District Court Dismisses Major Part of FTC Deceptive Advertising Case

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Advertising and Consumer Law

On August 16, 2018, the U.S. District Court for the Northern District of California dismissed a major portion of the Federal Trade Commission's ("FTC") lawsuit against DIRECTV, which involved broad allegations of deceptive advertising in promotional offers for its annual subscriptions.

In 2015, the FTC sued DIRECTV for approximately $4 billion, alleging that between 2007 and 2015, DIRECTV "failed to adequately disclose that: (1) the introductory discounted price only lasts 12 months, after which the subscriber is charged the then-prevailing rate; (2) the subscriber is subject to a 24-month commitment period; (3) a subscriber who cancels before the end of the commitment period is assessed an early cancellation fee of $20 per month for the remaining months in the commitment period; and (4) subscribers receive a free premium channel package . . . for three months, but must affirmatively cancel these premium channels before the end of the three-month period to avoid monthly charges." *F.T.C. v. DIRECTV*, No. 15-cv-01129-HSG, at *1 (Aug. 16, 2018 N.D. Cal.). The advertisements at issue included television commercials, print advertisements, internet banner ads, and the directtv.com website. At the conclusion of the FTC's case-in-chief, the court found that the FTC had failed to prove any violation of Section 5(a) of the FTC Act with respect to DIRECTV's print, television, and electronic banner advertisements, because the FTC did not present "the type of strong proof the Court would expect to see in a case seeking nearly $4 billion in restitution." *Id.* at *19. The court allowed the case to go forward only with respect to claims involving DIRECTV's website advertisements, although it noted that the FTC's evidence to support even those claims was "far from overwhelming." *Id*.

In its 45-page decision, the court provided a number of reasons for its decision (not all of which are recounted here). The court explained that it would conduct its analysis in two stages. First, it would determine whether the net impression created by the single print advertisement analyzed by the FTC's expert "would be likely to mislead consumers" *Id.* at *8. Second, it would consider whether, "even if the net impression of this advertisement was misleading, that impression can be generalized (1) to any of the other advertisements in evidence or (2) to tens of thousands of other advertisements." *Id.*

In stage one of its analysis, the court conducted a facial review of the print advertisement – examining the placement, size, color, font, and capitalization of the text -- and concluded that the material provisions were "adequately disclosed throughout the advertisement, and while the ad contains a substantial amount of information, a reasonable consumer would understand that this is because subscription satellite television service is a complex product with a number of options for price, level of service, package features, and other components."

After its facial review of the advertisements, the court considered the extrinsic evidence offered by the FTC, and found that evidence similarly unpersuasive. With respect to one expert's survey designed to determine whether consumer's comprehension of certain terms could be enhanced with minor modifications to DIRECTV's disclosures, the court reasoned that "saying that changing the presentation of certain information may result in better recollection of that information simply does not support the conclusion that the information was likely to mislead as presented in its original form." *Id.* at *10. The court similarly rejected the "social influence analysis" presented by another FTC expert, who testified that "lowball" initial offers can increase the likelihood someone will purchase a product, because that expert had performed no "copy testing or other empirical testing of how consumers perceive [DIRECTV's] advertisements." *Id.* at *11. The court also declined to view certain findings of a steering committee that DIRECTV created to monitor and address customer issues as evidence that DIRECTV had misled millions of customers. Rather, the court reasoned that "DIRECTV'S investment of substantial resources in analyzing its operations, candidly identifying areas for improvement, and following through on a number of improvements does not support a finding that the company violated the FTC Act." *Id.* at *18.

In the second stage of its analysis, the court found that "even had the FTC shown that these examples created a misleading net impression, it failed to show how that impression is generalizable to hundreds or thousands of additional advertisements." *Id.* at *15. The court noted that the FTC was presenting the court with a "daunting challenge[]" by asking it to "attempt to determine the 'net impression' of more than 40,000 advertisements, across print, television, and electronic formats." *Id.* at *7. Further, the FTC's expert "presented no persuasive explanation in support of her assertion that [a] single . . . advertisement [offered as evidence] was somehow representative of even the advertisements she reviewed, let alone the universe of 40,000 or more advertisements at issue in this case." *Id.* at *15. The court clarified, however, that this decision does not mean that the FTC had to introduce 40,000 advertisements into evidence. Rather, the FTC must "explain why conclusions about a handful of advertisements can be applied to derive a uniform net impression for an extremely large number of others that vary significantly in format, content and emphasis. The FTC simply cannot meet this burden by characterizing the advertisements at a high level of generality and asserting that conclusions regarding one advertisement apply uniformly to tens of thousands of others." *Id.* at *16.

With respect to the surviving portion of the case -- claims involving DIRECTV's website advertisements -- the court conducted a facial review of the website ads and decided to "defer a finding as to what net impression that website would leave with a consumer" because "[i]t was technically possible for a consumer to proceed through the entire purchase process without ever clicking or hovering over any of the hyperlinks or symbols" which provided some "key terms." *Id.* at *21.

At the close of its decision, the court set a case management conference to "discuss (1) a schedule and plan for completing what remains of the trial; and (2) whether the parties believe that renewed settlement discussions would be productive in light of the Court's findings and conclusions." *Id.* at 23. That conference was scheduled for September 4, 2018, but it was continued until October 4, by consent of the parties. If the parties do not settle, it is likely that the trial will resume with DIRECTV presenting its defense. We will continue to monitor the progress of this case.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Advertising and Consumer Law practice:

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