

2016 Year in Review: Marketing & Advertising

2016 was a busy year for litigation and regulation in the areas of marketing and advertising, impacting a wide variety of industries. Here are some of the highlights of the past year.

The FDA steps into the debate on “natural” and “healthy” claims.

In 2016, a lawsuit seeking to be certified as a class action was filed on behalf of consumers in New York and California against the owner of Quaker Oats after testing found traces of the pesticide glyphosate in some oatmeal. The lawsuit accused the company of false advertising because it markets the oatmeal as “100% natural.” The case was the latest in a string of lawsuits over “natural” claims on food products. Brands such as Snapple, Tropicana, Chobani, and Fiber One have also faced similar litigation.

Existing FDA guidance indicates that “natural” foods cannot contain anything artificial or synthetic. However, the agency’s stance on the application of that standard to high fructose corn syrup, GMO’s, and similar ingredients has been unclear, and while that may not affect the Quaker Oats case mentioned above, that lack of clarity has likely motivated at least some of the class action challenges.

Similar lawsuits challenged both “natural” and “healthy” claims by snack bar maker KIND after the FDA sent that company a warning letter in 2015 regarding its use of “healthy” claims for its products. KIND responded by noting that FDA regulations require foods marketed as “healthy” to meet the FDA standards for “low fat” and “low saturated fat” regardless of their nutrient density — a standard that allows sugary cereals to be labeled “healthy,” but does not allow foods like nuts, avocados, and salmon to make a similar claim.

In 2016, the FDA said it would continue collecting and reviewing public comments on the definition of “natural,” and also announced that the agency would re-review its approach to uses of the word “healthy” and other nutrient-content claims. Consequently, consumers and companies alike are awaiting further clarification from the FDA on the meaning of “natural” as well as possible revisions to the definition of “healthy.” In the interim, many conservative food product companies are avoiding “natural” claims and strictly adhering to the FDA’s current written standards for “healthy” claims. Until these issues are resolved, the class actions lawsuits may well continue to pile up.

High dollar settlements involving high profile brands and the FTC.

A few high-profile brands, such as Volkswagen and DeVry University, entered into extremely high dollar settlements with the FTC in 2016.

In the DeVry case, the FTC accused the company of making false promises in its TV, radio, online and print ads by promoting inflated job placement rates and post-graduation income levels. The FTC filed suit in January 2016, and announced a \$100 million settlement with the company in December 2016. The settlement requires DeVry to pay almost \$50 million in cash to be distributed to qualifying students, and to provide slightly more than \$50 million in debt relief.

In June 2016, Volkswagen entered into a settlement with the FTC in which it agreed to spend up to \$14.7 billion to settle allegations over misleading “clean diesel” advertising claims. This major settlement will affect owners of the brand’s 2.0 liter diesel vehicles.

The FTC cracks down on endorsement disclosures in social media campaigns.

Advertisers continue to expand their use of social media channels to promote products, services, and brands. In 2016, social media advertising budgets reached an estimated \$31 billion worldwide, and many expect the number to increase in 2017. The popularity of social media platforms as a promotion mechanism has drawn attention from the FTC. The agency has made clear — via industry guidance documents, speeches, and enforcement actions — that its material connection disclosure standard for endorsements applies to ads disseminated via social media. In 2016, the FTC announced settlements with Lord & Taylor and Warner Bros. on this issue.

In March 2016, Lord & Taylor entered into a settlement with the FTC over claims that it deceived consumers by paying online fashion influencers to post social media photos of themselves wearing clothing from the brand without requiring a disclosure that the influencers were compensated for the posts. According to the FTC, Lord & Taylor not only paid the fashion bloggers/influencers for the social media posts, it also gave them the clothing items for free without requiring disclosures of those facts.

In July 2016, Warner Bros. entered into a settlement with the FTC over claims that it deceived consumers by failing to disclose adequately that it paid online influencers to post favorable game play videos for a video game on YouTube and social media. The FTC alleged in part that Warner Bros.’ instructed the influencers to place the disclosures in the video description box that appeared below the videos rather than in the video itself. According to the FTC, these disclosure instructions were inadequate because consumers would be unlikely to view disclosures placed in such a location.

Retailers continue to face legal challenges regarding pricing/savings claims.

In December 2016, the City of Los Angeles filed suit against several major retailers asserting they disseminated misleading pricing claims by comparing their “sale” prices for thousands of products to higher “list” or “regular” prices for those same items when the products were never actually offered or available for purchase at the higher prices. This lawsuit was filed against JC Penney, Kohl’s, Macy’s and Sears, and alleges that the retailers engaged in a “misleading and deceptive false price advertising scheme.”

This litigation is certainly not the first recent lawsuit over allegedly misleading sale or discount prices. In recent years, many high-profile brands such as Amazon, Nordstrom, the Gap, and TJ Maxx have also faced putative class actions asserting that price claims comparing an item’s in-store or online price to a higher “MSRP” or “List” or “Compare at” price are deceptive because the higher comparison price is a fictitious one.

2017 Issues to Watch

As an initial matter, the presidential transfer of power in January 2017 will lead to changes in senior leadership at key government regulatory agencies like the FTC, FDA, FCC, and CFPB. These personnel changes — and the resulting modifications to agency policies, strategies, and priorities — are likely to have a significant impact on advertisers. For example, the new President will appoint at least three new Commissioners at the FTC, and he will also select a Commissioner to serve as Chairman. Although we know the head of President-elect Trump's transition team for the FTC is former Commissioner Joshua Wright, we are not currently in a position to predict reliably (or unreliably!) who might be nominated for the open positions.

In addition, developments in class action lawsuits alleging false advertising claims against major advertisers will also be important issues to follow in 2017. If advertisers are able to roll back the tide of class action litigation via procedural or substantive defenses, the future will look different than it will if advertisers are unable to stop the forward movement of such litigation.