

OLSHAN

COMPLIMENTARY TCPA WEBINAR AND ADVERTISING, MARKETING & PROMOTIONS LAW UPDATE

Dear Clients, Colleagues and Friends,

We are pleased to send you Olshan's Advertising, Marketing and Promotions Group's Summer 2013 Newsletter and an invitation to our upcoming TCPA Webinar. Since our last edition, there have been a number of important developments and activities. We have summarized recent items that we believe are of particular importance. As always, if you would like to discuss any of these developments, have concerns about their impact on your business or marketing campaign, or have any questions about the legal aspects of advertising and promotional marketing, please feel free to contact us.

COMPLIMENTARY TCPA WEBINAR

On September 17, 2013, 12:30-1:30 p.m. EDT, Andrew Lustigman and Scott Shaffer will present the webinar *Important Changes To Telephone Consumer Protection Act (TCPA): What You and Your Client Need To Know*. CLE credit will be available for this complimentary program which will offer a detailed look at the latest developments involving the TCPA, the rapidly evolving federal statute that has spawned hundreds of class actions over telephone calls, text messages and facsimiles targeting virtually every type of business and supplier.

Subjects to be discussed include:

- New regulations scheduled to take effect in October 2013;
- Liability based on the acts of third parties;
- Recent decisions that will encourage future class actions; and
- Steps you can take to minimize liability exposure.

Who should be listening?

- Anyone in the direct marketing or debt collection industries;
- Companies that solicit through text messaging and pre-recorded voice; and
- Class-action and consumer protection attorneys.

FIRM NEWS & UPDATES

Andrew Lustigman and Adam Solomon will speak at the second annual HitPath Masters Conference in New Orleans, LA on September 29 - October 1, 2013. Andrew and Adam will provide a comprehensive overview of the latest legal issues that impact the online marketing community. The presentation will focus on the FTC's revisions to the online advertising disclosure guidelines, the recently modified COPPA regulations, current regulatory enforcement and more.

On September 30 - October 2, 2013 the Advertising Self-Regulatory Council will hold its **NAD, CARU, and ERSP Annual Conferences**. The conference will cover new legal trends in Advertising Law, Claim Support and Self-Regulation. Olshan's Jonathan Ezor will moderate and Andrew Lustigman will be a panelist at the October 1, 2013 session on Legal Ethics and Social Media. The conferences will be held at the New York Ritz-Carlton. For information on fees and how to register, please click [here](#).

Andrew Lustigman and Adam Solomon will speak at the 35th BAA Annual Marketing Law Conference in Chicago, IL on November 18-20, 2013. Andrew will present on Advance Consent, Telemarketing & Direct Marketing. Adam will host a roundtable that will discuss

For registration please go to:

<https://university2.learnlive.com/olshan>

FACEBOOK EASES ITS PROMOTION GUIDELINES

Facebook revised its Promotion Guidelines in order to make it easier for business to create and administer promotions on Facebook. Facebook has removed the requirement that promotions on Facebook only be administered through apps. Now, promotions may be administered on Page Timelines and in apps on Facebook.

For example, businesses can now:

- Collect entries by having users post on the Page or comment/like a Page post
- Collect entries by having users message the Page
- Utilize likes as a voting mechanism

In order to maintain the accuracy of Page content, Facebook Pages Terms now prohibit Pages from tagging or encouraging people to tag themselves in content that they are not actually depicted in. For example it is permissible to ask people to submit names of a new product in exchange for a chance to win a prize. However it is not permissible to ask people tag themselves in pictures of a new product in exchange for a chance to win a prize.

SEE YOU AT ERA OR DMA?

Please let us know if you plan on attending the **Electronic Retailing Association's Direct to Consumer Conference** being held on September 24-26, 2013 in Las Vegas or the **Direct Marketing Association's Annual Conference** being held on October 12-17, 2013 in Chicago. Both conferences deliver a forum where leading marketing professionals talk shop and network. Attorneys from Olshan's Advertising Marketing and Promotions group plan on attending the conferences. If you plan on attending either show, please email **Andrew Lustigman** to set to set up a convenient time to meet in person.

SEC ADOPTS FINAL RULES PERMITTING GENERAL SOLICITATION AND GENERAL ADVERTISING IN PRIVATE OFFERINGS

The SEC recently adopted two final rules that have the potential to significantly impact private securities offerings conducted under Rule 506 of Regulation D under the Securities Act of 1933. The final rules adopted by the SEC will permit issuers to engage in general solicitation or general advertising in conducting

the latest developments in telemarketing compliance with a focus on the changes to the TCPA. For more information click **here**.

Law360 reported on a recent action taken by several state attorneys general to urge the FTC to step up its scrutiny on unauthorized third-party charges "crammed" onto mobile phone bills. Andrew Lustigman, quoted extensively in the article, worries not only that this will negatively impact law-abiding companies, but doesn't fully consider consumers' tendency to forget terms to which they have agreed, a point on which Andrew elaborates. **Read Article Here (Subscription required)**.

Andrew Lustigman was quoted extensively in the June 2013 issue of **Entrepreneur** magazine in the article "Can I Say That?" about the legal challenges potentially arising from making comparative and performance advertising claims.

Sheldon Lustigman was quoted in Law360 article, "5 Tips For Crafting Ads That Pass FTC Muster." **Read Article Here (Subscription Required)**.

The Luxury Daily quoted Steven Gursky on the proposed New York City legislation proposing to criminalize the purchase of counterfeit luxury goods. Steven opined that such a law would result in "*raising the public's consciousness of the problem surrounding counterfeit goods.*"

Reuters named Olshan as one of the top firms that "have come to dominate the activism market." The article puts Olshan's Activist Practice at the same level as much larger firms. You may directly access the Reuters article **here**.

private offerings of securities to accredited investors under Rule 506.

CONTINUE READING

COURTS DISREGARD FCC INTERPRETATION OF TCPA

In *Mais v. Gulf Coast Collection Bureau*, a trial court awarded the plaintiff \$7,500 for fifteen calls to his cell phone made by a debt collector. However, the court dismissed the companies that hired the debt collector. The ruling was significant because the court declined to follow FCC guidelines interpreting the TCPA. Aspects of the decision were both pro-plaintiff and pro-defendant.

CONTINUE READING

In *Luskin v. Seminole Comedy, Inc.*, the court denied a motion to dismiss a case concerning text messages, even though the plaintiff had provided his telephone number to the text sender. The case marked the second time in two months that the same judge issued a decision that is contrary to the FCC's official position concerning the TCPA.

CONTINUE READING

FLORIDA CLASS ACTIONS AVOIDED BY PICKING OFF PLAINTIFF

In *Keim v. ADF MidAtlantic, LLC*, the defendants were allowed to moot the threat of a class action by paying the plaintiff everything he demanded on his individual claim. This procedure, known as "picking off," provides additional defense.

CONTINUE READING

FTC OBTAINS \$7.5 MILLION SETTLEMENT IN DO NOT CALL CASE

In *United States vs. Mortgage Investors Corp. of Ohio*, a home loan refinancing company agreed to pay a \$7.5 million civil penalty for allegedly violating Do Not Call provisions of the Telemarketing Sales Rule ("TSR"). According to the FTC, it was the largest fine ever collected for Do Not Call violations. The complaint alleged that Mortgage Investors' telemarketers called more than 5.4 million numbers listed on the National Do Not Call Registry to offer home loan refinancing services. The settlement provides lessons to those engaged in telemarketing.

CONTINUE READING

PURCHASING KEYWORDS THAT ARE MARKS OF ANOTHER COMPANY

In *1-800 Contacts, Inc. v. Lens.com, Inc.*, a retailer of

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replacement contact lenses brought Lanham Act trademark-infringement action against a competitor that used Internet advertising in which search engines displayed the competitor's advertisement when customers performed an Internet search using keywords that resembled retailer's registered "1800CONTACTS" service mark.

CONTINUE READING

SECOND CIRCUIT IMPOSES A DUTY OF INQUIRY ON DATA RESELLERS

In *Gordon v. Softech International*, the Second Circuit tackled the issue of whether someone who discloses information obtained from a third-party source should be responsible when the information is misused by the person who received the information.

CONTINUE READING

SECOND CIRCUIT FALLS IN LINE WITH PRECEDENT ALLOWING FEDERAL TCPA CLASS ACTIONS

In *Giovaniello v. ALM Media, LLC*, the Second Circuit ruled that the federal four-year statute of limitations applied to a federally filed TCPA class action, not the two-year statute of limitations contained in Connecticut law. The proper time limit to apply was at issue because the TCPA allows a private right of action, "if otherwise permitted by the laws or rules of court of a State." The impact of this ruling will soon be evident in New York federal courts because New York has a state statute barring TCPA class actions.

CONTINUE READING

MINIMIZING CLASS ACTION EXPOSURE: THE POWER OF MANDATORY ARBITRATION CLAUSES

As class actions and other forms of litigation continue to plague corporate America as a major cost of doing business, businesses should be cognizant of one potent antidote that has repeatedly received judicial approval: mandatory arbitration clauses. The Supreme Court's recent decision in *American Express v. Italian Colors Restaurant*, illustrates the extent to which mandatory arbitration agreements with class action waivers can significantly limit corporate liability in the face of class action lawsuits. Moreover, recent trends in jurisprudence have made it easier to put arbitration provisions into effect.

CONTINUE READING

NEW YORK PROPOSES NEW LIMITATIONS ON SELLERS OF DISCOUNT BUYING CLUB MEMBERSHIPS

Proposed legislation introduced in the New York Senate would impose new limitations on discount buying clubs. 2013 New York Senate Bill 5632, styled the "Discount Buying Club Consumer Protection Act," would require sellers of discount buying club memberships to give potential buyers time in which to cancel their membership, and would impose new restrictions on their sales practices.

CONTINUE READING

NAD CLARIFIES STANDARD FOR "PUFFERY"

The NAD recently clarified the standard for determining whether statements are mere "puffery," rather than unsupported superiority messages. The Campbell Soup Company, maker of V8 V-Fusion fruit/vegetable juices, challenged a Tropicana television commercial in which Tropicana depicted a wide selection of non-refrigerated juices crashing down to the floor, accompanied with a statement that: "If you want the world's best fruit and vegetable juice, look in the cooler..." While a claim that a product is the "world's best" would ordinarily constitute a classic example of puffery, NAD noted that puffery is not a defense where a claim is made in a clearly comparative context.

CONTINUE READING

NEW GENERIC DOMAIN NAME EXTENSIONS ARE SET TO BE LAUNCHED THIS YEAR

Hundreds of new generic domain name extensions ("NgTLDs") are set to be launched later this year (i.e., .shop, .services, .reviews, etc.). These extensions will be similar to the familiar .com, .net and other current extensions, and those wishing to obtain domain names with these extensions will be able to start buying the same. There are new safeguards to protect against parties acquiring these new domain names using the registered trademarks of others in an infringing manner. However, in order to take advantage of these new safeguards, brand owners will need to register with the Trademark Clearinghouse.

CONTINUE READING

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We strive to stay on top of all relevant legal issues to provide our clients with the most effective and efficient legal advice. If you find any legal marketing news of interest, send it to us!

Please pass this newsletter on to your friends and colleagues and invite them to join our mailing list. As always, please feel free to contact us with any comments, questions or recommendations. Also, please follow us on Twitter for breaking news.

Advertising Marketing & Promotions Group

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