

# Advertising, Marketing And Promotions Law Year In Review: Where Did Lightning Strike In 2006?

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According to worldwide climate records, 2006 is likely to turn out to be the hottest year on record since the 1890s, meaning that Al Gore's *Inconvenient Truth* may not be so far off the mark. The inconvenient truth for marketers this year is that regulators have been busier than ever in the area of advertising, marketing and promotions. We explore below some of the major issues.

## Sweepstakes

Face Trading, Inc. the makers of merchandising coupons containing instant-win pull-tab games which were sold by retailers to consumers, and which could be obtained via a free request method, appealed a 2004 Circuit Court declaratory judgment which deemed the tab game an illegal lottery. On appeal, the Court cited the Michigan Supreme Court's position that, even though the elements of a lottery are prize, chance and consideration, "these essentials cannot be used to frustrate the plain and ordinary meaning of the word lottery" and the mere existence of the free method of entry did not render the ad-tabs game a legal promotion. This decision is consistent with other state decisions on similar facts, and is important because this theory could potentially be applied to any kind of "premium charge" promotion (e.g., "enter via SMS for .99¢"), despite a free method of entry.

In the "Oops! I Did It Again" category, CVS Corporation, tagged for the second time in as many years, has agreed to pay \$152,000 in civil penalties for violating a 2004 settlement order related to its sweepstakes practices. This time, CVS conducted a promotion where consumers could win a CVS gift card every week during the promotional period. Consumers who used their CVS ExtraCare Card in-store were automatically entered into the sweepstakes; however, CVS failed to inform consumers how to enter the promotion for free and failed to provide a free alternate method of entry at CVS retail locations.

## Privacy/Data Protection

Despite the impending release of the Spears/Federline sex tape, privacy has been a hot issue for a number of years, and the trend continued in 2006. Having acknowledged a security breach that exposed the personal information of more than 163,000 individuals, which led to over 800 cases of identity theft, ChoicePoint settled with the FTC for an unprecedented \$10 million. Clarifying its position in data-breach cases, the FTC alleged that ChoicePoint engaged in unfair practices in violation of Section 5 of the FTC Act.

In a clear reminder that the Children's Online Privacy Protection Act is still an effective tool in the FTC's arsenal, social networking website Xanga.com was charged with collecting, using, and disclos-

ing children's personal information. The Xanga.com site stated that children under 13 could not join the website, but then allowed visitors to create Xanga accounts despite providing birth date information indicating they were less than 13 years old. Over five years, 1.7 million Xanga accounts were created for users who submitted age information indicating they were under 13. The parties reached a settlement and Xanga agreed to pay a whopping \$1 million civil penalty – the largest ever assessed for a COPPA violation, and more than twice the next largest penalty.

## Children's Advertising

In November, CARU, the independent self-regulatory agency charged with ensuring responsible advertising to children under the age of 12, published its revised Self-Regulatory Guidelines for Children's Advertising. The revised Guidelines reflect significant changes intended to address the new media forms used by advertisers (such as interactive games or adveraging, product placement, and third-party licensed characters) to market all of their products to children, including video games, movies, and toys. In connection with the Guidelines review project, the CBBB established the Children's Food and Beverage Initiative, with ten of the largest food and beverage companies signed up as charter participants. These participants agreed to, among other things, devote half of their advertising directed to children to promote healthier dietary choices and a healthy lifestyle, and not engage in food and beverage product placement in program/editorial content.

## Telemarketing

Telemarketing is still in the minds of U.S. regulatory authorities. The FTC recently announced that, effective January 2, 2007, it will no longer permit telemarketers to use prerecorded messages for sales calls, at least when such calls are answered by a person. Telemarketers will continue to be able to use prerecorded messages when leaving voice mails, but the FTC is considering whether or not the practice can continue as well.

At the tail end of 2006, the FTC settled federal Do Not Call violations with satellite television provider DirecTV for a record \$5.3 million, and a few months later with book club marketer Bookspan for \$680,000 for similar violations. As long as the phone is used for marketing purposes, the FTC and state attorneys general will continue to pursue telemarketing violations – especially in the Do Not Call arena.

## CAN-SPAM

In what is the largest penalty to date for violation of the CAN-SPAM Act, Internet marketer Jumpstart Technologies was tagged by the FTC with a \$900,000 civil fine in connection with its FreeFlixTix promotion. According to the FTC, Jumpstart sent emails to consumers which offered movie tickets free of charge, in return for the email addresses and names of five friends of the original email recipient. Subsequently, Jumpstart sent unsolicited commercial emails to the recipient's friends, which appeared as if they were written and sent by the original recipient, and also misled consumers as to the terms and conditions of the free ticket offer. CAN-SPAM enforcement will continue to be a primary focus of the FTC, and this settlement will

surely be a clear deterrent to those companies that defy the Act.

## FCC Investigates VNRS

Due in large part to an investigative report on the subject issued by the Center for Media and Democracy, the FCC launched an investigation into the practice of broadcast stations airing VNRS (a staple of the PR industry consisting of prepackaged news stories produced by advertisers or PR agencies and provided to broadcast stations for air as news), sending "letters of inquiry" to dozens of stations. By October, the broadcast industry was already striking back, with the Radio-Television News Directors Association filing a petition asking the FCC to drop its investigation, since the practice is not generally prohibited by the Federal Communications Act, so long as no consideration is paid for the broadcast.

## More Actions By FTC On Bogus Weight Loss Claims

Because the U.S. public at large (no pun intended) is so eager to buy into new weight loss methods, a primary area of enforcement for the FTC continued to be false claims related to weight loss and dietary supplements. Basic Research, on behalf of itself and other related companies, was smacked with a \$3 million consumer redress penalty for making bogus and unsubstantiated weight loss claims, including that its Tummy Flattening Gel product would cause rapid and visibly obvious fat loss in areas of the body to which the gel is applied. The FTC's complaint also alleged that the company falsely claimed that clinical testing backed up its claims. We just wish we had known about the ineffectiveness of Tummy Flattening Gel before we doused ourselves with it. Well, at least our tummies are well-moisturized.

## New York Attorney General

As usual, Eliot Spitzer's office was busy this year. Federated Department Stores, Inc., the parent company of such department store chains as Filene's and Macy's, agreed to pay \$725,000 in civil penalties and costs to settle an investigation into its allegedly misleading advertising practices and phony sales promotions. Sparked by a Kaufmann's customer's complaint, the New York Attorney General's investigation revealed that Kaufmann's contradicted its saving coupons and store saving passes by using small print to exclude a significant number of items. Kauffmann's also agreed to reform advertising practices regarding the use of statements such as "Biggest Sale of the Year" and "One Day Only Super Sale," which conveyed a false sense of urgency to consumers when, in fact, the retailer continued to sell the items at the sale price after the so-called sale ended. Would this prevent us from titling this article the "One Time Only Super Year in Review Article"?

In March, the New York Attorney General joined 22 other states in a settlement with Time Inc. over its automatic renewal offers and its solicitations which resembled invoices. The states investigated Time's practice of initiating automatic renewals at the end of a subscription term without adequately informing consumers, thus requiring consumers to affirmatively cancel subscriptions in order to avoid being billed for renewals. Under the settlement agree-

ment, Time will pay \$44.5 million to the states in penalties and costs, provide conspicuous disclosures concerning the material terms for automatic renewals and send automatic renewal consumers written reminders on the right to and procedures for subscription cancellation.

## Internet Gambling

In what was undoubtedly viewed as a long shot by the Internet gambling industry, the Unlawful Internet Gambling Enforcement Act was signed into law by President Bush. The Act prohibits financial institutions from accepting any funds for "unlawful Internet gambling," but also provides that those who prevent or prohibit such illegal financial transactions through appropriate identification and blocking procedures will not be held liable. By mid-2007, the Secretary of Treasury and the Board of Governors of the Federal Reserve System are required to issue regulations to the Act which will clarify what financial institutions can and cannot do in order to comply with the Act, so expect enforcement shortly after that time. The passage of the Act overshadowed earlier actions in this area by the Department of Justice against BetonSports.com and Sportingbet PLC, and is likely to cause Internet gambling in the U.S. to dry up and put to bed the issue of whether or not accepting ads for such companies is a violation of the law. It is not anticipated that online gamblers will be targeted as part of any enforcement actions, so your PartyPoker.com account is safe for the time being.

## Rebates

Early this year, New York Senator Charles Schumer wrote a letter to the FTC calling for it to create uniform rules for rebate processing, in order to ensure that consumers properly receive advertised rebates. Likening rebates to "fool's gold," Schumer argued that advertised rebates attract consumers to purchase products at full price, for the promise of receiving cash back at a later date. With low 40-60 percent redemption rates, rebates have become a profit center for manufacturers. In some cases, consumers forget to redeem rebates. In many cases, however, rebates are not redeemed because rebate-processing centers, the entities hired by manufacturers to process rebate requests, devise onerous redemption rules and procedures in an affirmative effort to prevent consumers from collecting their money.

Schumer's request to the FTC dovetailed with the passage in Rhode Island of a new rebate law that mirrors Connecticut's current rebate advertising law. Among other restrictions, the new law requires retailers to offer rebates when the consumer pays at the cash register rather than making them send in mail-in coupons or log onto Web sites to get their money.

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The regulatory trends for 2006 are certainly consistent with those of 2005 – privacy and data protection, weight loss, children's advertising, CAN-SPAM, and telemarketing. Look for those trends to continue well into 2007 with an added twist. As marketing on social networking sites, Second Life, video game consoles and wireless phones, as well as through the use of viral, buzz and stealth methods continues to grow, expect regulators to start taking a closer look. They will probably not like everything they see.

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