Insights: Publications

Advertising Law Issues: 2022 Look Back and 2023 Look Ahead

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(a/k/a You can't know where you're going unless you know where you've been)

For proper business planning purposes, with the turn of the calendar, it's a good idea to try to project where the world is going. It's hard to do that, though, without looking at where we've been. In the legal world, that means reviewing the biggest legal issues to roil the legal community over the past year. With that, Kilpatrick Townsend's Advertising Team takes a look at five of the biggest legal issues from the year 2022, with an eye toward predicting what the five biggest legal issues will be for 2023. We also try to provide some useful recommendations to mitigate risks, but only you, dear reader, can judge how useful our recommendations really are.

Top Five Advertising Law Legal Issues of 2022

1. The FTC Unchained. In May 2022, the U.S. Senate finally confirmed a fifth member of the Federal Trade Commission ("FTC"), restoring a Democratic-appointed 3-2 majority. Chair Lina Kahn's ambitious agenda had been stymied since the previous fall, when then-Commissioner Rohit Chopra left to lead the US Consumer Financial Protection Bureau, which resulted in a 2-2 deadlock on all but the least controversial issues. The majority finally permitted Chair Kahn to move forward not only to take more aggressive action with respect to monopolies, but also with consumer protection concerns. Whether it's allegations of misleading Made in the USA claims or so-called Dark Patterns, the FTC took bold steps in 2022 under the consumer protection banner to clean up the marketplace of deceptive advertising.

2. Class Action Claims Continue Unabated. Marketers and the lawyers that advise them face tough decisions. When food products have only natural ingredients, marketers may be tempted to slap "All Natural" on the label. Yet surprisingly, food scientists disagree on the definition of a "natural" ingredient, leading to many class-action claims. Similarly, is your product vanilla flavored? Seems reasonable to label your product as vanilla flavored. Not so fast – a huge number of lawsuits were brought in 2022 alleging that consumers expected the product to contain real vanilla, not just vanilla flavoring. These are just a small sampling of the types of food-based class action claims prevalent in 2022, and the trend towards an increasing number of similar class action claims shows no signs of abating.

3. NFT Meltdown. At the beginning of 2022, many brands jumped headlong into the Non-Fungible Token (NFT) craze, and advertising lawyers had to jump in along with their clients. The blockchain, upon which NFTs are

built, was a mere curiosity to advertising lawyers for many years, but then quickly became a must-learn. Throughout the course of the year, though, along with many things crypto, NFTs crashed. NFTs may still be part of the marketing team's arsenal to try to break through the clutter, but the imperative that giving away or selling NFTs RIGHT HERE RIGHT NOW has diminished.

4. Influencers / Social Media. The FTC requires that anyone who endorses a product via social media include a message that makes it obvious when the endorser has a relationship (or "material connection") with the brand, including a personal, family, employment, or financial relationship. In May of 2022, the FTC published proposed updates to its Endorsement Guides, which were last updated in 2009, before "influencers" were as popular or common as they are today. The proposed updates include clarifications on who legally qualifies as an endorser, when a material connection is required to be disclosed, and how to disclose material connections to make sure that consumers can weigh the value of an endorsement. The FTC also clarified that everyone involved in social media and endorsements is required to ensure compliance with the Guides, not only the influencer making the endorsement, but also the advertiser whose product or service is being endorsed, as well as the advertising agency that connected the influencer and advertiser and the platform on which the social media endorsement may be encountered. In short, the FTC is keeping a close watch on social media endorsements to ensure the platforms, advertisers, and influencers are adequately apprising consumers of the connection between influencers and advertisers.

5. ESG (Environmental, Social, and Governance). Companies often make aspirational claims about their future environmental benefit activities, whether by reducing plastic use, increasing recycling efforts, or using less water and limiting waste during the manufacturing process. While aspirational claims may seem like puffery, if the reasonable consumer takes one to mean something specific, then the advertiser still needs substantiation for the claim. If, for example, a beverage company that sells billions of products in plastic bottles makes extensive plastic-reduction and eco-friendly claims and promises, it may be called to account for those claims and promises in court. The situation has gotten so fraught with potential claims that the end of 2022 led to the rise of "greenhushing," that is, not making any eco-friendly or sustainability claims for fear of accusations of insincerity, even after taking extensive steps to mitigate the brand's environmental footprint. Do not lightly make aspirational claims and assume consumers (or other interested parties) will not challenge them. Fortunately, in December, 2022 the FTC formally requested comments on its Guides for the Use of Environmental Marketing Claims (Green Guides), which serve at the FTC's non-binding enforcement guidance for environmental marketing claims.

Predictions: Top Five Advertising Law Legal Issues of 2023

1. Crackdown on Influencers Continues. The FTC has doubled down on enforcement concerning truth and transparency in influencer promotions and is likely to continue to do so. As recently as November 2022, the FTC and various state AGs coordinated an action and settlement concerning influencers who embellished their experience with the advertiser's product. **Recommendation:** An energized FTC is not going to diminish its focus on influencers. Under the FTC's Endorsement Guides, influencer opinions are supposed to reflect the honest opinion of the endorser, which obviously cannot be honest if they never used the product. Advertisers providing first-person scripts or suggested copy to its influencers should ensure that the influencers have actually used or experienced the products, to ensure that any influencer endorsements or statements are substantiated in advance of posting.

2. Arbitration clauses in consumer T&Cs Continue to Vex. Arbitration clauses in consumer terms and conditions will continue to vex advertisers and courts. As class action lawsuits show no signs of abating, one arrow in the advertiser's quiver is to mandate the arbitration of consumer lawsuits, so that when a class action lawyer files a complaint, the advertiser can move to compel arbitration. That has led class action plaintiff lawyers to utilize mass arbitration, which is when hundreds or thousands of consumers file individual arbitration claims against the same company over the same issue, all at the same time. Though arbitration is generally cheaper for companies than litigating class actions, that's usually only true when relatively few people file arbitration claims. When hundreds or thousands do, the fees start to add up. Since many companies agree to pay the fees for consumers' arbitration claims—which has helped them argue that their arbitration agreements are fair—the upfront costs of several thousands of dollars per claim can be daunting. **Recommendation:** Analyze your potential exposure to class action lawsuits and develop a strategy around including an arbitration clause in your company's terms and conditions. It may or may not be a good strategy to include an arbitration clause if you could face hundreds or thousands of arbitration claims over the same issue.

3. Charitable Co-Venture Enforcement. The highly regulated but lightly enforced area of commercial co-venture promotions, where brand advertisers use the halo effect of charitable donations to boost their bottom line, may be overdue for some enforcement. Many advertisers take special care to ensure compliance with the various state laws that require registration, bonding, and/or filing of contractual agreements, but others do not. California recently passed AB 488 which regulates online charitable giving platforms operating in the state and the charities that are hosted on these platforms. The law expands the state's regulatory supervision of charitable fundraisers. **Recommendation:** Check and double check compliance of any charitable fundraising initiative your company may engage in, as the state laws and regulations of this area are highly complex. Even though regulatory enforcement actions are rare, you certainly do not want to be the test case for any regulatory looking to send a message to industry.

4. Take Special Care with Celebrity and Athlete Sponsorship Deals. From the brand marketer's perspective, paying for sponsorship deals with athletes and celebrities can be worth far more in revenue than the funds paid to the individual. Of course, some deals do not move the needle for the advertiser due to basic business reasons – lack of traction in the marketplace or a simple mismatch between artist and brand. The year 2022, however, saw the souring of a number of deals that probably had advertisers scrutinizing their morals clauses. **Recommendation:** Given the exposure that social media provides, and how much the public learns about a celebrity's thoughts, feelings, actions, and emotions, it makes sense to ensure any sponsorship deal has a large number of reasons for termination by the advertiser. Of course, it comes down to leverage to negotiate those reasons, and at the end of the day, it may make sense to simply pay the artist whatever they are due and terminate the balance. However, no advertiser should enter into a sponsorship agreement without ways to get out of the deal if necessary.

5. ESG: Environmental Claims Overtake Social and Governance. Ok, so not really going out on a limb here, as environmental marketing claims have long been far more prominent than social-based and governance claims. It bears repeating, however, that environmental advocates are out there watching. Not only are they watching advertisers' every move, but they can be quick to drop a lawsuit alleging false eco-friendly advertising claims. **Recommendation:** Continue to be very careful to substantiate any eco-benefit claim that your marketing department wants to run. It may seem basic, but sometimes it makes sense to pose the simple question to a marketer “what does this mean?” You may be very surprised by the answer. Take specific steps to

disclaim or limit the potential for a false consumer takeaway from any eco-friendly claim. Disclaimers are not a cure-all, but they are very helpful for limiting the broad scope of a potential claim.

One more thing. Given the link between advertising and privacy, we recommend that all advertising counsel work closely with privacy counsel to ensure compliance with the fast-changing and ever-evolving world of privacy law. As you likely know, the world of advertising privacy law has grown up into its own field, so we recommend checking out the Kilpatrick Townsend Privacy Team's 2023 recommendations to ensure your company is on top of the latest and greatest privacy compliance advice.

CONCLUSION

While this is hardly a fully comprehensive list rounding up every important legal issue of 2022, nor a full list of the challenges to be faced in 2023, it is a good start to attempt to limit your company's downside risks for the coming year.

If you have any questions about any of these areas, please feel free to reach out to anyone at Kilpatrick Townsend.

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