mortgages or stop foreclosure.
- The FTC's announcement coincided with a meeting of federal and state officials including Chairman Leibowitz, Treasury Secretary Timothy Geithner, Attorney General Eric Holder, Department of Housing and Urban Development Secretary Shaun Donovan, and the state attorneys general from eleven states (Arkansas, Connecticut, Illinois, Iowa, Maryland, Missouri, Nevada, North Carolina, Ohio, Rhode Island and Washington) who met to discuss emerging trends and ongoing efforts against fraud in the mortgage marketplace.

FTC

Online tracking without adequate disclosures

- Approval of final consent order in Sears.com online tracking case. The FTC charged that Sears told consumers that software it was placing on their computers would track their “online browsing,” but according to the FTC the software also monitored consumers’ online secure sessions including sessions on third parties’ websites and collected consumers’ personal information transmitted in those sessions, such as the contents of shopping carts, online bank statements, drug prescription records, video rental records, and library borrowing histories.
- Sears disclosed the online tracking at the end of a long user agreement available only at the end of a lengthy multi-step registration process.
- The FTC alleged that Sears’s failure to adequately disclose the scope of the tracking software’s data collection was deceptive and violated the FTC Act. As part of the consent order, Sears must destroy the information it collected.

FTC

Roundtable Discussions and Workshops

- On Sept. 29 and 30, the FTC held the second in a series of roundtable discussions on consumer protection issues relating to debt collection proceedings against consumers. This discussion, held in San Francisco, focused on arbitration and litigation proceedings. The third roundtable discussion will be held in Washington, D.C., on December 4.
- The FTC extended the comment period to October 26 on its proposed amendments to the Telemarketing Sales Rules directed at the debt relief industry. A public forum on the proposed changes will be held on November 4 in Washington, D.C.
- The FTC announced it will host a forum on food marketing to children that will address developments in self-regulation and a report on recommended nutritional standards. It will be held at the FTC in Washington, D.C., on December 15.

Federal Reserve Board

New rules governing credit cards

- The Federal Reserve proposed rules amending Regulation Z (Truth in Lending) to protect consumers who use credit cards from a number of potentially unfair practices.
- Among other things, the proposed rule would:
 - Protect consumers from unexpected increases in credit card interest rates by generally prohibiting rate increases during the first year after an account is opened and rate increases that apply to an existing credit card balance.
 - Prohibit creditors from issuing a credit card to a consumer who is under the age of 21 unless the consumer has the ability to make the required payments or obtains the signature of a parent or other cosigner with the ability to do so.
 - Require creditors to obtain a consumer's consent before charging fees for transactions that exceed the credit limit.
 - Limit the high fees associated with subprime credit cards.
 - Ban creditors from using the "two-cycle" billing method to impose interest charges.
 - Prohibit creditors from allocating payments in ways that maximize interest charges.
- In December 2008, the Federal Reserve adopted final regulations prohibiting unfair credit card practices and improving the disclosures consumers receive in connection with credit card accounts. This new proposal would amend aspects of those regulations to incorporate provisions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit Card Act), which was enacted in May 2009.

US DOJ and HHS Settlement

Largest criminal fine in history

- Pharmaceutical company Pfizer settled charges with the U.S. Departments of Justice and Health & Human Services over alleged kickbacks to doctors and off-label marketing campaigns which violated FDA rules.
- As part of the settlement, Pfizer agreed to pay \$1.3 billion to resolve criminal allegations involving Bextra and another \$1 billion to resolve whistleblower complaints that it illegally promoted the painkiller Bextra, the antipsychotic Geodon, the antibiotic Zyvox and the epilepsy drug Lyrica.
- Pfizer will also pay \$33 million to 42 states and the District of Columbia to settle state civil claims related to its past promotional practices concerning Geodon.
- The fine also resolves allegations that Pfizer treated doctors to meals, paid them for speaking engagements and subsidized their travel to induce them to prescribe off-label uses for those four drugs and nine others.
- News articles say this is the largest health care fraud settlement and the largest criminal fine in history.

Congress

Consumer groups lobby Congress for online tracking laws

- Several consumer groups, including Consumers Union and the Electronic Frontier Foundation, sent letters to Congressional committee chairmen stressing the need for limits on online behavioral advertising. Congress held hearings on this topic in the summer of 2009.
- Specifically, the consumer groups want companies to obtain consent before collecting online behavioral data; to prohibit the collection of data from children under 18; the FTC to define exactly what constitutes sensitive personal data; companies should only be allowed to collect and use data on web surfers for 24 hours; companies should be required to inform users upon request of the scope and details of the data that a company has amassed on the individual and individuals should be able to obtain data about them upon request; a private right of action against companies for violating behavioral advertising laws; the FTC to establish a registry for online behavioral advertising (like the Do Not Call registry so consumers can sign up and not have data collected about them); and no pre-emption of state laws that might provide more protection.
- Right now, behavioral advertising is governed by self-regulatory guidelines and existing state and federal privacy laws. Rep. Rick Boucher of Virginia has stated he plans on introducing federal legislation regulating online behavioral advertising.

State Actions

Maine

AG agrees to not enforce marketing to minors law

- The U.S. District Court in Maine entered a stipulated order of dismissal in the court challenge to Maine's recently enacted law that prohibits the collection, receipt and use of personal information and health-related information from minors for marketing purposes without first obtaining verifiable parental consent.
- The law was going to take effect on September 12, 2009, but a coalition of publishing and educational groups challenged the law on constitutional grounds, arguing that the law was overbroad and restricted First Amendment rights.
- The court dismissed the complaint because the Maine Attorney General agreed not to enforce the law. However, the Maine Legislature will be reconsidering the statute when it reconvenes.
- The court also stated that, as a result of the dismissal, third parties are on notice that a private cause of action under the marketing law could suffer from the same constitutional infirmities. This appears to be an effort by the court to discourage individuals and attorneys from filing a private cause of action to enforce the law.

New York

- Settlement with Dell and its subsidiary, Dell Financial Services (DFS), including \$4 million in restitution to resolve charges of fraudulent and deceptive business practices.
- The settlement follows a state court decision sustaining the AG's claims that Dell engaged in bait and switch advertising with respect to its "no interest" financing promotions, misled consumers to believe they had qualified for promotional financing, failed to adequately disclose the terms of its "next day" service contracts and failed to provide consumers with warranty service and promised rebates.

Illinois

- AG files third lawsuit against debt settlement companies and proposes legislation to curb abuses by debt settlement companies.
- The lawsuit charges defendants with violating the Illinois Consumer Fraud and Deceptive Business Practices Act by misrepresenting the services that the company can provide to consumers and the effect the services will have on consumers' credit. The AG is seeking a permanent injunction barring the defendants from engaging in debt settlement in Illinois and asking the court to order the defendants to pay restitution for aggrieved consumers, civil penalties of \$50,000 for violating the Consumer Fraud Act, and an additional \$50,000 for each violation committed with the intent to defraud.
- The legislation would ban all debt settlement companies from operating in Illinois, unless they provide true, individualized credit counseling; charge no up-front fees; obtain a license and a bond; disclose to consumers the risks involved in entering into a debt settlement contract; and provide a written contract and a right to cancel the contract.
- The AG said her office has seen a sharp rise in debt- and credit-related consumer complaints. Over the last few years, the Illinois AG's office has received more than 12,000 complaints regarding debt and credit issues.

Selected NAD & CARU Decisions

NAD # 4817C

NAD follows up with Wal-Mart

- In a compliance report, NAD recommends again that Wal-Mart modify its ads touting “Wal-Mart saves the average family \$2,500 a year.”
- In March 2008, NAD reviewed the Wal-Mart ads and found that, although the literal meaning of the ad was supported by evidence showing the impact of Wal-Mart on the economy, the ad was still misleading because consumers could reasonably think that the average family could save \$2,500 a year more than families who shop elsewhere. Wal-Mart agreed to modify its ads.
- In August 2009, a competitor contacted NAD about Wal-Mart’s new ad which stated “Wal-Mart saves the average family about \$3,100 a year no matter where you shop.”
- NAD acknowledged that Wal-Mart added the phrase about “no matter where you shop” but it did not modify the ad to communicate that the savings are based on Wal-Mart’s impact on the economy, so consumers could still interpret the ad as saying a family would save \$3,100 by shopping at Wal-Mart compared to other stores.
- NAD recommended that Wal-Mart expressly disclose that the \$3,100 savings it touts are based on Wal-Mart’s impact on the economy.

CARU # 5077

Advertising a PG-13 movie on a children's website

- As part of its routine monitoring, CARU identified advertising for the film “Star Trek” on the website www.playmatestoy.com, the website for Playmates Toys Inc., where children can view and learn about Playmates toys.
- “Star Trek” is rated PG-13 by the Motion Picture Association of America for “sci- fi action and violence, and brief sexual content.”
- CARU contacted the website operator and expressed concern over advertising a PG-13 film on a website for children.
- The website operator agreed to remove the ads.

Private Litigation

Dannon Settlement

- Dannon announced a settlement of a class action lawsuit brought in federal district court in Ohio involving advertising claims that its Activia yogurts help regulate digestion and stimulate the immune system.
- The plaintiffs claimed that Dannon falsely advertised the health benefits of its products without adequate substantiation.
- As part of the \$35 million settlement, Dannon agreed to reimburse dissatisfied consumers and make labeling changes, among them adding the scientific names of probiotic strains it uses.



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