

The NAD Exposes Hidden Fees

6th Edition: Trends in Marketing Communications Law

As a regulatory force in its own right, the National Advertising Division (NAD) makes waves whenever it brings a challenge on its own behalf against a major advertiser. And, with recent leadership changes for the Advertising Self-Regulatory Council (ASRC), the NAD's most recent challenges may offer a glimpse into its enforcement priorities in the coming years. In particular, while the NAD has been increasing its focus on technology platforms, it took a particular interest this past year in large, reputable technology platforms which charged consumers hidden fees for their services.

The NAD kicked off 2018 with a challenge against StubHub, an industry leader in after-market online ticket sales. StubHub allows consumers to resell tickets to popular concerts, sporting events, plays and similar events, and charges ticket purchasers a 24% to 29% service fee. The NAD challenged StubHub's practice of advertising ticket prices exclusive of its service fee and subsequently adding the service fee at the check-out page. The NAD also noted that the service fee was not itemized as a separate charge, but was instead simply added to the total price of the ticket purchase. In response, StubHub argued that the challenged practices are common in the industry and that consumers understand that they will have to pay a service fee at checkout. The NAD disagreed, finding that a reasonable consumer may not expect to have to pay a 24% to 29% service fee on top of advertised ticket prices. The NAD also found that consumers are likely to be misled by StubHub's failure to disclose these services fees because they cannot meaningfully compare prices across platforms without knowing what service fee each platform will charge.

StubHub declined to comply with the NAD's recommendation that it clearly disclose its service fee when the initial ticket price is advertised and the case was referred to the FTC for possible enforcement action. Fittingly, the FTC is currently planning to hold a workshop focused on the online ticket-sales industry in June and may look at tackling service fee disclosures as a part of this workshop.

In December 2018, the NAD challenged PayPal's claim that there is "no purchase fee" when consumers order its PayPal Prepaid Mastercard online. Although it was true that PayPal did not charge consumers to initially acquire the card online, PayPal assessed a monthly fee to use the card, and, in many cases, a "load fee" to add funds to the card. The NAD found that consumers might reasonably interpret "no purchase fee" to mean that they can use the card without paying a fee. Although the advertisements at issue disclosed that "[o]ther costs, terms, and conditions are associated with the use and reloading of this Card Account," the NAD found that this disclosure did not provide sufficient detail to effectively communicate the material terms of the "no purchase fee" offer. Accordingly, the NAD recommended that PayPal discontinue the "no purchase fee when you order online" claim or modify the claim to clearly disclose the fees associated with the use of the card.

Key Takeaways

- Even though a particular advertising/pricing practice may be standard in the industry, consumers may not necessarily understand the practice and such advertising/pricing can still be misleading.
- The NAD's decisions in the StubHub and PayPal cases confirm that service charges and other fees are material terms that must be clearly and conspicuously disclosed in order to be effectively communicated.

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