



Offices in St. Louis | Chicago | Belleville

314.241.9090

[www.greensfelder.com](http://www.greensfelder.com)

# ABA Consumer Protection Update November 2008

---

Erwin O. Switzer  
[eos@greensfelder.com](mailto:eos@greensfelder.com)

Mary Ann L. Wymore  
[mlw@greensfelder.com](mailto:mlw@greensfelder.com)

John E. Petite  
[jep@greensfelder.com](mailto:jep@greensfelder.com)



# Consumer Protection Update

- Federal Trade Commission Updates
- State Attorney General Actions
- Private Enforcement
- National Advertising Division Updates
- Questions

# Federal Trade Commission Update

- Enforcement Acts, Settlements, and Judgments
  - Academy Collection Service, Inc.
  - CyberSpy Software, LLC
  - Premier Capital Lending, Inc.
  - Internet payday lenders and companies' principals
  - Glucorell, Inc. and Anafit, Inc.
- Reports and Guidance
- Announcements and Federal Register Notices

# Nationwide Debt Collector Will Pay \$2.25 Million to Settle FTC Charges

- Department of Justice filed complaint against Academy Collection Service, Inc. and its owner on behalf of the FTC
- Complaint alleges company and its collectors misled, threatened, and harassed consumers and disclosed consumer debt to third parties
- Academy agreed to settle the complaint for \$2.25 million, the largest civil penalty the FTC has obtained in a debt collection case
- Consent decree also bars future misrepresentations

# Court Orders Halt to Sale of Spyware

- At request of FTC, TRO issued by U.S. District Court halting sale of RemoteSpy spyware by CyberSpy Software, LLC
- Defendants allegedly provided service to clients that allowed clients to record every keystroke typed by consumer victims
- Company charged with engaging in unfair advertising and selling of software in violation of the FTC Act
- Complaint filed by Electronic Privacy Information Center (EPIC) brought RemoteSpy software to FTC's attention

# Mortgage Company Settles Data Security Charge

- Mortgage lender Premier Capital Lending, Inc. settled FTC charges that it violated FTC's Safeguards and Privacy Rules and Section 5 of the FTC Act
- Complaint alleged lender failed to provide reasonable security to protect sensitive customer data
- Computer hacker compromised data kept by lender to access hundreds of consumer reports
- Settlement agreement was subject to public comment from November 6, 2008 to December 5, 2008
- Commission will now decide whether to make agreement final

# Marketers of Dietary Supplements Ordered to Halt False Claims About Diabetes Prevention and Treatment

- Marketers of dietary supplements Insulow® and Glucorell R have settled FTC charges that they engaged in deceptive advertising practices
- Complaint alleged defendants made unsubstantiated claims about the ability of the drugs to treat and prevent diabetes
- Court order prohibits future unsubstantiated representations about the drugs
- \$493,545 judgment (suspended)



# FTC Charges Internet Payday Lenders with Failing to Disclose Key Loan Terms and Using Abusive and Deceptive Collection Practices

- FTC complaint filed against 10 Internet payday lenders and their principals
- Complaint alleges companies offered consumers loans in exchange for bank account and social security numbers
- Allegations made that defendants violated the FTC Act by using unfair and deceptive collection tactics

# Reports and Guidance

- Performance and Accountability Report (PAR)  
Issued for Fiscal Year 2008
  - Report combines FTC's performance report, financial statements, and audit opinion
  - Report may be viewed at [www.ftc.gov/par](http://www.ftc.gov/par)
- Report on U.S. Ethanol Market Concentration  
Issued for 2008
  - Fourth Annual report issued by FTC as required by Energy Policy Act of 2005
  - Report concludes U.S. fuel ethanol market remains unconcentrated

# Reports and Guidance

- Report on 2007 Do Not Call Improvement Act Submitted to Congress
  - Report contains information about the FTC's efforts to improve the accuracy of the National Do Not Call Registry and explains new procedures in place for maintaining this accuracy
- 1966 Guidance on Statements Concerning Tar and Nicotine Yields Rescinded
  - Former guidance permitted statements concerning tar and nicotine yields if based on the Cambridge Filter Method
  - FTC determined statements based upon this method are likely to be misleading
  - Advertisers may no longer indicate this method is approved or endorsed by the FTC

# Announcements and Federal Register Notices

- FTC Announces First in Series of Hearings on Evolving Intellectual Property Marketplace
  - FTC held the first of a possible series of public hearings addressing changes in IP law and IP marketplace on December 5, 2008
  - Commission is seeking public comments in response to these hearings
  - Comments must be received by February 5, 2009 and should refer to “Evolving IP Marketplace – P093900”
  - Additional information may be accessed at [www.ftc.gov/bc/workshops/ipmarketplace/](http://www.ftc.gov/bc/workshops/ipmarketplace/)

# Announcements and Federal Register Notices

- Health Care Booklet and Web Site for Seniors Announced
  - FTC has developed booklet entitled “Who Cares: Sources of Information About Health Care Products and Services”
  - Booklet may be ordered by calling the FTC’s Consumer Response Center toll free at 1-877-FTC-HELP or in bulk at [www.ftc.gov/bulkorder](http://www.ftc.gov/bulkorder)
- Federal Register Notice on Advertising Endorsements and Testimonials Approved
  - Notice will soon be published in the Federal Register and is available now on the FTC’s website
  - Public comment will be accepted through January 30, 2009

# State Attorney General Actions

- 42 Attorneys General Submit Comments on FTC's "Used Car Rule"
- Five Attorneys General Take Action on Lending and Mortgage Fraud Issues
- Florida AG Sues Cruise Ship Company over Fuel Surcharges
- California AG Settles Price-Scanning Error Lawsuit with Wal-Mart

# 42 Attorneys General Submit Comments Advocating an Expansion of the “Used Car Rule”

- In July, the FTC issued a Request for Public Comment on the Used Car Rule (73 Fed. Reg. 42285-42293 (July 21, 2008), referring to 16 C.F.R. § 455 (2008))
- Used Car Rule requires a window sticker (“Buyers Guide”) disclosing, among other things, warranty details
- Attorneys General of 40 states, DC, and one territory (Northern Mariana Islands) urged the FTC to:
  - Include vehicle history (title and prior use) in the Buyer’s Guide
  - Use Wisconsin Buyers Guide Law as a model

See <http://www.ftc.gov/os/comments/usedcarrule/536945-00013.pdf>

# Six Attorneys General Bring Separate Actions Based on Allegations of Lending and Mortgage Fraud

- Ohio:
  - AG settled claim against New Century Financial Corp., a subprime lender
  - Company was enjoined from most foreclosures while modification talks continue
  - Company is barred from soliciting consumers for loans, initiating foreclosures, or evicting borrowers
- Massachusetts:
  - AG obtained preliminary injunction limiting foreclosures on presumptively “unfair” loans by H&R Block and Mortgage One
  - Lawsuit accused lenders of making loans they knew were destined to fail and charging minorities higher rates

# Six Attorneys General Bring Separate Actions Based on Allegations of Lending and Mortgage Fraud (cont.)

## ■ Colorado:

- ❑ Settled suits with three companies regarding mortgage advertising (Arbor Financial, 5280 Financial Group, and Mortgage Toolbox), and sued another company over advertisements for “option ARM” loans with negative amortization after teaser rate expires (Home Mortgage Solutions)
- ❑ Settled with Encore Lending for inflating borrowers’ incomes to qualify for larger loans
- ❑ Settled with Tri-Point Realty for deceptive letters to borrowers that appeared to come from recipients’ current lenders
- ❑ Entered into cease-and-desist order with seven foreclosure “rescue” companies that prohibits receipt of fees upfront and specifies services to be rendered

# Six Attorneys General Bring Separate Actions Based on Allegations of Lending and Mortgage Fraud (cont.)

## ■ Illinois:

- Sued seven mortgage “rescue” firms for violating “no-upfront-fees” provisions of IL law

## ■ California:

- Arrested persons allegedly involved in “foreclosure scam” for taking upfront fees for foreclosure “rescue” and taking no action to stop foreclosure

## ■ Florida:

- Settled with debt relief company (Laura Hess and affiliates) that falsely told customers their debts would be cancelled
- HSBC Bank agreed to forgive debts of 6,000 Hess clients

# Cruise Ship Company Sued by Florida Attorney General Over Fuel Surcharges

- Imperial Majesty Cruise Line accused of collecting \$4 million in “fuel surcharges” of \$20 to \$30 per consumer since 2006
- Company allegedly implied that the fee was government-imposed
- State and federal regulators and private attorneys have been investigating and bringing actions based on surcharges in several areas, including cell phone services, airlines, and hotels
  - Earlier this year the Florida AG settled two similar cases with Carnival Cruise (refund totaling \$40 million) and Royal Caribbean and Celebrity Cruises (refund totaling \$21 million)



# Wal-Mart Settles Price-Scanning Lawsuit with California Attorney General

- CA asserted that Wal-Mart check-out counters were scanning items at higher prices than advertised on store shelves and signs since 2005
- CA investigators reported errors at 164 stores in 30 counties, averaging \$8.40 per customer
- Stipulated judgment entered into by Wal-Mart and CA AG and San Diego prosecutor, in which Wal-Mart agreed to:
  - Refund lesser of \$3 or cost of item when check-out errors found
  - Post signs on this policy at every checkout counter for at least four years
  - Pay \$1.4 million to CA in civil penalties and reimbursement
- Limited to California stores

**People v. Wal-Mart, San Diego Superior Court, No. 37200800096757-CU-BT-CTL**

# Private Enforcement

- Andrews v. Chevy Chase Bank
- Davis v. Creditors Interchange
- Smith v. MSV Sales and Services
- Brazil v. Dell Inc.
- Janda v. T-Mobile
- Ronat v. Martha Stewart Living Omnimedia
- Leslie v. Fidelity Nat'l Title Ins. Co.
- Ironworkers Local Union No. 68 et al. v. AstraZeneca Pharm.
- Michaels v. Classmates Online Inc.

# Truth in Lending Act (TILA) Developments

- Andrews v. Chevy Chase Bank – Seventh Circuit denies class certification for claims seeking rescission under TILA
  - Class action alleging bank failed to adequately disclose interest rate and payment periods associated with mortgage loans
  - Seventh Circuit reversed E.D. Wisc. grant of class certification, holding class certification is not available in cases seeking rescission under TILA

# Fair Debt Collection Practices Act (FDCPA) Developments

- Davis v. Creditors Interchange Receivable Management, LLC et al. – Court reevaluates standard for assessing actual damages for emotional distress under FDCPA
  - USDC, N.D. Ohio
  - Plaintiffs alleged defendants violated the FDCPA by harassing plaintiffs at work about a Chase credit card debt and thereby inflicting emotional distress
  - Court determined plaintiffs alleging emotional distress under FDCPA need not satisfy the state law elements of the torts of intentional or negligent infliction of emotional distress to prove actual damages

# Fair and Accurate Credit Transaction Act (FACTA) Developments

- Smith v. MSV Sales and Services, LLC – District courts in the Eleventh Circuit disagree as to whether FACTA is constitutional
  - USDC S.D. Fla.
  - Plaintiff alleged defendant violated FACTA by providing consumers with receipts containing more than the last five digits and expiration dates of consumers' credit card accounts
  - Defendant challenged constitutionality of FACTA
  - Court refused to follow decision of the USDC for the N.D. Ala. and upheld constitutionality of FACTA

# State Consumer Protection Statute Developments

- Brazil v. Dell Inc. – Class action brought against Dell Inc. alleging company deceives customers by advertising false rebates, discounts, and offers on website
  - USDC, N.D. Cal.
  - Plaintiffs alleged Dell’s ads mislead customers by implying that advertised prices are sale prices when they are not
  - Court denied defendant’s motion to strike plaintiffs’ class allegations, finding allegations that Dell engaged in a widespread marketing plan to deceive the public were not “manifestly unascertainable”

# State Consumer Protection Statute Developments (cont.)

- Janda v. T-Mobile USA, Inc. – Plaintiffs bring claims against T-Mobile challenging certain cell phone fees
  - USDC, N.D. Cal.
  - Allegations made that T-Mobile passed ordinary business expenses on to consumers in the guise of a “government tax”
  - Court found claims brought under CA consumer protection statutes are subject to heightened pleading requirements of Fed. R. Civ. P. 9(b) if they sound in fraud

# Cases Of Note

- Ronat v. Martha Stewart Living Omnimedia – USDC S.D. Ill. follows Seventh Circuit precedent and denies class certification in suit alleging violations of multiple consumer protection statutes based on spontaneously combusting glass-top tables
- Leslie v. Fidelity Nat'l Title Ins. Co. – USDC W.D. Wash. finds a title insurer's deviation from its filed rates may amount to a deceptive practice under the Washington Consumer Protection Act if the deviation is made in bad faith
- Ironworkers Local Union No. 68 et al. v. AstraZeneca Pharm. – USDC, M.D. Fla. dismisses case alleging marketers of the drug Seroquel misrepresented the safety, efficacy and superiority of the drug, causing consumers to pay millions for the drug to treat conditions it was not approved for
  - Relying on RICO case law, court dismissed under 12(b)(6) state consumer protection act claims for “failing to establish proximate cause”
  - Unjust enrichment claims were dismissed because all tort claims had failed

# Cases of Note (cont.)

- Michaels v. Classmates Online, Inc. et al. – Plaintiff alleges that Internet company induced him to purchase premium subscription by falsely telling him former classmates were trying to contact him
  - Superior Court for the State of California, County of Los Angeles, Central District
  - Plaintiff alleged defendant made misrepresentations to consumers to induce them to subscribe to defendant's website in violation of the California Business and Professions Code and various other state statutes
  - As in other suits alleging deception on the part of online companies, knowledge and intent will be two key issues in the case



# National Advertising Division Update

- Viral Videos
- Captain D's
- Indoor Tanning Association
- Verizon – Sprint
- Verizon FiOS
- DermaSilk
- Castrol

# NAD States that “Viral Advertising” is Within its Jurisdiction

- NAD initiated an investigation into YouTube video by Cardo Systems, maker of Bluetooth technology
  - Issue was whether showing popcorn kernels popping near ringing cell phones implied that cell phones were dangerous without wireless headsets
- Cardo argued the video was not advertising
- Even though the campaign had ended, NAD stated that viral videos are considered advertising and, therefore, any claims made in the videos must be substantiated

# NAD Refers Captain D's Ad to FTC After Captain D's Refuses to Participate in NAD Review

- In response to a challenge by Red Lobster (GMRI, Inc.), NAD requested Captain D's substantiate various TV and internet claims
  - Same amount of food, plus \$30 back, \$45 bucks back
  - Captain D's offerings are "like the same thing we just ate" at Red Lobster...
- NAD reviewed the implied claim that "Captain D's offerings are comparable to items served at Red Lobster at one half the price"
- Captain D's "respectfully declined" to participate in the review
  - NAD referred the ads to the FTC

# NAD Finds Unsubstantiated Claims of Indoor Tanning Ass'n Regarding Health Benefits or Lack of Danger of Tanning

- NAD investigated ads from the Indoor Tanning Association (ITA) implying that tanning is not dangerous and is necessary to produce vitamin D
- Among the claims NAD investigated were statements that:
  - TANNING CAUSES MELANOMA: HYPE
  - No compelling scientific evidence that tanning causes melanoma
  - Vitamin D protects against many types of cancer
- ITA submitted three articles from various institutes addressing the benefits of vitamin D on human health
  - Each article also warned against the role of UV radiation in producing certain cancers
- NAD concluded the ads overstate the benefits of vitamin D obtained through sun exposure and “dismisses as hype” the relationship between UV rays and skin cancer

# NAD Recommends Modification of Advertising for DermaSilk

- NAD challenged ads from BioTech Corp. Int'l., regarding its DermaSilk Anti-Wrinkle dietary supplement
- NAD recommended that several claims be discontinued, including:
  - It's like getting a face-lift without the invasive surgery
  - Helps repair damage caused by sun exposure
  - Turn back the years with DermaSilk
- NAD also recommended that DermaSilk's ads claiming that it "helps increase firmness, hydration, and elasticity" be modified to reflect that there is emerging evidence that the product may improve the appearance of aging skin
- BioTech stated it intends to consider NAD's recommendations in future advertising

# NAD Recommends Verizon Modify Push-to-Talk Advertising

- Sprint Nextel challenged Verizon's TV advertising of Push-to-Talk (PTT) service
  - Ad showed construction workers in yellow hard hats who couldn't connect on calls
  - Another worker in a red Verizon hard hat says they "upgraded" and "the old service is useless now"
  - Narrator states: "Don't be the last one standing with another push to talk. Switch to the only one that comes with 'the network,' showing a large group of people behind the "can you hear me now" guy
- NAD found that Sprint was implicitly referenced and found unsupported the claims that the challenger's "old service is useless now" and that Verizon's PTT service was superior to Sprint's
- Recommended that future ads touting the network clearly express whether it applies to PTT or regular cell phone service

# NAD Recommends Modification of Some of Verizon's Superior Picture Quality Claims as to FiOS Service

- CSC Holdings (parent of Cablevision) challenged Verizon's advertising as to its picture quality claims
- NAD found that some claims comparing FiOS to Cablevision were not sufficiently supported, including:
  - "So much more bright"
  - "Channels come on quicker"
  - "The colors are more vivid"
- Verizon stated it "will take NAD's recommendations into consideration"

# NAD Recommends Modification of Castrol GTX Advertising

- Pennzoil-Quaker State Co. challenged BP America, Inc.'s advertisements for Castrol GTX motor oil
- The challenged claims were in broadcast and website advertisements and a technical brochure
- TV Commercial:
  - Shows a stunt driver preparing to jump a line-up of buses, when his car is drenched by sludge, causing it to stop
  - The voiceover states, "Engine sludge can strike anyone. So get Castrol GTX. It's superior sludge protection, 57% better than the leading 5W-30. Tests prove it."
  - A line on the screen reads, "In M271 Sludge Test"

# NAD Recommends Modification of Castrol GTX Advertising (cont.)

- Pennzoil's Complaint: The M271 sludge test was created by Mercedes-Benz to test motor-oil performance in European Mercedes-Benz cars driven on European roads
- NAD concluded the M271 test was not an appropriate basis for BP's broad and unqualified "57% better" claim
  - Recommended discontinuation of claim in TV ads and addition of disclaimers on website ads
- BP America is appealing the case to NARB

# Questions?

---