

Time To Review Your Company's Consumer Disclosures?

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A series of recent federal court decisions highlight the importance of making sure your company's online consumer disclosures are robust and accurate. If done properly, they just might help you avoid a class-action lawsuit.

In ***Berry v. Webloyalty.com, Inc.***, the court dismissed a putative nationwide consumer class action, concluding that the company's business practices were not unfair or misleading as a matter of law because of the company's disclosures. Slip Opinion, No. 10-1358 (S.D. Cal. Apr. 11, 2011).

The case involved "**post-transaction marketing**," the practice of presenting a consumer with an offer from a third party after the primary transaction has been completed. This type of marketing generally involves a data-sharing arrangement, where the company completing the primary transaction passes data to a second company for marketing purposes. After the consumer takes some further action (e.g., entering an email address, checking a box and clicking "yes"), the second company charges the consumer for a new product or service using the payment information provided to the first company.

This practice has been criticized by certain legislators and officials at the Federal Trade Commission. Last December, Congress passed and the President signed the **Restore Online Shoppers' Confidence Act** into law, targeting online post-transaction marketing; the law now requires additional disclosures to be made and prohibits third-party sellers from charging consumers for goods or services without the consumer's express consent and from receiving certain financial information obtained during the initial transaction.

Notwithstanding any public debate over the propriety of these marketing practices, several federal courts have granted motions to dismiss in post-transaction marketing cases based on the companies' disclosures. The most recent example is *Berry*, where the court took judicial notice of the company's disclosures and ultimately dismissed the case, concluding that no reasonable consumer could have been misled, given the disclosures that were made.

After reviewing the online disclosures and terms of service, the court in *Berry* held that "the explicit and repeated disclosures that defendants made in their enrollment page suffices to defeat" all of the

plaintiffs' claims, including fraud, invasion of privacy and violations of the Electronic Communications Privacy Act, Electronic Funds Transfer Act and California's Unfair Competition Law. Slip Op'n at 9. The court explained that by completing his transaction after receiving such disclosures, plaintiff had consented to the conduct about which he complained. *Id.* Although the plaintiff claimed he did not understand he would be charged for the third party's product (here a membership club providing discounts on products and services), the court emphasized that the enrollment page disclosed more than five times that, by signing up, plaintiff would be charged \$12 per month after an initial thirty-day trial period. *Id.* at 10.

Based on these disclosures, the court granted the defendants' motion to dismiss, thus ending the case and potentially saving the companies millions in discovery costs and other expenditures.

Other federal courts have reached similar conclusions. In ***Baxter v. Intelius, Inc.***, No. 09-1031, (C.D. Cal. Sept. 16 2010), the court granted a motion to dismiss, concluding that "[t]he disclosures combined with the affirmative steps for acceptance are sufficient that, as a matter of law, the webpage is not deceptive." Similarly, in ***In re Vistaprint, Marketing and Sales Practices Litigation***, No. 08-1994 (S.D. Tex. Aug. 31, 2009), *aff'd*, No. 09-20648 (5th Cir. Aug. 23, 2010), the court held that a "consumer cannot decline to read clear and easily understandable terms that are provided on the same webpage in close proximity to the location where the consumer indicates his agreement to those terms and then claim that the webpage, which the consumer has failed to read, is deceptive."

A key factor in each of these cases was the courts' willingness to examine the company's online disclosures in connection with a motion to dismiss. In each case, the plaintiffs opposed any review of the disclosures, arguing that they were outside the four corners of the complaint and may not be authentic. In *Baxter* and *Vistaprint*, the court rejected the argument because plaintiffs came forward with nothing to challenge the authenticity of the disclosures. In *Berry*, the court took the extraordinary step of allowing discovery on the authenticity and accuracy of the disclosures before ruling on the motion to dismiss. When the plaintiffs were unable to offer any evidence that the disclosures were not authentic, the court considered them in connection with the motion to dismiss and granted the motion.

These cases highlight two strategies that could help your company reduce the risk of class-action lawsuits.

First, the cases demonstrate that, even for controversial business practices, robust consumer disclosures may provide an effective defense against a consumer class-action lawsuit.

Action Step: Consider conducting a comprehensive review of your company's consumer disclosures to evaluate whether your company is adequately protected and in compliance with existing law.

Second, the cases demonstrate the importance of being able to provide a court with accurate copies of the disclosures individual consumers saw and in a form that is subject to judicial notice in connection with a motion to dismiss.

Litigating a class action can be incredibly expensive and risky. One effective way to mitigate the risk is to have a strategy for defeating them at the earliest stages of the case, preferably on a motion to dismiss. But if you cannot provide accurate copies of the actual disclosures made to the named plaintiff, the court may be unwilling to consider them on a motion to dismiss and you may have lost

one of your company's most effective weapons against class actions.

Action Step: Consider reviewing your company's systems for documenting consumer transactions to ensure you can provide accurate copies of consumer disclosures for any given transaction.

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