

Morgan Lewis

AUTOMOTIVE ADVERTISING & MARKETING

**CHALLENGES PROMOTING INNOVATION
WITH EVOLVING TECHNOLOGIES**

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Morgan Lewis Automotive Hour Webinar Series

Automotive industry focused webinars led by members of the Morgan Lewis global automotive team. The 10-part 2018 program provided a comprehensive overview on a variety of automotive industry topics.

The Morgan Lewis Automotive Hour webinar series is a monthly program. The schedule for 2019 programs will be released shortly and posted on our website at <https://www.morganlewis.com/events/automotivehour> shortly.

SECTION 01

INTRODUCTIONS



Presenters



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SECTION 02

**SUBSTANTIATION/
DISCLOSURE IN
ADVERTISING AND
MARKETING**



Regulatory Framework

- Unfair, deceptive or false advertising enforcement actions or lawsuits may be initiated by the FTC, State Attorneys General, competitors and consumers
- The FTC has been more active in addressing manufacturer/distributor advertising and marketing (whereas state – and joint federal and state – efforts have focused on dealer advertising)



Regulatory Framework

- **Federal Trade Commission Act** (enforced by the Federal Trade Commission (FTC))
 - Prohibits unfair or deceptive acts or practices
 - Prohibits disseminating a false advertisement for the purpose of inducing, or one that is likely to induce, purchase
- **State Unfair Trade Practice Statutes**
 - Regulation of Business Practice and Consumer Protection Act, Mass. Gen. Laws Ch. 93A
 - California Business & Professions Code, § 17200
 - New York General Business Law - Deceptive Acts and Practices, § 349

Failure to Have Substantiation for Claim is Deceptive

“[F]ailure to possess and rely upon a reasonable basis for objective claims constitutes an unfair and deceptive act or practice in violation of ... the Federal Trade Commission Act.”
49 Fed. Reg. 30,999 (FTC Aug 2, 1984), *reprinted in* 6 Trade Reg. Rep. (CCH) ¶ 39,060

- Reasonable basis for all express **and implied** claims (*See American Home Prods. Corp. v. FTC*, 695 F.2d 681, 693 (3d Cir. 1982))
 - *i.e.*, attributes, performance, safety or efficacy

Failure to Have Substantiation for Claim is Deceptive

- **Safety & Efficacy Claims** – competent and reliable scientific evidence, *i.e.*, tests, analyses, research, studies or other evidence based on *expertise of professionals* in the area that have been conducted and evaluated in an *objective manner* by *qualified persons* using *procedures generally accepted in the profession* to yield accurate and reliable results (*See Novartis AG*, 127 F.T.C. 580, 670 (1996), *aff'd* 223 F.3d 783 (D.C. Cir. 1996))
 - *i.e.*, Firestone tires “stop 25% quicker” (*Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 450, 451 (1972), *aff'd*, 481 F.2d 246 (6th Cir. 1973))

Failure to Disclose Material Facts is Deceptive

- **Silence** can contribute to incorrect impression
 - *i.e.*, failure to disclose qualifying information necessary to prevent claim, representation or reasonable expectation or belief from being misleading (FTC, Policy Statement on Deception (1983), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,205), appended to Cliffdale Assocs, 103 F.T.C. 110, 176-77(1984))
- Disclosures must be ***clear and conspicuous***

Failure to Disclose Material Facts is Deceptive

- “[R]eadable [or audible] to a reasonable consumer”
(*See, e.g.,* Consent Order, Automobile Leasing Cases, No. C-3710 (FTC Feb. 11, 1997))
 - **Proximity and placement:** same screen, no scrolling
 - **Prominence:** size, color, graphics
 - **Distracting factors in ads:** graphics, sounds
 - **Repetition**
 - **Multimedia messages and campaign:** no fleeting messages, consider variety of media
 - **Understandable language**
- **Disclosures should not contravene the ultimate message**

Recent Automotive Enforcement Issues

Recent Enforcement Has Included Claims Related to:

- MPG statements
- Emissions/environmental qualities
- Performance capabilities/vehicle attributes
- Comparative quality
- Warranty coverage and exclusions



Overview of Evolving Disclosure and Disclaimer Issues

- Concept cars and their capabilities
- Autonomous and connected vehicle capability/functionality/availability
- Electric vehicle capabilities/distance capacity/environmental impact
- Warranties regarding developing technologies vs. other elements of vehicle coverage
- Vehicle options, accessories and compatibility



SECTION 03

SOCIAL MEDIA



Social Media: Sources of Guidance

- **The FTC Endorsement Guides**
 - Best practices for ensuring that endorsements in advertising comply with FTC Act, § 5
 - Updated in 2009 in light of current marketing techniques (blogging, social media, etc.)
- **Native Advertising Guidance**
 - FTC’s 2015 Policy Statement on Deceptively Formatted Advertisements
 - FTC’s *Native Advertising: A Guide for Businesses* (2015)
- ***.Com Disclosures: How to Make Effective Disclosures in Digital Advertising***
 - FTC’s 2013 guidance for mobile and other online advertisers; describes how to make disclosures clear and conspicuous in the digital context
 - Addresses the expanding use of smartphones and the rise of social media marketing

The FTC Endorsement Guides

- Endorsement: “any advertising message...that consumers are likely to believe the reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by the party are identical to those of the sponsoring advertiser.”
- Endorsements in social media appear on blogs, online forums, Facebook, Twitter, Instagram, YouTube, etc.
- **Endorsements must:**
 - Be honest and not misleading
 - Clearly and conspicuously disclose any connection between an endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., endorser was paid, is an employee of sponsor, or was paid)

Native Advertising Guidance

- “Native advertising” or “sponsored content” are advertisements whose format may prevent consumers from identifying them as advertisements
- More prevalent with the emergence of social media and includes:
 - Online ads formatted to match the style, layout and behavior of the non-advertisement content into which it is integrated
 - Paid endorsements in user-generated social media (Instagram, YouTube, Facebook, etc.)
 - Search results and email
- Best practices:
 - Include disclosures regarding the ad’s commercial nature
 - Disclosures should be easily understood, prominent, and placed near the ad’s focal point

.Com Disclosures: How to Make Effective Disclosures in Digital Advertising

- Key message: consumer protection laws apply equally to all marketers across all mediums, whether delivered on a desktop computer, mobile device, or more traditional media such as television, radio, or print.
- Provides specific standards for making disclosures in digital advertising; important to consult the guide.
- General standards:
 - Clear and conspicuous (proximity & placement; no blockable pop-ups)
 - Prominence (size, color, layout)
 - Repetition (throughout site, video, audio)
 - All devices and platforms: if a disclosure cannot be made clearly and conspicuously on a particular device or platform, that device or platform should not be used.

Advertising & Social Media: Key Best Practices

- Review the .Com Disclosures guide and other FTC guidance
- Implement policies for endorsements and disclosures in accordance with FTC guidance
- Establish a program for training internal website team, external marketing vendors, and external influencers/endorsers
 - Training should include:
 - What endorsers can and cannot say
 - Instruction regarding responsibility for disclosure of connection to you
 - Disclosure requirements and consistent messaging requirements
 - Provision of specific language and content for, at a minimum, key topics (e.g., autonomous and connected capabilities; electric vehicle charging capacity and travel distances; crash protection and avoidance)
 - Conduct routine audits and searches of endorsements and disclosures

SECTION 04

THE MAGNUSON-MOSS WARRANTY ACT



Requirements of the Magnuson-Moss Warranty Act

The Magnuson-Moss Warranty Act and the relevant rules promulgated by the FTC establish three basic requirements for warrantors:

1. A warrantor must designate its warranty as either “full” or “limited.”
2. A warrantor must provide certain specified information about the coverage of its warranty in a simple, clear, and easy-to-read document.
3. A warrantor must ensure that warranties are available where its products are sold so that consumers can read them before buying.

See 15 U.S.C. § 2302–3.

Requirements of the Magnuson-Moss Warranty Act

“Full” or “Limited” Warranty?

A warrantor may choose to offer a full or a limited warranty.



Requirements of the Magnuson-Moss Warranty Act

A warranty is “full” if it meets the following conditions:

1. There is no limitation on the duration of limited warranties.
2. Warranty service is provided to anyone who owns the product during the warranty period (not limited to first purchasers).
3. Warranty service is provided, within a reasonable time, free of charge.
4. At the consumer’s choice, either a replacement or a full refund is provided if, after a reasonable number of attempts, a defect or malfunction cannot be remedied.
5. Consumers need not perform any duty as a precondition for receiving service except providing notice that service is needed, unless the warrantor shows that the duty is demonstrably reasonable.

If any of these conditions is not met, then the warranty is “limited.”

See 15 U.S.C. § 2304; 16 C.F.R. § 700.6.

Prohibitions of the Magnuson-Moss Warranty Act

There are three primary prohibitions under the Magnuson-Moss Warranty Act.

They involve:

1. Implied warranty disclaimers or modifications;
2. Tie-in sales provisions; and
3. Deceptive or misleading warranty terms.

Prohibitions of the Magnuson-Moss Warranty Act

1. Disclaimer or Modification of Implied Warranties

- The Magnuson-Moss Warranty Act prohibits anyone who offers a written warranty from disclaiming or modifying implied warranties.
- Thus, no matter how broad or narrow the written warranty is, customers will receive the basic protection of the ***Implied Warranty of Merchantability***.
- There is only one permissible of modification of an implied warranty: If a “limited” warranty is offered, the duration of implied warranties may be limited to the duration of the limited warranty.

See 15 U.S.C. § 2308.

Prohibitions of the Magnuson-Moss Warranty Act

2. Tie-in sales provisions generally are not allowed.

Under the Magnuson-Moss Warranty Act and the applicable FTC rules, a warrantor may not condition (explicitly or implicitly) the continued validity of a warranty on the use of only authorized repair services and/or authorized replacement parts for non-warranty service and maintenance.

Exception: A warrantor may require a consumer to use select items or services if:

- (a) they are ***provided free of charge*** under the warranty or
- (b) the warrantor obtained a waiver from the FTC by proving to the product will not work properly without a specified item or service.

Prohibitions of the Magnuson-Moss Warranty Act

It ***is*** permissible to (i) disclaim warranty coverage for defects or damage caused by the use of parts or service not provided by the warrantor and (ii) deny liability where the warrantor can demonstrate that the defect or damage was so caused.

See 15 U.S.C. § 2302(c); 16 C.F.R. § 700.10.

Prohibitions of the Magnuson-Moss Warranty Act

3. Warranties may not contain deceptive or misleading terms.

A warranty is deceptive if it:

- a) contains any representation which is either false or fraudulent, or which, in light of all of the circumstances, would mislead a reasonable individual exercising due care;
- b) fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or
- c) uses terms such as “guaranty” or “warranty,” if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

See 15 U.S.C. § 2310(c)(2); see also 16 C.F.R. § 239.1 et seq.

Dispute Resolution Under the Magnuson-Moss Warranty Act

The Magnuson-Moss Warranty Act contains two important provisions regarding the resolution of customer disputes.

1. The Act makes it easier for consumers to take an unresolved warranty problem to court.

How? The Act (a) makes breach of warranty a violation of federal law and (b) allows consumers to recover court costs and reasonable attorney's fees.

2. The Act encourages companies to use a less formal, and therefore less costly, alternative to legal proceedings.

How? The Act allows warrantors to include a warranty provision that requires customers to attempt to resolve warranty disputes through an informal dispute resolution mechanism before going to court.

See 15 U.S.C. § 2310(a), (d).

Advertising Warranties

The Magnuson-Moss Warranty Act does not cover the advertising of warranties.

However, warranty advertising falls within the scope of the FTC Act, which generally prohibits “unfair or deceptive acts or practices in or affecting commerce.”

Therefore, it is a violation of the FTC Act to advertise a warranty deceptively.

The FTC has issued guidelines called the Guides for Advertising Warranties and Guarantees.

- Advertisements regarding warranties may not be deceptive or misleading.
- If the terms of a warranty are described in an advertisement, material limitations must also be disclosed.

See 15 U.S.C. § 45; 16 C.F.R. § 239.1 et seq.

Key Upcoming Challenges

- High voltage electric equipment—impact on warranty coverage periods, tie-ins and exclusions
- Sensors, software and other elements of connected and autonomous technology—warranty coverage periods, interoperability and exclusion issues, tie-ins
- Clarification of scope of exclusions and potential impact of the use of non-interoperable parts, attempts at electric componentry repair
- Maintenance requirements for emerging and evolving technology and its impact on warranty coverage—oil changes may no longer be a meaningful metric

SECTION 05

FINANCIAL DISCLOSURES



Methods of “Ownership”

- Installment Contract
- Direct Loan
- Lease
- Rental
- Subscriptions and Other Evolving Models



Emerging Technology Financing Disclosures

- **No Major Shift in Obligations**
 - Auto finance disclosures should not experience a qualitative shift for traditional ownership models even as vehicle technologies become more complex.
 - In particular, auto financing arrangements will need to ensure continued compliance with all applicable laws (e.g., Truth in Lending Act/Regulation Z, Consumer Leasing Act/Regulation M).
- **Disclosures in Subscription and Other Novel Models**
 - Find the closest analogue and adjust.
 - New procedures may be necessary if companies decide to participate in the subscription model service.
 - Whatever the model, some laws will still apply (e.g., use of a consumer report when determining whether to “rent” to consumer).

Emerging Technology Financing Disclosures

- **Risk Management Considerations**

- Focus on the key objectives behind the disclosure laws.
- Recognize technology-related carve-outs.
- Exercise caution with expanding universes of optional products.
- Do customers understand the ownership model?
- Can customers compare prices within and across ownership models?
- What might surprise customers as they pay for the vehicle?

Subscription Model

- **Multiple Interested Parties**
 - We expect there to be continuing pressure from multiple parties concerning the use of alternative ownership models in the future.
- **State Restrictions**
 - At least one state, Indiana, has restricted the use of subscription models for the near term by legislation.
 - Expect additional states to consider legislation in the future.
- **Monitoring Required**
 - Companies offering subscription services should actively monitor state developments to ensure they do not inadvertently run afoul of state requirements.

Financing of Ancillary Products

- **Scrutiny of Add-Ons**

- If emerging technology leads to new ancillary products that are financed (e.g., Battery Warranty), such products could be subject to increased scrutiny from regulators.
- Any ancillary product which is financed could potentially bring the product under review by the CFPB.
- The FTC has stated that they are interested in sales tactics concerning ancillary products.

- **Company Response**

- Auto Finance companies should be prepared to implement policies and procedures to ensure that new ancillary products have a tangible value for the consumer.
- For example, we are aware of at least one regulator who requested that an auto finance company analyze price trends of ancillary products.

QUESTIONS?



THANK YOU

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