

RetailLawBCLP

DON'T GET TARRED: FTC CONTINUES TO SCRUTINIZE MISLEADING MARKETING AND SALES METHODS

Nov 22, 2017

The Federal Trade Commission has taken Tarr, Inc. and 18 other entities to task for fake news, unsubstantiated advertising claims, and fake celebrity endorsements.

A stipulated order for permanent injunction and monetary judgment announced on November 15, 2017 imposes a \$179 million penalty against the online marketer on charges it sold weight-loss, muscle-building, and wrinkle-reduction products to consumers using unsubstantiated health claims, fake magazine and news sites, bogus celebrity endorsements, and phony consumer testimonials.

The injunction includes, among other things:

- A permanent ban on the use of negative option features to sell dietary supplements, cosmetics, foods or drugs, products sold on a trial or sample basis, or products that are sold as add-ons when consumers purchase other products. Negative options occur when a customer accepts a supposedly free trial offer, but is enrolled in a continuity program, through which they are charged for the initial supply of products if they do not cancel within a short time.
- In order to use negative option programs for other products, the order requires defendants to provide enhanced disclosures, secure consumers' express informed consent before purchase, and provide a simple mechanism to stop recurring charges, using the same medium that the consumer used to purchase the product.
- The order also prohibits misrepresenting the terms and conditions of any offer, or the health benefits or efficacy of any product; requires improved supervision of affiliate marketers, including advance review of materials and hyperlinks being used in websites and email marketing campaigns; and mandates proper substantiation of health claims about products.

A significant portion of the monetary judgment has been suspended given representations regarding the defendants' financial statements and their stipulation to pay \$6.4 million in funds in escrow and on reserve.

The FTC alleged that Tarr and the other defendants “used fake media websites with domain names that appeared to be legitimate news or magazine sites, such as goodhousekeepingtoday.com, menshealth.com—i.link, and womenshealthi.com”. According to the FTC, the quality and benefits of the dietary supplements and other products being offered were buttressed improperly by “bogus celebrity endorsements, and phony consumer testimonials.” The marketing testimonials alleged dramatic muscle gain, weight loss, and/or wrinkle reduction, as well as other dramatic but apparently unsubstantiated results. The order covers approximately 30 different products.

The FTC’s order has garnered attention from celebrity news media such as BuzzFeed News. The unauthorized and fake endorsements by and/or fake news reports involve celebrities such as Jennifer Anniston, Jason Statham, Dr. Oz and Paula Deen, according to the FTC.

The FTC also challenged the defendants’ allegedly deceptive offers of “free” and “risk-free” trials and automatic enrollment of consumers without their consent in auto-ship programs with additional monthly charges. The defendants allegedly debited consumer’s accounts without first obtaining express valid written pre-authorization, in violation of the Electronic Funds Transfer Act, 15 U.S.C. sections 1693e(a), 907(a) and 918(c), as well as 1005.1(b) of Regulation E.

According to the FTC, consumers likely did not understand any materials they might have seen while navigating pop ups and web links, and likely also did not realize they were authorizing ongoing charges (in other words the consumers likely did not actually consent). The FTC also challenged defendants’ conduct under the FTC Act, 15 USC 53(b) and the Restore Online Shoppers’ Confidence Act (ROSCA), 15 USC 8404.

The order provides a good pragmatic checklist for evaluating compliance in the following areas, among others:

- Provide clear and conspicuous disclosure of fees and charges, including if/when negative option features are involved;
- Disclose cancellation and refund policies;
- Supervise marketing affiliates; and
- Provide reliable human clinical testing and substantiation for product claims.

While the FTC has taken its proverbial pound of flesh, the defendant companies may continue to have exposure to consumer class action suits, to the extent that any penalties do not fully compensate consumers.

Tarr’s challenged tactics may seem extreme to many companies, who may not believe the order has any lessons for them. Not so fast. Many companies use the tools at issue, and the order helps define how they can be used properly. Shortcuts and slickness in marketing do not provide benefits

in the long term. Overly aggressive short-term sales pushes can lead to substantial product returns, consumer complaints, adverse media and regulatory/legal risk.

Company legal, compliance and risk teams can help vet marketing campaigns and endorsements thoroughly. This will ensure that the representations and endorsements are accurate, transparent and can be supported if challenged by regulators, competitors, or the public at large. The language and look of marketing materials is critical in evaluating potential regulatory and class-action risk exposure. Functionality and customer experience on websites, links and pop-ups is critical as well. Even in situations where the marketing is proper, some consumers may not be pleased with the products or have other complaints. Post-sale customer service is critical to avoid the emergence, and related groundswell, of potential negative consumer social media complaints.

MEET THE TEAM



Merrit M. Jones

San Francisco

merrit.jones@bclplaw.com

[+1 415 675 3435](tel:+14156753435)

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be "Attorney Advertising" under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.