Podcast Transcript

AD Nauseam: Junk Fees Will Keep Us Together

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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. Today we have a special guest, Jack Ferry, an associate on Amy and Daniel's team. On today's episode of AD Nauseam, Amy, Daniel, and Jack talk about issues surrounding what are now being called junk fees, including the FTC rulemaking on the subject, as well as activity around the country. With that, welcome to AD Nauseam, and let's turn it over to Amy, Daniel, and Jack.

Kaufman: Thank you so much for joining us here at AD Nauseam. Really glad to have you here today and we have a great topic today: Junk fees. But Amy, first I want to talk to you about a different podcast.

Mudge: A different, not AD Nauseam?

Kaufman: Yeah, forget about AD Nauseam for a minute.

Mudge: Okay.

Kaufman: So, the New York Times has this great podcast on their Modern Love stories and a really good friend of mine was just featured in one of their podcasts discussing how she met her husband. And I'm mentioning it because A, she does a great job, but B, I am mentioned in the podcast because thanks to me, she met her future husband. So, it is a great podcast, really good story, worth checking out.

Mudge: Daniel, you are indeed an excellent yenta. I can vouch for that. You have love in your heart and are always looking out for your friends. And first of all, any New York Times anything is, of course, it is bragging rights. So, we will get back to AD Nauseam because I'm not really sure what the Modern Love has to do with junk. fees, which is our topic du jour.

Kaufman: Pretty much nothing, but it is cool. But, so, let's talk a little bit about junk fees at the outset. And certainly, when you think junk fees, the public has been very concerned, particularly about hotel resort fees and concert ticket fees. Those are probably the fees that have generated the most public and legislative outrage.

Mudge: Well, they used to be called drip pricing. Now we've moved over into junk pricing which, okay.

Kaufman: Yes. It is never good when you are renamed something in a really negative way. But Amy, I want to talk about concerts 'cause it is relevant to the issue of junk fees. What was your first concert? What was your most recent concert?

Mudge: Well, first of all, concerts are relevant to anything in life, so I'm very glad you've asked me this. And I'm a big user of the ticket services and the aftermarket ticket services. But in the old days I used to stand in line to get tickets and my first concert was Hall and Oates. And my most recent concert was, just this week, we got to see Depeche Mode, and if somebody wants to see an amazing front man who is over the age of 60, I highly encourage that tour.

Kaufman: Okay, that is pretty awesome and I forgot to mention we have a special guest here today. We have our…

Mudge: _______ what? We have a guest?

Kaufman: We have a guest.

Mudge: Who do we have?

Kaufman: The wonderful Jack Ferry, our associate in the DC office has to join us.

Mudge: We _______ and Jack is back. Yes, yes.

Ferry: Hey Amy and Daniel. Thanks for having me back.

Kaufman: Well, but now we got to ask the question, Jack. First concert, most recent concert? I'm afraid of your answers.

Ferry: Yeah, I previewed this for you guys a little bit. Mine was, I think, middle school and it was a church youth group kind of to a big all day event of the top Christian musicians out there. So that was my first concert. And then the most recent one, I think, was a very D.C. affair. It was at the 9:30 Club and it was White Ford Bronco, which is popular nineties cover band in the area.

Mudge: I love the dropping of the anthem Jack, ‘cause we know we do, you and I both love our local D.C. concert venues.

Ferry: I don't go to as many shows as Amy does, though. She sets the bar in that area.

Mudge: Well, I don't let you out enough, but. No, kidding. Kidding. Alright, Daniel, what about you?

Kaufman: I got you both beat. I'm sorry. My most recent concert. A few weeks ago, I did get to see the B-52s live, who I've always wanted to see.

Mudge: You've never seen them before?

Kaufman: I had never seen them before.

Mudge: Oh, wow.

Kaufman: And seeing the live version of Rock Lobster is just amazing. But my first concert, June of 1977, my oldest brother took me to Tarrytown, NY to see The Captain and Tennille, so. I was just a youngin then, it was my first concert. It was wonderful.

Ferry: I think that is third group that I don't recognize the name of that we've named now in this little bit.

Mudge: Jack, I keep telling you, you're not going to be employed here much longer if you don't learn these important seventies and eighties bands. Daniel, I refuse to name the year of my first concert. I will simply add that it was decidedly unchristian. That was also the first time I saw a bong. That point in time, apparently, you could get into concert venues and actually use. I will ask though, when we were at Depeche Mode and everybody was waving their phones during the encore, we did pause and say, remember when we used to light our lighters at concerts, and that is actually how we expressed our joy. But anyway, alright Daniel. Even though love may keep us together, I love you tying in the two themes and muskrat love will always be a thing. It is really about junk fees. Junk fees we're gonna focus on today. So, at the outset, I really am struck by this salacious term junk fees and how important technology can be at a high level. But of course, things aren't always that simple. So set the table for us. What is going on at the FTC with this FTC junk fees rulemaking? Why isn't it drip pricing rulemaking and why is it such a BFD?

Kaufman: So, I think it is a junk fees rulemaking because it really helps when you're doing these things to call things by a name that people are gonna oppose, like who could be against the imposition of junk fees? But let me start with the good news. I, look, words matter and I think we see that in this context and the word junk fees has entered into the public consciousness. The good news about this rulemaking, there were signals, very strong signals that the FTC was going to start to look into the actual value of the kind of fees that were being imposed. Were they good? Were they worth it? The good news is they did not do that and that would have been, I think, even more problematic. But let's have Jack maybe give us the summary of what is in the rule because he was the first in this office to read all about 1000 pages of the rule.

Ferry: Yeah, 1000 might be a little bit of go ahead and.

Mudge: Jack, I got a cross market, I got a cross market here. He actually also wrote a completely fabulous blog that everybody needs to check out on our adtorneys at law.com blog that really does lay out the basics. If you are a visual learner, not an oral learner like I am. Jack, take it away.

Ferry: And as another little tease, there is another music reference in the title of that blog. So really keep to a theme here, at AD Nauseum. Well, yeah, picking up on what you said before, Daniel, about the title junk fees and labeling it that everyone has a sense for what junk fees are, but there isn't legal definition for it, at least as of yet, it is more just a term in the common vernacular as a thing that people really don't like. So, the FTC had to figure out a way to get at what is a junk fee and the way it went about defining it is that basically any advertisement that includes an amount the customer must pay has to also include the total price and the total price is basically meant to include those junk fees. And what are they? They're all mandatory fees or charges. You know, exactly how that is going to get cut down and detailed is something that I think the comments will have to get into and we'll see if the FTC makes changes on it, but what we do know is that it excludes shipping charges and government fees, at least as of now. So, if you're going back to our concert ticket example, if you're going to a show and the site you're using always imposes a $10 booking fee of some kind, then under this rule, if it were finalized, they would have to include that $10 fee up front in the price and an interesting tweak on it. It doesn't have to be the only price, but it has to be more prominent than any other price disclosed. Which, I think effectively leads to the same result, but that is a straightforward example. It is likely there is going to be a lot of other ones that test the limits of the language that the FTC included here, and I expect we'll see some of that in the comments as they start rolling out.

Mudge: So, Jack, they put out a proposal for notice and comment on whether to write a rule at all on junk fees. And they did get a lot of comments and dutifully went through them all or said they went through them all, given that they went through a pretty broad notice and comment on just whether to write a junk fees rule at all, do you think that the current notice and comment period for comments on the proposed rule will be more streamlined?

Kaufman: So, I think this is where the comments get really serious. Once the agency puts out a proposed rule and companies and industries start looking at the rule and realizing the breadth of what it would do to their industry, I do think this is when the serious comment starts, the impact on industry, the effect on what this rule would do to how companies advertise their prices. It is, when you look at the concept and the FTC issuing a rule on how pricing happens in the marketplace, that is a really big deal and it is a broad rule that would cover, at the moment, virtually every industry. So, I think I wouldn't call these comments as likely to be streamlined. I think they're going to be a very robust and I think the FTC is probably going to have to have some formal hearings down the road on all the comments that are raised here.

Mudge: Interesting. Well, I mean, this is in fact an enormous change, and it would dramatically alter how pricing is advertised or depicted in this country.

Ferry: Yeah, one hundred percent. I didn't mean to bury the lead on that at all, Amy. It is really it is across the board right now.

Mudge: Sorry, you're just less of a drama queen than I am.

Ferry: Well, I didn't say that, but I will gracefully move on to the next topic. Really is a focus everywhere right now. This kind of junk fees, it is something policymakers I think hear that constituents care about and also know could be an easy win for them, like Daniel alluded to before. When California actually just enacted legislation on this, that same topic that goes into effect next June, I believe, and that law really is very similar to the FTC's overall. But I mentioned that the FTC's doesn't actually require that the only price be the total price. California does do that. It says if you're disclosing a price, then it's got to basically be that total price and include all mandatory fees. Again, we're looking at mandatory fees as a test, with exemptions for government imposed fees and shipping, and that's got to be postal, carriage, shipping. They don't want you getting cute with what shipping is. California, though, they did include exemptions for financial entities and food delivery platforms. And that is something that we expect to be a focus of the comments. The FTC even included some particular request for comments on those issues. You know, should they narrow that rule to make it applicable to the most egregious platforms, the ticket of vendors and resort fees of the world, or should it be a broader rule? But that is something we can see a preview of in California. The fact that they do include exemptions from their law, maybe that is something the FTC will do too.

Kaufman: Yeah. So, the FTC does have an exemption for auto dealers in connection with the rulemaking on auto dealers that the FTC is doing. But I'm going to guess that you're gonna see a lot of comments from a lot of industries explaining why that industry should not be covered by this rule because it might be covered by other pricing laws that are out there. So, I think that is going to be a robust source of come. That is the other thing that strikes me is when the FTC talks about the shipping fee, they're making it clear you can't just put all these other fees and call them a shipping fee to get out of this, but they are saying that the shipping fees should be the actual shipping costs. And I think that has the potential to raise some issues. I think, how precise do we have to be in terms of the actual cost on shipping when we're putting this together? And of course, that can vary. You know, like I think this proposal raises all sorts of questions and certainly is going to be hotly debated.

Mudge: That is, so actual cost. Does that mean the amount that a shipper pays to UPS literally? I mean that, wow.

Kaufman: An excellent question.

Mudge: Something that maybe folks would want to comment on. That, look, the states have gotten into this game before and there are some state cases that have been brought over shipping and handling, but typically these are in really extreme cases like buy one, get one free but the second free product they triple or quadruple the shipping and handling for. So, they're out there, but they're fairly rare. We've also seen some class action demands over what I would say are really excessive up charges called shipping and handling fees. But look, I want to come back to, as you know, we've been following the agency for years on pricing matters and everything else and this to me seems like a really huge shift and including especially in how the FTC is approaching its relationship with these closing fees.

Kaufman: Yeah, you're totally right, Amy. Look, for quite a while. like the FTC attitude has been look, if the fees are adequately disclosed, charge what you want. I mean that has been the general philosophy. As long as we're adequately disclosed and that is very important. But we have seen some movement on the FTC on this issue in the past decade. In 2012, the FTC held a workshop on the economics of Drip Pricing and in 2017 and this was really interesting, the FTC put out one of their economists had done a report and analysis on resort fees, focusing specifically on them, and there was a pretty strong language in that report raising concerns that when you separate mandatory resort fees from posted room rates, it makes it harder for consumers to comparison shop and can cause consumer harm. So again, the FTC's been talking about this issue for a while, but a huge difference between talking about it and starting to promulgate a role.

Mudge: Right. Well, and that, the idea was as long as the pricing is disclosed before consumers check out. So, I think there was a focus as long as it was prominent, it was clear, it was in the shopping cart that that would pass muster. Something like you couldn't wait till someone checked into a hotel.

Kaufman: It would pass muster, but there were always concerns that it made comparison shopping harder. If you're on a website and they're saying it is $200.00 a night, but you don't find out about the $50 fee until towards the very end. It makes it harder to look at another website and figure it out. It is just a complicating factor for healthy consumer behavior. For lack of a better word.

Mudge: Well, the last time I looked, facilitating price comparisons was not a requirement of Section 5. But…

Kaufman: That is true.

Mudge: Who am I? Who am I to, you know. One thing just complete side note, I find it interesting that the drip pricing, that was the only thing I ever remember coming out of the Bureau of Economics, which is typically a Bureau that really provides support for the Competition Bureau and the Consumer Protection Bureau and you were there at the time. Was that scandalous at all?

Kaufman: Oh, we could have a long conversation on these interactions between the Bureau of Consumer Protection and the Bureau of Economics. But they do independent research. There is some really interesting studies and reports that BE has done over the years. But you're right. You don't see them popping up too often to opine on these issues. So, it is a little bit of a rarity, but they do a lot of work behind the scenes and do sometimes do public events and publish significant papers on consumer protection issues.

Mudge: All right, we're gonna scratch into that on a future episode of AD Nauseam, but I mean, there is some history here. There have been certainly, they're old timey. I've dealt with them. The states implemented a bunch of laws decades ago related to rental cars and the kinds of fees that were added, mandatory fees that were added to rental car prices. I do find it ironic that government fees, the government can charge a massive concession fee, but that is okay. But any of those extra fuel charges that are automatically tacked on have been the subject of some state laws and of course this is one where Europe is ahead of us. There are laws overseas that specifically relate to ticket resale and have that what they call all in pricing that is a requirement to show up front like Jack had indicated is likely going to be required here.

Kaufman: Yeah. Look, it is hard to predict where this rule is going to land at the end of the day, but there is a big focus on this issue, not just at the FTC, but in other parts of the federal government as well as the president getting in on this issue.

Ferry: Yeah, I like that quote. You know, Biden said that we're tired of being played for suckers, so if that doesn't make a statement, I don't know what does. Then of course, he called on Congress to act in that same state of the Union address where he said that, but we haven't seen that developed yet, so the FTC has taken up the reins.

Mudge: Oh shucks. Joe referring to suckers. Okay. Well, look, we also can't ignore the recent cases we've seen about restaurant delivery fees.

Ferry: Yeah, we've really seen a spate of these cases both in the class action bar and District of Columbia enforcement getting in on it here in DC, we had a case against a large food delivery platform. One of the issues was that these companies advertised delivery fees and they say maybe $0.00 delivery fee or what the delivery fee will be. And the theory of enforcement was that consumers then think, oh okay. That is the fee. There is not going to be other delivery fees, effectively a service fee that is only applied for delivery. But there were, and that was the DC AG action focused on that issue. Partly there is also been focusing class action cases on whether the taxes and fees are really disclosed at checkout. If people know what the fees are that. They're paying for. If the menu price of fees are higher for delivery than they are at the restaurant. So, if you go in, then you would pay $8 for a burger, but it is $12.00 on the delivery platform. Then there's been class action cases and state enforcement and other guys should be disclosed and city enforcement. Chicago's had a couple of these cases, too. Yeah, it is really an issue that's been popping up and not just in the policy making area like this, but also in, through some enforcement examples.

Mudge: Well, if this rule staves off a bunch of different local and state laws, that might be actually a very good thing. And so, I will cross over into being a glass half full gal on this too, but let's finish up by thinking about what should folks do now. I think it is very clear from this discussion that, comment if you have stuff to say, this is a really important time to be heard. Now I think the dates have not been given to us yet as to when the 60 day period will start and end. But when it comes, sixty days is here and gone pretty quickly. Now, we know sometimes the FTC extends the time for comments. We can't count on that here. I mean, Daniel opine, maybe they'll be some investigative hearings. But I think people have got to get in and got to get early and it is also a good time to start taking a close look at when and how you disclose fees and you got to get ahead of this. Maybe you don't need all in pricing at this point, but seeing when shipping and handling and any other charges are first mentioned is key and consider having information that allows people to compare different options rather than needing to put things in the cart to cross shop. And finally, if you're charging any fees that aren't typical in your industry, perhaps charging a restocking fee for returns or adding in an automatic tip or upcharge, pause there and consider when and how clearly this needs to be disclosed, if it is something that consumers wouldn't naturally and automatically expect. But we do think this is going to be, continue to be a next big thing in class action filings as well.

Kaufman: Totally agree, Amy. And when you look at all the rulemaking the FTC is doing, I would absolutely put this rulemaking towards the top of the list in terms of priorities and things they will want to move on quickly. And that about wraps it up here at AD Nauseam where there are no hidden fees and what you pay for is what you get. We charge people for this right, Amy?

Mudge: We should, Daniel. We absolutely should I'm expecting.

Ferry: I’m expecting a check any day now so.

Mudge: And Jack, thank you again for joining us. AD Nauseam is also a happier, brighter place. We have you with us, but please join us in two weeks for another issue of AD Nauseam.

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