July 01, 2017

ARTICLE

Hot Topics in Misleading Advertising

Introduction

The *Competition Act* — Canada's principal competition/antitrust law statute — contains both general and specific, civil and criminal prohibitions against false or misleading advertising. The Act, including the deceptive marketing provisions, is administered and enforced by the Competition Bureau, an independent law enforcement agency headed by the Commissioner of Competition. In its 2015-2018 Strategic Vision, outlining the agency's enforcement objectives over the next three years, the Bureau identifies "empower[ing] Canadians to make more informed purchasing decisions" by "ensuring consumers have access to accurate information, and benefit from a wide range of products and services at competitive prices" as a key priority. The Bureau has settled 13 misleading advertising cases by way of consent agreement in the last two years, has another enforcement proceeding pending before the Competition Tribunal and ongoing misleading advertising litigation before the Ontario Superior Court of Justice. The penalties imposed in these cases have been significant, ranging up to $15 million, and in a number of instances there has been follow-on class action litigation for damages. The Strategic Vision promises (at least) more of the same. Advertisers should expect continued aggressive enforcement activity by the Bureau targeting false or misleading representations and deceptive marketing practices in Internet advertising, social media, promotional emails, text messages and in the traditional media, and should review and improve their competition compliance programs, as appropriate.

Ordinary Price Claims

A major focus of the Bureau in recent years has been ordinary selling price claims, which are addressed by specific provisions in the *Competition Act* which mandate that representations about the ordinary selling price of a product (*e.g.*, regularly $19.99, now $9.99) accurately reflect the price at which the product has been sold or offered for sale. The basic rule is that the claimed ordinary selling price must reflect (i) the price at or above which more than half of the volume of sales of that product occurred in the past year or (ii) the price at which the product was offered for sale in good faith for more than half of the preceding six months.

In February 2017, the Bureau brought enforcement proceedings against a brick and mortar retailer alleging that its promotion of "sleep sets" (consisting of a mattress and box spring) violated the ordinary price provisions of the Act. In particular, in its application to the Competition Tribunal, the Bureau asserts that the retailer has "engaged in deceptive marketing practices by offering sleep sets at grossly inflated regular prices, and then advertising deep discounts off these deceptive regular prices in order to promote the sale of the sleep sets to the public". In one of several examples of illusory savings based on deceptive regular prices cited by the Bureau, the retailer allegedly advertised a $2,000 discount off the regular price of a product that it had never sold at the regular price prior to making the discount claim. The hearing of this matter is scheduled to start in November 2018.

Earlier in the year, a major online retailer entered into a consent agreement with the Bureau pursuant to which it agreed to (among other things) pay an administrative monetary penalty of $1 million, plus $100,000 in costs, again based on alleged violations of the ordinary price claim provisions of the Act. The retailer had made representations on its website that compared its selling prices for certain products to their regular prices — or "list prices" — (*e.g.*, "List Price: C$39.99, Price: C$29.99"). As noted in the Bureau's position statement in respect of this matter, "[t]hese pricing representations were often accompanied by specific 'You Save' claims that set out a dollar amount of savings and a percentage discount off of the list price, such as 'You Save: C$10.00 (25%)'". In making these representations, the retailer relied upon the regular prices provided to it by the suppliers of these products. Although the Bureau found that the retailer required its suppliers to provide accurate prices and had honestly relied upon the accuracy of the regular prices provided to it, the Bureau concluded that the savings representations made by the retailer "did not accurately reflect the savings available to consumers" based on the prevailing market prices for the products in question.

Given the ubiquity of price claims, the complexity of the ordinary selling price rules, and the current highly competitive and fast-paced retail environment, it is essential for retailers to have a dynamic and flexible corporate compliance program in place to ensure their ongoing adherence to the *Competition Act*. A "set-it-and-forget-it" approach to compliance in this area is simply not an option, particularly given that promotional decisions are often made on short notice, in response to quickly changing market conditions.

Disclosure of Non-Optional Fees

Another Bureau priority is to ensure that the advertised price of a product reflects the actual price that consumers can expect to pay, without the addition of any hidden, non-optional fees.

This issue arose most recently in April 2017, when the Bureau reached a consent agreement, including the imposition of a $1.25 million administrative monetary penalty, with two car rental companies. The companies were alleged to have advertised prices for car rentals that were unattainable by consumers, due to the addition of non-optional fees that were not clearly disclosed to consumers and that increased the price of the rentals by 10 to 57% of the base price. The Bureau further alleged that the companies had made percentage-off discount representations that were misleading because the discounts in question were only applied to the advertised base price, and not to the non-optional fees. Finally, the Bureau alleged that the manner in which the non-optional fees were described by the companies conveyed the general impression that they were mandated by the government when, in fact, they were voluntarily imposed by the companies in order to recoup their costs. This consent agreement was preceded by an earlier, $3.25 million settlement reached in June 2016 between the Bureau and two other car rental companies in relation to similar conduct.

Prior to these two recent cases, in July 2013, the Bureau announced that it had commenced a lawsuit against two brick-and-mortar furniture retailers with respect to "buy now, pay later" promotions that involved up-front "administration" and "processing" fees which the Bureau alleged were inadequately disclosed in fine print and inconsistent with the general impression conveyed to customers by the “pay later” messaging. That case is still ongoing.

Improper Use of Disclaimers

The car rental and "buy now, pay later" cases discussed above provide two examples of a final Bureau enforcement priority, related to the improper use of disclaimers. The Bureau's longstanding position on disclaimers has been that, while disclaimers can expand upon and add information to a claim, they cannot be used to counter or "save" an otherwise false or misleading claim under the Act. A good rule of thumb is that, if a claim would be false or misleading if the disclaimer were removed, then it should not be made (even with the disclaimer).

Another recent example of the improper use of disclaimers can be found in a consent agreement from September 2016, between the Bureau and a telecommunications company that made "unlimited" representations in relation to its telephone and Internet services (*e.g.*, "unlimited local calling" and "no caps on downloads"). The Bureau alleged that these representations were false or misleading because, in the case of the "unlimited local calling" claim, consumers were in fact limited to 3,000 minutes per month and, in the case of the "no caps on downloads" claim, consumers' download speeds were significantly slowed after a certain download limit was reached. The Bureau concluded that, although these limits on the company's services were disclosed in disclaimers, the disclaimers were not sufficient to overcome the general impression conveyed by the "unlimited" claims, namely, that the services were "[w]ithout limits or bounds; not restricted, limited, or qualified." Under its consent agreement with the Bureau, the company agreed to pay a $300,000 administrative monetary penalty plus $60,000 in costs.

Takeaways

The Bureau's recent enforcement activity and ongoing priorities hold several important lessons for advertisers:

- Ensure that all advertised "ordinary" prices reflect the price at which products have actually been sold or offered for sale over a significant period of time;
- Develop a dynamic and flexible competition compliance program for adhering to the ordinary selling price rules (and other marketing and advertising strictures in the *Competition Act*), so that you will be able to adjust your pricing strategies on short notice in response to market conditions, without violating the *Competition Act*;
- The advertised price of a product must be the price that customers can actually pay for the product (but for the addition of sales tax);
- Non-optional fees must be clearly disclosed and should not be portrayed as being government-mandated, unless they actually are; and
- Although disclaimers may be used to expand upon and add information to a claim, they cannot be used to counter or "save" an otherwise false or misleading claim.

By: Davit Akman

Services: Competition & Foreign Investment Review
