Podcast Transcript

AD Nauseam: You’re a Mean One, Mr. Mail Order Rule

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Rubenking: 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 Randall Rubenking, 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. On today’s episode of AD Nauseam, Amy and Daniel talk about the mail order rule. With that, welcome to AD Nauseam, and let’s turn it over to Amy and Daniel.

Kaufman: Welcome back to AD Nauseam. So, we’ve got a compressed holiday season this year. Between how late Thanksgiving was, we’ve got a mad dash for the holidays, and everything seems even more frantic. Black Friday, Cyber Monday reports were all positive, and it appears that shopping is up to pre-COVID levels.

Mudge: Woo-hoo! Woo-hoo!

Kaufman: Exactly. So of course, the more sales, the more chances to violate one of the FTC's rules or guidance. So, for advertising, selling, and shipping goods. So, before we settle down for our very long, very well-deserved winter nap, we thought we would do a brief drive by of some of those, with a particular emphasis on the well-known mail order rule. This being not a new Biden-era rule, but an oldie, but a goodie related to promises that companies make as to when goods will ship.

Mudge: Okay, Daniel, what I want to know is when do we get our long winter's nap and what exactly is this? I think it comes, I think it is the, 'twas the night before Christmas and blah blah blah, and the parents are settling down for a long winter's nap. I will tell you what I remember the night before Christmas was staying up half the night, putting together the toys that Santa was supposed to be bringing, and then getting waken up at dawn by my excited children. It might have been a nap, but that was certainly not long.

Kaufman: I've been an expert at nap since I was a little one. Look, one of the many things I do not miss, I don't celebrate Christmas, I don't have kids. But I still do love the holiday season and all of its celebrations. Amy, I know we talked about this in a previous episode, but just quick recap. Favorite Christmas song? Favorite Christmas movie?

Mudge: Oh, favorite Christmas song? Do They Know It's Christmas Time At All from the 80s, which is actually a very, very, very sad song in some ways. But favorite holiday movie, Elf or Christmas Story.

Kaufman: Okay. So, for me it will always be Christmas Wrapping by The Waitresses, another 80s song. Who, of course, also, and we never talked about the show Square Pegs. Well, they did the theme song for Square Pegs by The Waitresses also, which…

Mudge: Square pegs, square pegs, love that.

Kaufman: …which, of course, was a young Sarah Jessica Parker in that role in the early 80s. For movies, I hugely love the Charlie Brown Christmas special, and I think you're going to give me grief on this one, because maybe it is not a holiday movie, but every holiday season I would always watch the Wizard of Oz as a kid, so.

Mudge: Daniel, not, there is not even. it is not a holiday movie at all, sir. Maybe because you don't celebrate Christmas, I guess they'd show it on network TV maybe, sometime.

Kaufman: There is a lot of green in it. There is a lot of green, you know.

Mudge: Okay. Alright. Fair enough. But I'll cut you some slack on that. But we do absolutely have to talk about the new Wicked movie. It is just, I know it is not super holiday either, but it is what is bringing me joy right now in this season.

Kaufman: So, I will confess, I have not seen it yet. I will be seeing it. I absolutely will be seeing it. It is three hours. It feels like a bit of a commitment to me. But look, I've seen the musical several times. Totally loved it. Lots of fun. Really love it and I can't wait to see it in movie. So, what was your reaction to it?

Mudge: Oh my gosh. Three hours, it wasn't, it passed by in a heartbeat. Nobody should, I mean, pee first, but other than that, it was, I don't know what all this smack is about, it is too long and suffered from lack of editing, blah blah blah. Not at all. Every single minute was completely awesome. Cynthia Erivo, Ariana Grande, just, Jonathan Bailey. I mean, there was not a clunker performance in the mix. And of course, by the end, I was bawling along with everyone else in the theater. And thankfully, I did not go to one of the showings where there were a bunch of glee choirs that were singing along. Yeah, I would have gone all Daniel on them and had gotten really surly.

Kaufman: Yeah. No, it is funny. I've read a lot of articles recently about the, people don't want to hear you singing in a movie theater, so.

Mudge: They do not. I want to hear the stars sing. But Daniel, I think your love of this comes honestly and early. I understand you were actually in a production of the Wizard of Oz at one point in your pre-lawyer life. Is that correct?

Kaufman: Yes, it was a fantastic production that we did in the fifth grade at PS152 in Brooklyn. I was the scarecrow, and there is very little photo evidence. We actually showed a picture of it at ANA this year, which was quite fun. But what I love about it is that the munchkins were basically wearing these large green lawn bags, trash bags as their outfits. It was excellent, excellent costuming by Mrs. Amesh that was my fifth-grade teacher, who...

Mudge: The trash, that is absolutely brilliant, Daniel. I would, if you want to know what I want for Christmas, is for you to wear a trash bag to work so I can see.

Kaufman: I'm pretty close today. This is pretty close, Amy.

Mudge: Okay. Thank goodness we haven't moved on the video recording yet. But let's get to it. A lot of the actual real holiday specials involve some shopping at a store. But I can't actually think of a holiday special that involves e-commerce. But that is what our topic is today.

Kaufman: Yeah. And look, the mail order rule is all about promises made when ordering online. It is actually now called MITOR, or the Mail Order Internet and Telephone Order rule. But it came out back in '75, before there was e-commerce or even Amazon. And the basis of the rule back then, it was pretty simple. Sellers had to have enough stock to reasonably fill expected orders in a timely fashion. Either as soon as they promise to ship, or no longer than 30 days which, of course, in

2024, seems like a lifetime when we're all used to next day shipping. But if sellers are not able to ship by when they said they would, they need to get the customer's permission for a later shipment or cancel the order and return the payment. And since this is an FTC rule, there are penalties and potentially significant ones for violations.

Mudge: Yeah. And we do live in this Amazon Prime world where everything is expected to ship almost immediately. And lots of companies, even small companies, now promise two-day shipping because these third-party fulfillment houses that a lot of people use have gotten so much more efficient in packing, getting stuff out the door. But what that means for MITOR, or I'm old school, so I call it mail order rule compliance, is the order has to leave the merchant's warehouse in whatever period of time they promise. Okay? The rule actually doesn't cover shipping times by the carriers. It is not when you get the package, it is when the package leaves the fulfillment house.

Given how many e-tailers promise to ship in these very short time frames, this can be a real challenge to comply with the letter of the rule. Because you're supposed to give customers advanced notice if you're going to miss the deadline. Alright? So, the rule requires that you give that advanced notice, and you let customers know when the good will ship, and the customer has to have the ability to cancel. The first time, if you blow your deadline, silence can be taken as consent to wait but if the retailers going to miss the second promised ship date, they've got to give notice again. And this time the customer needs to affirmatively opt in to wait for that good or else that order must be cancelled.

Kaufman: And it is worth noting, we have seen FTC cases where companies have gotten into trouble for not giving prompt money refunds. And this is specifically what the FTC expects. Giving a gift receipt for a future purchase if you can't ship the order in time is not going to cut it. And the FTC brought a lot of mail order cases over COVID when companies were promising next day shipping for masks or sanitizer when they knew they did not have enough stock to fulfill all the anticipated orders at that time. I was at the FTC for a bunch of those cases. And just this month, the agency announced it was issuing refunds for customers of a website called Sure Good Deals, and they had promised pay today, ship tomorrow for PPE when most often there was no available stock to ship the next day.

Mudge: Oh, and Daniel, thank you for your government service. That was good government. I really, I do. No, I think there was, we all needed…

Kaufman: You're welcome.

Mudge: We needed protection back then, and there were a lot of overblown promises. So, I think that was a good use of government's time and resources. But it was also announced this month the FTC had a settlement in an investigation involving a website called GOAT. That is an online seller and a reseller of high-end tennis shoes and other swanky sportswear. I have a son who is slightly addicted to high end Nikes, so I am a shopper on GOAT myself. The company, basically, it does a couple of things but in large part it acts as a middleman between people buying and selling sneakers. And the company offered, you could pay more, a higher cost to get something called instant orders or you could pay higher to get next day shipping. The FTC took a look at this and broke down the data and they said almost 40% of these instant orders, and almost 20% of these next day orders, weren't shipped in the promised time frame. And then the key is that customers weren't given notice and a chance to cancel the order.

Kaufman: So, Amy, at some point we need to discuss this concept of high-end tennis shoes, because it definitely has me perplexed. But look...

Mudge: Oh, it has me perplexed too, and much poorer. But I don't, we can definitely talk about it.

Kaufman: Yeah. I think your son would disapprove of my sneakers. Let's put it that way. So, the *GOAT* case also looked at the promise of the company to guarantee satisfaction. The FTC alleged misrepresentations in how GOAT was advertising its buyer protection program. The *GOAT* case also looked at the promise of the company to guarantee satisfaction and the FTC alleged misrepresentations in how GOAT was advertising its buyer protection program. And also alleged that it was an unfair practice that GOAT had advertised this buyer protection program but failed to set up a program to actually allow customers to take advantage of the program. Instead, the only way customers were able to get relief was to complain to customer service. This is a novel use of unfairness by the FTC to essentially set standards for what is reasonable for customer service.

Mudge: I will tell you, that terrifies me a bit. And I'm hoping that extensions like that over, what I'll call overreaches of unfairness will be put to bed beginning in January. But in this case, we didn't get scathing descents from the Republican commissioners. They actually issued concurring statements that essentially applauded this use of unfairness. But it seemed to me like they were really just taking the opportunity to encourage cases, future looking cases, looking at terms and services and abuses of web operators who are trying to control speech. And I know you dive into these dissents or concurrences probably before you even read the complaints in the orders. Can you flesh this out for us? Do you have thoughts? They both just seemed really far afield of the actual complaint and pretty political.

Kaufman: Yeah. It is funny, Amy, I'll confess to you. I saw the case came out. I saw the press release, didn't give it a moment's thought. I was like, oh, mail order rule case, whatever, it is not going to be that interesting. And then I started looking at the statements, and I'm like, okay, this has very little to do with the actual facts of the case but certainly, both Commissioner Ferguson and Commissioner Holyoke were making important points about what to expect in 2025 and beyond. And we talk a lot about unfairness as the tool that allows the FTC to do some creative things. And certainly, in the last four years, we've seen the FTC use unfairness creatively, specifically in the privacy area, to go after some practices, regardless of what companies are saying that the practices are unfair. And this was definitely the two Republican commissioners signaling that this is a two-way street. Fairness is not just a tool to be used by Democrats, but also can be a tool that Republican commissioners will advocate for. But in some very different contexts, and they're raising concerns about platforms and suppression of speech and deplatforming and things like that. So, look, it remains to be seen what they're going to do.

Mudge: Now, and Daniel, I am absolutely fascinated with mail order rule cases and read them closely. I do think that the rule from '75 being written back then, focused on when, it took a long time to ship. The idea that 30 days, I mean, can you imagine? That would just not fly today. But to the extent that the rule does require people to give notice if they're going to miss a deadline, that becomes really hard to do if the deadline you're promising is next day or two days. To get the, it is a very compressed time frame to be able to give that notice. So, I think, this is one where I think the rule itself is due to probably be updated to reflect current realities can be a real challenge for retailers.

Kaufman: Absolutely, Amy. But it is, we talk about mail order a lot, but the other thing we want to start thinking about, and maybe you can dig into, issues involving reviews. Because lots of products being sold, lots of purchases, lots of acquisition. Time to start reviewing them as well.

Mudge: Yeah. Well, though this is certainly being the peak time for sales, and it is a great time for sellers to solicit reviews from buyers. Now, we just did an episode on the new FTC review rule, and we mentioned this case, but it is actually worth flagging again. The FTC brought enforcement against a company called Sitejabber and the crux of the issue was the company was soliciting reviews before customers had actually purchased the products. They were asking for reviews of the website performance and then they were wrapping up and including these reviews with other product reviews. So just an important flag. If you send solicitation for reviews to your verified customers and you want to make sure you send this solicitation after the goods have shipped, but you might consider adding a slightly longer delay or a time for the buyers to actually receive the product and actually try them before you ask for a review.

Kaufman: Yeah, I thought Sitejabber was really interesting. It is one of those fundamentals. You can't ask for a review of a product until you know consumers actually have the product in hand.

Mudge: Yep. Makes great, good sense.

Kaufman: Yeah. And we'll be hosting an episode all about up to claims in the new year, as this has been also getting a lot of attention and discussion lately. But for now, if you are offering sales on your websites, be careful to make sure that if you are advertising deals of, say, up to 80% off, that a meaningful number of the goods you have for sale are available at that highest amount. It is a best practice to be clear about what is on sale, such as sales on new merchandise, rather than calling out a site wide sale with a bunch of exclusions in the fine print.

We talked so much this year, about junk fees, dark patterns, free to pay subscriptions and other pricing practices and a lot of that is going to continue into

2025. Maybe not dark patterns, I have a feeling we're not going to be seeing much dark pattern discussion in FTC complaints going forward. But really important to state your value proposition clearly and include all of those material terms so they are likely to be seen.

Mudge: Alright. I'm not a gambling person, but I think dark pattern is going to continue. But Daniel, that was some excellent and practical advice about sales advertising. We should probably give some key takeaways for MITOR compliance as well, and I'll take a stab at that.

So, one, take a close look at what you say regarding when you expect to ship goods. So, while many fulfillment houses have a quick turnaround, are you really comfortable promising two-day shipping? Or should you build in some extra time, particularly for really busy shopping and shipping months?

Second, if you want to stick to a tight window to offer shipping, you really do need to build in processes to ensure that notice is given before that window is missed. Another alternative, of course, for MITOR compliance, is simply to cancel orders if you miss a deadline, but this is likely to irk some of your customers, even if it is technical compliance with the rules. So, probably not the best place to start.

Three, have written policies and record keeping for MITOR compliance. That is something that the rule requires, and the FTC expects it. So, if you get embroiled in a MITOR investigation, that is 101 what you're going to be asked for. And last, and certainly not least, track complaints and promptly respond. The cases the FTC brings in this area tend to be where companies have gotten lots of complaints and where it was also hard to reach customer service to get a resolution.

Kaufman: Yeah. And of course, we've got some tips for you for satisfaction guarantees. That is a bold promise and be very clear what is being promised. Include material limitations up front and not buried in the terms. Make sure you set up a simple method for customers to file for a refund under any such program and keep response times short and reasonable. And make sure refunds under such programs are in cash, unless it is very clearly stated upfront that only credit is provided.

Amy, I think this is our last episode for 2024. And you know what I'm thinking? Thinking, again, if there are other topics that people want us to talk about, we welcome that. Any concerns, any issues, let us know. We're always looking for fun topics to talk about in the advertising space. Love hearing from our listeners.

Mudge: And with that, that is a wrap for another year, I suppose, of AD Nauseam.

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

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