

Practice Update

The FTC Social Media Consent Order Against SmartClick: Injunctive Relief and Monetary Judgment For Doctor Certification Program and Paid Promotions Formatted To Appear As Independent Lifestyle Blogs and Review Sites

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The FTC continues its efforts to combat deceptive social media advertising. Recently, the FTC brought an enforcement action against SmartClick Media LLC and its owner. The FTC alleged that SmartClick engaged in the following deceptive and misleading conduct:

(1) operating a “Doctor Trusted” certification program under which “Doctor Trusted” seals were sold for use on websites that indicated to consumers that products were evaluated by doctors using their medical expertise although doctors they hired did nothing more than a superficial and cursory review of the products online; and

(2) hosting websites that were formatted to appear as independent lifestyle blogs and health product review sites when they were in actuality paid promotions or placements.

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In particular, according to the complaint, SmartClick advertised and sold the “Doctor Trusted” seal and certification program to the public as a means for companies to improve their credibility and increase online sales. Complaint, ¶¶ 13-14. SmartClick advised companies to promote their use of the seal by using a template press release that represented that, to earn certification, the company using the seal passed a “strict application process” that involves careful evaluation by a doctor of their website and any products or services offered. Complaint, ¶, 16. The review process, however, was superficial and did not require actual exercise of medical expertise. Complaint, ¶¶ 17-18. As of March 2015, the “Doctor Trusted” seals and certificates were displayed to consumers on approximately 800 websites, including websites that were maintained by companies that subsequently entered into settlements with the FTC for making deceptive advertising claims about their products. Complaint, ¶ 21.

In addition, the FTC’s complaint alleged that SmartClick hosted a lifestyle blog that purported to provide unbiased advice and information about various products, programs, health issues, scientific breakthroughs, and other services and two websites that purported to objectively evaluate products, to allow consumers to rate the effectiveness of the products, and to display the results of such ratings. Complaint, ¶¶ 22, 24. SmartClick, however, received commissions and other payments when consumers clicked on links or purchased the promoted products on any of these websites. Complaint, ¶ 23. Such commissions and payments made the websites paid promotions, but were not clearly and conspicuously disclosed anywhere. Complaint, ¶ 23. The disclosure of such payments within links entitled “About Us” and “Disclosure” at the bottom of the website were inconspicuous and, therefore, insufficient. Complaint, ¶ 23. Further, for the product review sites, SmartClick did not disclose that they were not objectively evaluating the products or compiling and

accurately reporting product ratings from consumers. Complaint, ¶ 25.

The FTC alleged that, based on the above conduct, SmartClick had made false and misleading representations about the certification program, misrepresentations about the websites, and failed to disclose material connections in violation of the FTC Act. Complaint, ¶¶ 28-38. One week after filing the complaint against SmartClick Media LLC and its owner, on June 21, 2016, the FTC and SmartClick reached a settlement and a proposed Stipulated Order was entered. The FTC's settlement with SmartClick not only included numerous injunctive, disclosure, and compliance-reporting provisions, but it also contained a monetary relief in the amount of \$603,588, which was to be partially suspended upon the payment of \$35,000, dependent upon the accuracy of financial information provided to the FTC by SmartClick and its owner. Stipulated Order for Permanent Injunction and Monetary Judgment, ¶¶ 7-8.

As made clear by the FTC's enforcement actions against Lord & Taylor, SmartClick, and Warner Bros., a social media or other website cannot represent, explicitly or implicitly, that it is an independent or objective resource for products or services, health issues, scientific breakthroughs, consumer evaluations or product ratings, or other information, when it is not. As the FTC has counseled, connections between a sponsoring advertiser and online content that appear to reflect independent, impartial views, opinions or experiences of consumers or experts must be "clearly and conspicuously disclosed." Including disclosures in "About Us" or "Disclosure" links at the bottom of a website, like those included on its website by SmartClick, fall short of what is required by the FTC's "clear and conspicuous" standard. Similarly, where a spokesperson is used, any connection between that person and a sponsoring advertiser that is not reasonably expected must be clearly and conspicuously disclosed. The failure to provide the

proper disclosure, says the FTC, will mislead consumers into believing those messages are impartial when they are really paid-for or sponsored advertisements.

A word of counsel: if you have not already, it is time to review social media, advertising programs, websites, and materials and advise your marketing teams, endorsers, and influencers, to ensure that the proper clear and conspicuous disclosures are being included in sponsored and paid-for content.

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