

Legal Risks Associated with Interactive Marketing Campaigns and Social Networks

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These days, it seems that all marketing teams are using interactive media as a platform for their marketing activities. While the allure of online social media platforms for building lead-generation databases is undeniable, marketers need to be wary of potential legal traps.

Online Interactive Contests/Sweepstakes

Marketers know that their customers love to participate in edgy online contests and sweepstakes where participants upload videos, photos, or other user generated content (UGC) in the hopes of winning prizes or notoriety. While this type of marketing is now “de rigueur,” marketers need to be aware of the intellectual property issues associated with such campaigns. Of course, most companies are well aware that copyright issues lurk behind user generated content and warn contestants not to use, for example, third-party music or video clips without express authorization. However, many people forget that under copyright law, if someone else held the camera, wrote part of the script or even appeared in the work, these other contributors also might have strong intellectual property rights of their own. Therefore, contestant forms should include an assignment of rights from everyone who helped create the content, or at a minimum, an express representation by the named entrant that he or she has obtained an assignment of rights to use all of the contributions. One way to help contestants be mindful of who contributed is to have forms that ask for explicit identification of people who helped the contestant, including the videographer and any writers.

In addition, thorny issues are created when the UGC contains images of people or their voices, especially if the video, photo or soundtrack

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includes more than just the image or voice of the named contestant. Specifically, use of faces and voices implicates a complicated web of publicity and privacy rights that vary by state. In general, because such rights are personal to the individual, a single contestant cannot validly waive them, or represent that he or she has authorization on behalf of all others who may appear. Savvy marketers will need to chase for releases from everyone, or choose not to post content involving multiple people.

Similarly, if the contest encourages UGC that discusses the merits of one product over another, chances are good that third-party trademarks will be part of the uploaded content as part of a product comparison. While such comparisons can be legally acceptable, care should be taken to ensure that the UGC, if broadcast, will not result in claims of trademark infringement, disparagement or unfair advertising. Savvy marketers who want to avoid the issue will discourage direct comparison or use of third-party brands, and instead encourage UGC that focuses uniquely on the company's products.

Social Networks, Marketing Campaigns and Disclosure Rules

Traditionally, if an advertisement was materially deceptive to the consumer, advertisers could expect retaliation from the consumer or more likely, the Federal Trade Commission (FTC), which is charged with policing and enforcing against deceptive marketing practices. As a general rule, the same laws against deceptive marketing apply

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Amazing Clients[®]



Alan Gray, Inc.

The Solution for Insurance and Risk Management Quandaries

Alan H. Gray, Founder and Executive V.P.

The Alan Gray, Inc. (AGI) organization does not sell insurance, but it is a storehouse of insurance-related expertise. That is why insurance

companies, self-insured companies, reinsurers, financial institutions, law firms, brokers and professional service providers who work with insurance all look to AGI for guidance and assistance.

“What we really do is gather facts and perform analysis so that our clients can make the best business decisions possible. Our aim in providing any service is to improve the client's bottom line,” says Al Gray, Founder and Executive V.P. of Alan Gray, Inc.

In fact, he can point to many instances where AGI has dramatically improved the bottom line for clients through professional investigation, auditing, management, processing, handling or forecasting of insurance or reinsurance claims. For example, AGI has produced:

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HSR Update

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In 1978, the Hart-Scott-Rodino Premerger Notification Program (the HSR) became effective, requiring that certain proposed acquisitions of voting securities or assets be reported to the Federal Trade Commission (FTC) and the Department of Justice (DOJ) prior to closing.

What transactions are required to be reported? While the rules for calculating these amounts are complex, generally if assets or voting securities valued at greater than \$63.4 million are transferred (including transfers over time) between parties, one of which has assets or sales of greater than \$126.9 million and one of which has assets or sales of greater than \$12.7 million, then the transaction is reportable. If the size of the transaction is greater than \$253.7 million, it must be reported regardless of the size of the parties. The assets of the "parties" are those of the "ultimate parent entity" and all subsidiaries of the party, and may be an individual. These thresholds reset annually based on changes in the gross national product. Certain transactions such as acquisitions of assets in the ordinary course of business (such as inventory and equipment) and certain acquisitions of real estate may be exempt from reporting.

If reportable, prior to closing the transaction, both the buyer and the seller must complete and file with the FTC and the DOJ the Notification and Report Form (the "Form") and the buyer must pay a fee ranging from \$45,000 to \$280,000, depending on the size of the deal. The Form requires that the parties report information regarding their finances, their goods and services, and the proposed transaction in order to help the FTC and the DOJ evaluate the antitrust

implications of the deal. Notably, the Form requires that the parties submit "all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s)...for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets....". The government defines the scope of this requirement quite broadly. When preparing such documents prior to an acquisition, buyers and sellers should be cognizant of the fact that copies of these materials must be submitted to the government with the Form. Failure to submit required documents can result in substantial fines.

Once each party has filed completed forms they must wait 15 days before closing a cash tender offer and certain acquisitions under bankruptcy law or 30 days before closing other transactions. The parties may request early termination of the waiting period, and upon notification from the DOJ or the FTC that such request has been granted, the time period may be shorter (typically, around two weeks). These periods can be extended if the government requests additional information from the parties. It is important that in the acquisition agreement (a copy of which must be submitted with the Form), the closing of the transaction is made contingent on the expiration or early termination of the waiting period. Care must also be given in drafting provisions in the agreement giving the buyer control over actions of the seller prior to closing such as "ordinary course of business" covenants in merger or acquisition agreements. The DOJ and FTC can take the position that a buyer's review of, or consent to, activities of the seller in the ordinary course of business constitutes a de facto transfer of beneficial ownership of the seller prior to expiration of the HSR waiting period in violation of the HSR Act.

In sum then, anyone planning an acquisition of assets or voting securities which may meet the requirements of the HSR Act, must consider the implications of the required filing, both as to the timing and structure of the transaction. ☺☺☺

Won't Get Fooled Again: New Investor Protection Law

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In the wake of the historic melt-down of the economy, Congress is close to adopting legislation to restructure the financial services regulatory system. The Wall Street Reform and Consumer Protection Act of 2009 was approved by the U.S. House of Representatives in December, but it has been harshly criticized from both the right and the left as being too much and too little. Details are still being negotiated in the Senate. Exactly how the new law will work, and whether it will prevent future financial collapse, remains to be seen as Congress grapples with reconciling the different parallel bills.

Meet the New Boss

Under the House legislation a "systematic risk regulator" -- called the Federal Stability Oversight Council -- will be created. The Council, which is intended to monitor the marketplace to identify threats to the stability of the financial system, would be chaired by the Secretary

of the Treasury and consist of the top financial regulators, including the heads of the Federal Reserve Board, SEC, FDIC, Federal Housing Finance Commission, and the Consumer Finance Protection Agency. The Council will be responsible for advising Congress on financial regulations and for making recommendations to enhance the integrity and stability of the financial markets. These goals are laudatory and non-controversial, but are already being provided under the current regulatory regime. The only certain change that can be expected now will be an increase in reporting and regulatory requirements.

Ain't Nothing But A Watchdog: Consumer Financial Protection Agency

One of the more controversial aspects of the legislation is the creation of a Consumer Financial Protection Agency (CFPA). The CFPA's goal is to "seek to promote transparency, simplicity, fairness, accountability and equal access in the market for consumer financial products and services." The Agency would also have authority to take action to prevent unfair, deceptive or abusive practices in connection with financial products, including mortgages and credit cards.

The CFPA mirrors the responsibilities of other agencies regulating consumer financial products and services. Nevertheless, financial

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The Solution for Insurance and Risk Management Quandaries

Alan Gray, Inc.

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- Forensic accounting audit on behalf of an international financial services company to quantify a misappropriation of funds resulting in the discovery of more than \$100 million in misappropriated funds, leading to a substantial recovery and prosecution.
- A successful reconstruction of reinsurance claims that had been overlooked for a three-year period, leading to the collection of more than \$7 million for AGI's property and casualty insurer client.
- An account reconciliation of payments made, leading to the collection of \$4 million in deductibles from an insured for claims that were mistakenly reported as being subject to aggregation rather than treated as per claim deductibles.
- A review of \$25 million in legal invoices relating to asbestos liability claims, resulting in a recommended reduction in billings of more than 23 percent.

With results like that, it is hardly surprising that clients look to AGI for a wide array of services, including: *actuarial services* to set reserves and provide accurate cash flow projections; *business technology services* to develop real-time reporting of claims or automated legal invoice review; *claims auditing services* to help clients accurately evaluate exposures and reduce claim costs; *commercial premium and deductible collection services* to help clients improve cash flow and reduce collection costs; *forensic accounting services* for discovery of fraud, embezzlement or irregularities; *investigative services*, including interviews of witnesses and claimants, procurement of medical reports and producing photos or diagrams of accident scenes; *legal invoice auditing* to ensure compliance with litigation guidelines and help reduce legal costs; *reinsurance* collections and reconciliations to help improve cash flow and maximize the value of a company's reinsurance assets; *quantitative services* for loss trending and other projections; *third party claims management* for management, evaluation, administration and disposition of claims; and *underwriting or risk management services* related to policy design, account testing and other matters.

With offices in Boston, New York, Hartford, Philadelphia, and London, AGI has also developed an incredible stable of

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clients, ranging from small businesses to Fortune 100 corporations, from regional insurance providers to global insurance and financial services giants.

“Because of the breadth of our experience and knowledge, clients are now looking to us not just for traditional services, but for strategic advice and that is where we see a lot of future growth,” says Gray, noting that the firm now has the capabilities to help insurers and other clients with their merger, acquisition and capital raising strategies.

Looking at this juggernaut company, it is hard to imagine that it consisted



ALAN H.
GRAY

Founder and Executive Vice
President of Alan Gray, Inc.

of just a few dedicated souls when Gray founded it 22 years ago after developing his expertise working for insurance companies involved in general liability, professional liability, auto, workers comp, products liability, toxic torts, mass torts and other areas. “Because of our strong commitment to client satisfaction and quality customer service, we have had a solid and loyal client base that has been willing to move with us and that was extremely important,” Gray recalls, noting that AGI still services the very first client they ever had.

The firm now employs about 85 full time staff members, most of whom are insurance professionals, auditors, CPAs, actuaries and other professionals.

He also credits Mike Ceppi, now the President of Alan Gray, Inc., for being a rainmaker, talent finder and business developer ever since he came to the firm in 1990. “Mike pushed the envelope on growth, but just to the right extent and at the right times,” says Gray.

The veteran insurance expert is quick to point out that the firm has never pushed beyond the capabilities of its people. “Just recently we had a client call us about a need and after careful evaluation of the circumstances we had to tell him that it was not really a good fit for what we do. This is definitely a rare exception, given the wide range of services we provide, but it does happen and I think clients respect it when you admit that you are not the best fit for them,” says Gray.

He adds that the firm has also benefited from a “go lean” movement in the insurance industry. “A lot of companies cut back and no longer had sufficient staff or expertise to handle their auditing, claims, actuarial, accounting or other functions,” Gray says, pointing out that many incredibly experienced professionals have joined the firm as a result of seismic shifting in the industry.

“Because of our experienced staff, clients know that we won’t take missteps and we will get results in adversarial settings while preserving critical relationships among brokers, insurers, insureds and law firms,” says Gray, noting that “it is not unusual for us to conduct an audit and later have the audited firm call us for assistance on an unrelated project, due in large part to our professional approach to conducting business.” He says that each matter the firm handles is a chance to live up to its motto of “expertise, integrity and results.”

Gray also attributes a measure of AGI’s success to the firm’s outside legal counsel, noting that Richard G. “Rick” Pichette of Burns & Levinson has represented AGI for more than 15 years. “He brings to us what we try to bring to clients. He is experienced, reliable and responsive. He finds a way to get things done, or he finds the right colleague in the firm and produces results,” Gray asserts. ■■■

- John O. Cunningham, freelance writer/editor

Won't Get Fooled Again: New Investor Protection Law

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institutions are strongly opposed to this portion of the legislation. This new financial consumer watchdog agency is one of the obstacles to a compromise in Congress. In a concession to Republicans, the current Senate bill would allow other regulators to overturn proposed CFPB rules, and would place the CFPB within the Federal Reserve.

Working for Who?

Stockbrokers and Investment Advisors

The new law will impose additional disclosure requirements on broker/dealers and investment advisors, and will codify a fiduciary duty standard. In the past, investment firms and broker/dealers could defend against lawsuits by asserting that they were not subject to a fiduciary duty to investors, in spite of marketing their services to be in the best interest of the customer.

Under the new law, every broker/dealer and investment advisor providing personalized investment advice will owe a fiduciary duty to act in the best interest of the customer. Perhaps the most shocking thing about this concept is that it is considered "new".

The Change It Had to Come: Securities Arbitration

Most investors do not realize that when they open an account with any of the major brokerage firms, the account opening forms include a mandatory arbitration provision. This provision waives the investor's right to go to court and requires binding arbitration in a securities industry controlled forum, in the event of any dispute regarding the investor's account. Congress has finally realized that such arbitration provisions have unfairly restricted the ability of defrauded investors to seek redress in the courts for wrongdoing by investment advisors and brokerage firms.

However, while recognizing the inequity of the securities arbitration system, Congress failed to take the necessary corrective action of prohibiting mandatory securities arbitration. Instead, Congress passed the buck to the SEC on this critical issue. Under the new law, the SEC would have the power to restrict or even prohibit broker/dealers' and investment advisors' use of mandatory arbitration contracts. It is unclear how the SEC will deal with this issue.

Risky Business: Hedge Funds and Collateralized Investments

The new law will greatly expand regulation of hedge funds and private equity funds, which are currently not subject to the same standards as banks and mutual funds. The past exemption allowed private funds to operate largely outside of the financial regulatory system because their investors were supposedly more sophisticated and required less protection.

The new law also adds some protection in the sale of asset-backed securities, such as mortgage-backed securities, which have been exposed in the past as frequently not backed by assets of adequate value. Under the new law, companies that sell collateralized securities will be required to retain at least 5% of the securities themselves. The hope is that the new law will ensure that financial institutions that sell these products are not selling collateralized garbage to the public.

Conclusion

Many observers believe that Congressional Democrats may have pushed the limits of their power with the health care bill, and therefore will have to scale back some of the more controversial aspects of the financial reform legislation. The proposed Consumer Financial Protection Agency is already being eyed as a target, perhaps to be decimated if not eliminated entirely. ❧

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to internet and interactive media, but the new media-created wrinkles to traditional marketing styles have challenged the application of existing laws. Specifically, the new "buzz marketing" and the ability for "word of mouth" endorsements to "go viral", caused some zealous marketers to encourage corporate employees to blog about products without disclosing the employee relationship. Similarly, advertisers sought to pay celebrities to mention products on Twitter®, and to set up what appear to be grass roots-created Facebook® pages about products rather than disclose corporate sponsorship. These activities lead some commentators and consumer rights advocates to question whether corporate marketing participation in social networks was potentially misleading to consumers. As a result, the FTC recently revamped its guidelines for online marketing to attempt to curb some of the more misleading activities.

Under the FTC's new guidelines, which went into effect on December 1, 2009, bloggers who discuss products or services in exchange for money or other compensation must disclose that relationship in the blog. Additionally, celebrities who engage in product endorsements also must disclose if they benefit financially from a relationship with the producer of the product. Interestingly, the new rules also clarify that celebrities can be held personally liable if their paid endorsements are misleading or deceptive.

Enforcement of these new guidelines can result in the imposition of fines of up to \$16,000. However, the FTC has also stated that its intention is not to chase down every blog, rather the blog or posting would probably also have to be misleading or deceptive in some way, in addition to a failure to disclose the corporate relationship before the FTC would investigate. That said, corporate marketers would do well to ensure that its paid bloggers and word of mouth marketers disclose relationships while blogging.

In short, online and interactive marketing techniques, including contests and sweepstakes, are replete with potential legal pitfalls, including those discussed above. Marketers would do well to seek legal review of their practices in order to avoid the potential for significant exposure. ❧

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Focus

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