FEDERAL ADVERTISING GUIDELINES FOR BUSINESSES

The Federal Trade Commission Act prohibits advertising that is untruthful, deceptive, or unfair, and it requires advertisers to have evidence to back up their claims. There are also other federal laws applicable to advertisements for specific types of products and state laws that apply to ads running in particular states.

Unfairness

An advertisement is unfair if it causes "consumer injury." The Federal Trade Commission (FTC) uses a three-part test to determine if a consumer injury has occurred or is likely to occur as the result of an advertisement: (1) the injury must be "substantial"; (2) the injury must not be outweighed by any offsetting consumer benefits; and (3) the injury must be one that consumers could not reasonably have avoided. An injury may be substantial because of monetary harm or unwarranted health and safety risks. More subjective effects, such as offending the tastes or opinions of consumers, generally will not constitute a substantial injury. The FTC will also consider whether a challenged practice violates established public policies and whether the conduct is immoral, unethical, oppressive, or unscrupulous in deciding whether it is unfair.

The Act recognizes that, in general, the government expects the marketplace to be self-correcting, with informed consumers making purchasing decisions without regulatory intervention. The FTC may step in, however, when sellers use practices that distort free market decisions, such as by withholding critical information from consumers or pitching questionable products to highly susceptible and vulnerable classes of purchasers such as the terminally ill.

Deception

An ad is deceptive if it contains a statement or omits information that is material and is likely to mislead consumers. Information is material if it is important to a consumer's decision to

buy or use a product. Examples include representations about a product's performance, features, safety, price, or effectiveness.

The FTC will scrutinize an ad for deceptiveness from the point of view of the typical consumer who sees it. The focus is on the whole context of an ad, rather than whether certain words are used. Sometimes what an ad does not say is most important. If the ad is for a collection of books, it is deceptive to withhold from consumers the fact that they will receive only abridged versions of the books. An ad that says “this product prevents colds” and one that says “this product kills germs that cause colds” both claim to prevent colds, but the first claim is expressed, and the second is implied. The FTC expects an advertiser to be able to back up both types of claims with proof and to have such proof before an ad runs.

Backing It Up

Substantiation of a claim in an ad means that there must be a reasonable basis for the claim in the form of objective evidence. The kind and amount of evidence depend on the claim, but at the very least the advertiser must have the level of evidence it purports to have. If the ad boasts that “two out of three doctors” recommend a product, the advertiser must be able to produce a reliable survey to prove the claim. For more general representations, the required level of proof is determined by factors such as what experts in the field think is necessary. Health and safety claims, in particular, must be supported by competent and reliable scientific evidence. As flattering as they may be, testimonials from satisfied customers usually are insufficient to substantiate a claim requiring objective evaluation.

Comparative Ads

The policy of the FTC actually is to encourage the naming of or reference to competitors, so long as there is clarity and such disclosure as may be needed to avoid deception of the consumer. Even ads that disparage the competition are permitted if they are truthful and not

deceptive. The FTC requires neither less nor more substantiation for comparative ads than for other advertising.

Enforcement

The FTC marshals its resources in order to pay closest attention to ads that make claims about health or safety ("Acme water filters remove harmful chemicals from tap water"), and ads that make claims that consumers would have difficulty checking out for themselves ("ABC hairspray is safe for the ozone"). The FTC also concentrates on national rather than regional or local advertising, patterns of deception rather than isolated disputes, and cases that pose the greatest threats of widespread economic injury.

Depending on the nature of the violation, the FTC or the courts can choose from a variety of remedies. These include cease and desist orders, civil penalties, orders to make refunds to consumers, and informational remedies such as running a new ad to correct misinformation in the original ad. Other federal legislation allows businesses to sue competitors for making deceptive claims in advertising.

CASE BY CASE

Bait-and-Switch Credit Card Offer

In a variation on the typical "bait-and-switch" scheme, a bank made a promotional offer of a "no annual fee" credit card, then changed the terms mid-year to require such a fee. A credit card holder sued the bank under the federal Truth in Lending Act (TILA). She alleged a violation of the requirement in TILA that an issuer of a credit card disclose the terms of the card accurately and without misleading statements. A federal court allowed the lawsuit to continue.

Both the advertisement soliciting customers for the credit card and the card holder agreement stated that no annual fee would be charged, but the agreement also stated more generally that the bank had the right to change any of the terms at any time. The bank maintained that the latter provision gave it the right to impose an annual fee whenever it wanted.

In ruling for the credit card holder, the court found that a reasonable consumer was entitled to assume that the issuer of the credit card would refrain from imposing an annual fee for at least one year. Given the apparent intent of the bank to begin an annual fee after the “bait” had been taken, the statement of “no annual fee” was misleading and in violation of TILA. If the bank had wished to reserve the right to impose an annual fee later, notwithstanding the “no annual fee” solicitation, further clarification would have been necessary to comply with TILA.

Casino Cheats Gambler

Steven was a multimillionaire businessman with a fondness for high-stakes gambling. His reputation as a high roller led a Las Vegas resort to recruit him to gamble at the grand opening of its new casino. The enticement from the casino was a $2 million line of credit.

When Steven was just getting warmed up in what figured to be a long stretch of gambling, casino officials informed him that he had used up the line of credit, plus several million dollars of his own money. Steven had been gambling not with chips but with a “player card,” and cameras had been recording his betting results. He strongly disputed how much in the red he really was, but the casino made him leave the premises.

Steven sued the gaming company that operated the casino, and a jury added more millions to his net worth. He convinced the jury that the casino's goal on opening night was to improve its bottom line by forcing him to quit while he was in the hole. The casino officials knew that an experienced gamer like Steven could recoup his losses, and then some, in the same night, so they created the conflict over the amount of the gambling debt as an excuse to ask Steven to leave. This breached the agreement between the parties.

Evidence of underhanded tactics of the casino no doubt made an impression on the jury. Steven produced gambling debt invoices that the casino had generated even before he began to gamble. The videotapes from the night in question, which were key to proving just how much gambling debt Steven had incurred, had been destroyed by the casino. These tactics cast a cloud of suspicion over the casino's version of the events.