



Podcast Transcript

AD Nauseum: Negative Opinions – From Wine, to Cookies, to Gyms – Everything You Need to Know

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Brave: Thank you for joining us for another episode of BakerHosts AD Nauseam, a podcast series focusing on new and trending advertising issues with an emphasis on the FTC and the NAD. I'm Leah Brave, and you're listening to BakerHosts.

We are once again joined by Amy Mudge and Daniel Kaufman, two partners from BakerHostetler's Advertising, Marketing, and Digital Media team. Together, they have decades of advertising experience and approach advertising issues from multiple perspectives. And today, they have invited one of their favorite BakerHostetler partners to join the podcast, Linda Goldstein. Linda is also a partner in our Advertising, Marketing, and Digital Media team, and is widely recognized as one of the leading advertising lawyers in the country.

On today's episode of AD Nauseam, Amy, Daniel, and Linda will cover an issue that has been quite a hot topic of late, the marketing of subscription services and negative options. With that, welcome to AD Nauseam, and let's turn it over to Amy, Daniel, and Linda.

Kaufman: And welcome back to AD Nauseam. We have a great episode for you today, a very hot topic, subscription services. And we have a special guest for us today who has lots of thoughts and lots of views and experience handling the marketing of subscription services. I'm really glad to have my partner, Linda Goldstein, here. Linda, it is awesome to have you here today.

Goldstein: Thanks for having me. Glad to be here.

Mudge: Well, Linda, we're never very formal at AD Nauseam, perhaps to the chagrin of the powers that be at BakerHostetler. But we're so glad to have you here. You really, you're absolutely an advertising legend, and we're eager to discuss some of the subtleties and insights that you have to share on negative option advertising. And particularly how it's changed over the years, which you've been following this for some time, and I think the evolution is quite interesting. But before we get to that, I would like to know, Daniel and Linda, what are your favorite and least favorite subscription services that you personally have bought into?

Kaufman: Okay. So, I'll jump in first. So favorite by far, I was at a wedding in Sonoma, maybe six or seven years ago, visited this small winery, signed up for their subscription service and every six months I get a small delivery of six bottles of different kinds of wines, and it is just a great experience. It is a really wonderful winery. I love supporting them and the wine delivery is great also.

The worst by far, so for Mother's Day many years ago, my mom was really hard to get gifts for. I was like, okay, she likes cookies. I will get her a subscription to a cookie delivery service. She hated it. Every month I would get different complaints from her about what was wrong with the cookie of the month. They were too crisp. They were too chewy. They were too chocolatey. So, I would love to get a cookie of the month subscription, but it was a torturous experience for me that full year.

Mudge: Okay. Ding, ding, ding, ding, ding. That was Daniel being posh again, bragging about his wine subscription. And Daniel, I think we all know if I got you a cookie of the month subscription, you would simply say, Amy, take these away. I do not eat cookies. Alright?

Kaufman: Yes. 2023, can't eat them anymore, but...

Mudge: Alright. Well mine, my absolute favorite, maybe not super creative, but Amazon Prime. I can't live my life without it. They probably think I'm a business, the number of boxes that show up. Couldn't have gotten through the pandemic without them. Just think as seismically changed delivery as we know it. So that is a very easy one.

My least favorite is probably that gym membership. I'm not going to say the name on our podcast, but the gym membership I didn't cancel for about two years. Probably the first year and a half was me just feeling guilty and embarrassed that I was not going to the gym and didn't want to fully admit that to myself. But the last six months, that gym made it really, really hard to cancel and kept trying to, are you really sure you want to cancel? And we'll give you this, we'll give you that. And just actually not canceling me, until finally I said, enough is enough. And I have parted ways with that gym. Linda, what about you?

Goldstein: So, I too would say that we have several wine membership subscriptions. And we love it because you do subscriptions because you want to be sure you never run out of whatever it is you're subscribing to. So, that helps us ensure that we're never low on wine in our house, which is a very important goal for us.

My least favorite subscription is similar to yours, Amy, but a little bit different. During the pandemic, I signed up for actually a bunch of on-demand exercise programs. And honestly, I forgot about them because I don't get any notices that they renew. Finally, maybe months after the pandemic, I happened to notice a charge that I didn't recognize. And then I was like, aha, that was that online demand subscription that I never used and totally forgot I had.

Mudge: All this stuff the FTC fusses over, it happens to us. What is that? Celebrities, they're real people too? Maybe it is advertising lawyers. We're real consumers too. I think we certainly live this, and we certainly understand that while there are incredible efficiencies to getting subscription services, as you mentioned, Linda, with your wine. I can't imagine Linda being out of wine, or Daniel for that matter, but there are some practices out there that probably need reining in, and the FTC's been at this for a number of years. Linda, I'm going to turn it over to you to give us that lay of the land.

Goldstein: So, it is interesting. Subscription services have, they've obviously been around a long time. And just to go a little bit down history lane, there actually is a prenotification, negative option rule which was passed years ago to set out best practices for the old record clubs that then became the DVD clubs, where you would get one selection every month and they would notify you of the selection in advance. And if you didn't say you don't want it, it would show up at your door. It

is interesting because that is the rule that the FTC is using today. I know we're going to talk about this more, but that is the rule they're using today to really attack today's versions of negative option, which are the automatic renewals, continuous service, free trial.

So, they've been around for years, but subscription services as we know them today really started to get regulatory attention when ROSCA, the Restore Online Shoppers Confidence Act, was passed in 2010 and provided for civil penalties. What is interesting is, when you actually look at ROSCA, ROSCA's focus initially and the reason it was passed, you can see this if you're a nerd like me and you go and read the legislative history. The main thing Congress was trying to address was transactions at that time where consumers were not providing their credit cards. So, these were called post-transaction marketing ideas. You might, you buy one product, then they'd upsell you another and it could actually be from a third party and the first merchant would just pass on the credit information to the second merchant. So actually, when ROSCA was passed, general subscription programs was not the focus.

So, it was kind of a yawn until the FTC began to enforce ROSCA in 2014. And again, ROSCA wasn't alarming when it passed because the provisions looked pretty simple. Provide notice of the material terms and conditions, get affirmative consent, and have an easy method of cancellation. Seemed pretty basic. But since 2014, in its enforcement actions, the FTC has kind of been rewriting ROSCA. So, through their enforcement actions, through their consent orders, we began to see a pattern where the FTC was interpreting ROSCA to require much more than ROSCA actually stated. And so, when we get to today, and I know we'll talk about this when you see what is in the policy statement and what the FTC is proposing in its current rule, that was all foreshadowed if you followed the enforcement actions that the FTC took. So maybe between 2014 and 2021, where they specified in more detail what the material terms had to be. They then went on to say the material terms have to be disclosed right next to the affirmative method of consent. Then they began their consent orders defining affirmative consent as a check box or something similar. And then the simple method of cancellation became as simple a method of cancellation and has evolved today to something like a one click rule.

Kaufman: Linda, I was just going to point out, it is interesting because the ROSCA passes in 2010, the FTC doesn't bring any cases until 2014, which is quite a long time lag. But the reality, I was at the FTC at the time, of course. The FTC wasn't clamoring, and this is my personal views, for something like ROSCA. Between 13B and pre-AMG and the FTC Act, the FTC was able to bring subscription cases without the use of ROSCA. Now, of course, when Congress passes a statute, they expect you to use it. So, at some point, the FTC did start pleading ROSCA. But with 13B and the FTC Act, the FTC was able to bring these cases.

But things changed dramatically in 2021, when of course, AMG happens and then the FTC is scrambling, looking for other statutes and rules that they can rely upon to get money. And ROSCA, of course, becomes even more important at that point in time because of the authority it gives the agency to get both money

and redress in cases. But you're right. The ROSCA itself is a very simple statute. There's not many words to it. There is no rulemaking authority of the FTC. But over time, we definitely saw the agency magnifying what ROSCA stands for and creating sort of more rigorous expectations of how to comply with those fairly simple terms in ROSCA.

Goldstein: Yeah, and it is also, the other thing that is interesting when you talk about the enforcement history is even early on in many, really, of the cases that they brought, they weren't using the penalty authority under ROSCA. They didn't have to because they had their team B. It is really only when the Supreme Court's decision in AMG wiped out their authority to get money under 13B that the penalty provisions of ROSCA became a very attractive tool for the FTC.

Kaufman: Right. The philosophy at the FTC was always, look, even if you can get penalties if you have a redress theory, redress is first, you get the maximum redress and then usually there was no need for penalties. The world is very different right now, of course. But I was hoping we could turn a little bit to the proposed negative option rule that the FTC put out a few months ago. I know the comment period just closed. There were a huge volume of comments that were filed. But I was wondering, Linda, if you could talk to us a little bit about this proposed rule, what your take is on it.

Goldstein: So, this proposed rule certainly, in my view, goes beyond anything ROSCA ever intended. Some of the provisions are ones I've already mentioned that foreshadowed in some of the enforcement action a very prescriptive requirement for how you have to disclose the material terms and conditions, where you have to disclose the material terms and conditions, meaning in direct proximity to where you get the consent. And then, of course, the requirement that affirmative action be a check box or something similar. But I tell clients if you want to go with the quote-unquote, something similar, you're really doing so at your peril. Because the FTC, at least in my experience, has been very fixated on either wanting a check box or a digital signature. So that is all in there.

I feel like with the proposed rule, they've come a little clean in the sense that they're now putting down on paper the way they've been interpreting ROSCA for the last several years. So, you've got those notice requirements, you've got those consent requirements. But one of the biggest issues and a real challenge for businesses is how far they've gone on cancellation. And I will say that cancellation and sort of the back end, that's been a big issue for the FTC for a number of years. But the proposed rule essentially says that if a consumer wants, is trying to cancel, you cannot try to save the sale unless you get their consent beforehand. And if you think about it from a business standpoint, how can you effectively ask the consumer to consent to what you want to offer them if you can't tell them anything about what they're going to be offered? So, it is a terrible experience for businesses. I think it is an even worse experience, honestly, for consumers because they may be saying no to something that if they had heard about what it was, they might actually be interested in.

So that is a big shift and I think probably the game changer is that they've incorporated into this rule what they articulated in the *MoviePass* case. In that case, the FTC said that if you're advertising something that has a negative option feature and you make any misrepresentation about anything, about the efficacy of the product or the service, that will be a violation of ROSCA. So, if you think about it, and if this goes the way it is currently drafted, the FTC will have found a way to get civil penalties for unsubstantiated product claims. It is the biggest end run on the Supreme Court decision that I think we've seen to date because it will now make any unsubstantiated claim subject to civil penalties.

Mudge: Alright, that is not going to be held up. I just can't imagine. I mean, that is the biggest tail wagging the dog I've ever heard. Are you surprised, Daniel and Linda, that they're even trying this? I mean, this is ballsy.

Kaufman: I mean it, no, it is definitely ballsy. Look, the next step in the rule making process, I think there will be informal hearings, they have not scheduled them yet. Maybe end of this year, early next year. But I have a feeling the agency was a little surprised at the volume of comments they got and the huge concerns that industry is raising about some of these provisions. I think there will be these hearings coming up in the future where a lot of these issues will be raised. But now, Amy, we've been talking a lot about the FTC. I want to know, what are you hearing and what are we hearing from NAD on this issue?

Mudge: You know NAD really likes to get in the game of anything that is kind of hot and topical. And so, we have seen a rash of pretty recent subscription cases, largely monitoring cases, that they brought in the last year or two. But just like Linda said, the FTC has been involved in this for a number of years and so has the NAD. Back in 2005, they brought a case, actually, a consumer initiated a case, over the subscription flow for Sports Illustrated and they said that it wasn't clear that a person was signing up for a subscription that would automatically renew at the end of the six months or at the end of the year. And NAD agreed and said that the, had to be more clear and conspicuous that the automatic renewal element was a material term and that it be upfront. And then about 2017 there was *Fabletics* case. I think that was a pretty complicated situation. That was a case involving you could just buy some Fabletics stuff, or you could buy it at a significant discount and also sign up for a VIP membership. That was sort of fashionable for a little bit and that, the FTC said, was too confusing, that also those are material terms. If you're signing up for an ongoing subscription, then that really has to be upfront. But more recently the NAD brought a case against Blue Apron, the meal subscription service, and there was even a more recent case involving another meal service company, and most recently they brought a case involving a newspaper subscription.

But what was interesting to me in these more recent cases is the NAD was clear to say, look, we don't have jurisdiction to enforce ROSCA, that is not our jam, that is the purview of the FTC but NAD, we are in the position to make sure that consumers are, that the advertising is clear and that the material terms are right up front and understandable. Most of these cases were surrounding the right of cancellation Linda talked about, and even though ROSCA requires that there be

an easy method of cancellation and some of the other laws are requiring that that method be online, how the NAD got to that was to say there are promises that it is easy to cancel. Cancel anytime. Cancel when you want. That those are affirmative advertising claims, and the NAD said that unless there was an online method of cancellation that that wasn't easy or clear or any time. Which I found was kind of a back ended way at getting to this notion, but they certainly did. And one of the other things I want to probe with you, maybe we'll end on this, Linda and Daniel, one of the other things that the NAD highlighted was in the Dark Patterns Report that the FTC issued. One example of a dark pattern the FTC gave was when there is not an online method of cancellation. To my mind, that does not ring true. That a dark pattern is not the absence of a cancel button, but what do you think about that?

Goldstein: I mean, I agree with you, Amy. I mean, the FTC has defined a dark pattern as a user interface that is designed to force consumers actually to take action that they otherwise might not take. Like giving up...

Mudge: Mm-hmm.

Goldstein: ...personal information or entering into a transaction. So, if you don't have a user interface at all, I don't see how you can have a dark pattern. But I'm not surprised at this because the FTC, at least, has been using the term dark pattern now as a wide bucket into which they kind of put anything...

Mudge: Mm-hmm.

Goldstein: ...that they kind of don't like.

Mudge: Yeah. It is not very intellectually honest, I have to say. But coming to the end of our AD Nauseam episode on subscriptions, Linda, what suggestions would you give to companies to get their house in order right now?

Goldstein: So, I think that companies now should be looking at how the requirements, the basic requirements under ROSCA, will likely change. And they should be looking to implement changes to their current buy flows if they're not already there, that if not strictly consistent with the rule, because I understand some businesses may not want to go that far, but certainly comply with the spirit of the rule.

And one thing I really, really want to emphasize because we see so many clients making this mistake, New York and California, as we know have, very restrictive requirements, but compliance with those laws is not compliance with the way FTC is proposing to interpret ROSCA. So, I'm suggesting that clients look at their entire consumer buy flow, and not just at the technical compliance pieces, but what is the overall net impression of the buy flow? And certainly, look at their back-end cancellation and save the sale policies because that's been so much a focus of FTC attention of late.

Mudge: Well, Linda, thanks so much for joining us, and I do hope that our listeners hear that this is one that it is time to take a fresh look at any subscription offerings if

you have them, if you're launching them afresh, to make sure that you're considering not only the current state of play, but also developments that are down the road with the FTC's rule and with developing state laws. Well, with that, thank you so much for joining us for this episode of AD Nauseam.

Goldstein: Thanks for having me.

Brave: Thank you, Amy, Daniel, and Linda. If you have any questions for Amy, Daniel, or Linda, their contact information is in the show notes. For more information on the latest developments in AD law, visit our AD-torneys law blog at www.adttorneyslawblog.com, and check out all AD Nauseam podcasts by subscribing to BakerHosts wherever you get your podcasts. As always, thanks for listening to BakerHosts.

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