

Hot Ad Law Topics for the New Year



Don't let the new year be ruined by U.S. class actions, regulatory enforcement

actions, or competitor claims. Here are five ad law takeaways for brand and legal teams to consider as 2019 approaches.

1. **Watch out for more challenges to price, discount, and subscription advertising.** With over 100 class actions filed in the last few years alleging false or misleading price or discount advertising, these cases will likely continue into 2019, especially in California. Retailers should make sure that their price, sale, and discount advertising programs comply with applicable state, federal, and local pricing and truth-in-advertising laws. And don't forget to comply with state and federal laws that govern recurring, subscription-based billing programs, including the federal Restore Online Shoppers Confidence Act, California's strict disclosure and consent requirements, Vermont's new double-opt in requirement for certain subscription programs, and more.
2. **Establish a sensible influencer compliance program.** The popularity of influencers has skyrocketed over the past few years, and advertisers should have a sensible compliance program to manage these relationships and address Federal Trade Commission (FTC) truth-in-advertising requirements for influencers. Also, the practice of using computer-generated image (CGI) or robot influencers is becoming more common. While the FTC has not yet provided express guidance on CGI influencers, this tactic is subject to FTC requirements for endorsements, and an FTC spokesperson stated that posts from CGI influencers "should be identifiable as advertising." Further, additional disclosure may be required to ensure that consumers are not misled by this form of influencer advertising, in part because a robot controlled by a company presumably cannot (currently at least) have an opinion.
3. **Use strong morals clauses.** Advertisers engaging celebrities, athletes, and other talent as endorsers or spokespersons should ensure the contract's morals clause is broad enough to permit termination of the relationship for controversies that may arise, including allegations of *past* wrongdoing that could harm the brand (e.g., #metoo-related allegations).
4. **Don't discourage honest consumer reviews.** Beyond the FTC's truth-in-advertising requirements for endorsers and influencers, the Consumer Review Fairness Act (CRFA) prohibits brands from establishing terms that (a) restrict honest reviews about the brand's products, services, or conduct; (b) impose a penalty or fee on someone who gives a review; or (c) require people to give up intellectual property rights in the content of their reviews. The FTC brought its first enforcement action under the CRFA this year, and more enforcements are likely moving forward. Brands should make sure that their policies and terms of use comply with the CRFA, and that their review programs comply with the FTC's requirements for endorsements.

5. **The new FTC leadership may seek increased monetary relief in future enforcement actions.** The FTC, now led by a new slate of commissioners, may place more emphasis on monetary remedies, and, where necessary to achieve that goal, work closely with other agencies such as the Consumer Financial Protection Bureau. For example, a senior attorney and speaker from the FTC recently noted at a national marketing law conference that the days of the FTC only seeking injunctive relief and monitoring may be ending, and the agency may be more likely to seek monetary remedies moving forward. This would be a major shift for the agency. Brands should take note and consult with knowledgeable marketing and consumer protection law counsel to ensure that they have their advertising compliance programs in order.

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