Advertising Compliance: Catch up on the Recent "Buzz" Regarding Marketing to the Reasonable Consumer

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Do you love Trader Joe's? I'm going to assume you said yes based on the line at my local one, so read on.

Do you want to know how bees recently impacted the "reasonable consumer" standard for advertisements? If so, read on. I mean, how could you possibly ignore that tease?

First things first. Let me give you the backstory of how we get to talking about the reasonable consumer.

Both the Consumer Financial Protection Act and the Federal Trade Commission Act regulate marketing materials aimed at consumers. The CFPA and the FTC Act both prohibit unfair and deceptive acts or practices, while the CFPA also prohibits abusive acts and practices. Almost all regulatory actions based on marketing come under the deception prong. The deception standard is the same under both the CFPA and the FTC Act. An act or practice is deceptive if: (1) there is a representation, practice, or omission likely to mislead consumers, (2) the consumers interpret the message reasonably under the circumstances, and (3) the misleading effect is "material," i.e., it affects the consumers' conduct or decisions regarding the product.

When regulators assess an advertisement under the deception standard, they consider the advertisement in its entirety to determine how reasonable consumers are likely to respond. This is called the "net impression." In other words, regulators look at the advertisement as a whole and ask, "What would a reasonable consumer think that this advertisement is saying about this product?"

It's important to note here that when advertisements or sales practices are targeted to a specific audience, such as children, the elderly, or the terminally ill, regulators determine the effect of the practice on a reasonable member of that group. So, for dealers and finance companies, you need to be thinking about your target audience and how a reasonable member of that audience will view your advertisement.

Courts and regulators have been focused on the "reasonable consumer" standard for many years. In fact, according to a 2019 article written by the nonprofit Truth in Advertising.org, the following conclusions, developed from actual court decisions, help us define the "reasonable consumer":

- A reasonable consumer expects there to be ice in iced drinks.
- A reasonable consumer does not expect the overall size of a package to "reflect precisely" the

amount of product inside.

- A reasonable consumer expects that "grass-fed" cows eat grains or other food.
- A reasonable consumer does not expect that a guarantee on the life of a battery means it won't leak in storage.
- A reasonable consumer expects soy milk and almond milk to be different from dairy milk.
- A reasonable consumer does not expect olive oil marketed as "black truffle flavored" to be flavored with actual black truffles.
- A reasonable consumer expects bourbon to be made using machines, even if it's labeled "handcrafted" or "handmade."
- A reasonable consumer does not expect pretzels marketed as "fat free" or "low fat" to be healthy.
- A reasonable consumer expects labels on wood to not show the exact dimensions of the lumber.
- A reasonable consumer does not expect a "Jamaican Style Lager" with "The Taste of Jamaica" to be brewed in Jamaica with Jamaican ingredients.

All of these examples help formulate the standards we should be using when reviewing marketing materials for compliance before using them. (You do review your marketing materials for compliance before using them pursuant to established policy or procedures, right?)

A recent decision in a class action lawsuit out of the Ninth Circuit adds a new wrinkle to the "reasonable consumer" standard that's worth noting. The case involves a bunch of people from California who were simply buzzing over the fact that Trader Joe's markets "100% New Zealand Manuka Honey" that is, in fact, not made with honey pollenated only by the Manuka flower.

Quick background on Manuka Honey—it is pricey. Apparently, Manuka plants grow in New Zealand and Australia, and their nectar has numerous health benefits. Therefore, honey made from bees buzzing around Manuka plants is super expensive.

The class action case claimed that Trader Joe's deceived consumers because its "100% New Zealand Manuka Honey" actually was made with less than 100% Manuka Honey. In determining the outcome of the case, the court relied on previous adopted reasoning that "deceptive advertising claims should take into account all the information available to consumers and the context in which that information is provided and used." The court took into account the low price of the honey (Trader Joe's Manuka Honey costs $13.99 a bottle, whereas the average cost is over $200 for actual 100% Manuka Honey) and the general knowledge of how bees make honey. In the end, the court decided a reasonable consumer would not have been deceived by Trader Joe's 100% Manuka Honey claim.

The judge, who adorably included several bee puns in the opinion, wrote, "First and foremost, given the foraging nature of bees, a **reasonable honey consumer** would know that it is impossible to produce honey that is derived exclusively from a single floral source." I bolded and underlined the phrase **reasonable honey consumer** because it is so striking. The judge also referred to "a reasonable consumer *in the market for Manuka honey*."

This case is different because the court seems to be including additional information outside of the advertisement in determining the net impression the advertisement makes on the reasonable consumer. In other words, advertisers should consider not only what the advertisement says and the

target audience it was intended for but also other information that a person in that target audience is likely to know, such as, in this case, how bees make honey and how much 100% Manuka Honey should cost.

So, what now? First of all, know that this is one case out of one court. So, it's definitely not the law of the land as a whole. But it certainly could influence regulators and court cases going forward. Second, in my view, this opinion could cut both ways. On one hand, this case represents an expansion of what a reasonable consumer is and provides dealers more leeway to advertise because a reasonable car consumer would know X, Y, or Z. But, on the other hand, expanding on the "reasonable consumer" standard could also mean an increased focus on the details in an advertisement. Regulators may expect advertisements to be more tailored and include more detailed information to satisfy the needs of a reasonable car consumer.

In my opinion, as a dealer or finance company marketing products and services, you should still be considering how a reasonable consumer would interpret an advertisement. You should consider that reasonable consumer's net impression of the advertisement to ensure that it is not misleading to that consumer. It is too early to rely on the "reasonable *car* consumer" standard, but stay tuned. This could be a one-off case, or it could impact the "reasonable consumer" standard going forward.

Either way, I'm glad we all now know more about Manuka Honey.

Moore v. Trader Joe's Company, 2021 U.S. App. LEXIS 20951 (9th Cir. (N.D. Cal.) July 15, 2021).

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