Simpson Thacher

The Ad Standard: Monthly Update

August 2025

Companies should take a close look at the transparency of their fees and recurring charges as regulators and the class action bar target misleading pricing practices. The FTC has reiterated its focus on misleading pricing in two cases this month. First, the FTC announced a settlement with a telehealth provider of weight loss drugs, alleging that the company misled its customers on the price of its monthly service and the material terms of the program alongside allegations of fake testimonials, endorsements, and reviews. Second, in an action filed by both the FTC and the State of Connecticut against a car dealership alleging it charges misleading, duplicative, or fraudulent fees, the regulators filed an amended complaint reaffirming that the litigation remains a priority for this administration. Both actions highlight the regulatory crack down on deceptive pricing and incomplete disclosures that, according to Christopher Mufarrige, Director of the FTC's Bureau of Consumer Protection, sends a message that "companies cannot hide important information."

Plaintiff class action attorneys are also focused on companies' hidden fees, incomplete disclosures, and difficulty in cancelling auto-renewing plans. Three recent cases were filed adding to many more commenced since the beginning of the year. And although the FTC's Negative Option rule was overturned by a federal court last month, various states continue to adopt new laws governing auto-renewal plans, including the State of New York, with its new law set to become effective in November.

The recent cases have hit a range of product categories including weight loss drugs, privacy and data security software, auto loans and leases, platforms offering services in the so-called "gig economy," as well as airline ticket pricing. Given the popularity of subscription pricing and the ubiquitousness of fees in all sectors, now is a good time for legal teams to evaluate risk mitigation strategies for pricing and subscription plans.

Although past NAD cases focused on hidden fees, this month two NAD cases looked at hidden connections between an endorser or influencer and the company or product being promoted. Additionally, NAD cases provided guidance on advertising health-related claims as well as advertising directed to small business owners, with a look at how to tailor "#1" "most popular" claims to avoid unfair or misleading messages.

TOPICS

FTC Focus

Deceptive Pricing and Subscriptions

1. In an action alleging misleading pricing, hidden terms in an auto-renewing contract, obstacles to cancellation, misleading endorsements, fake reviews and the suppression of negative reviews, the FTC announced a proposed settlement with the operators of telemedicine company Southern Health Solutions, Inc., d/b/a Next Medical and NextMed. The complaint alleged that defendants used unsubstantiated weight loss claims and deceptive before and after photos to sell telehealth weight-loss membership programs that would provide access to medical providers who could prescribe popular weight-loss drugs but that defendants failed to adequately disclose that the price did not include drug costs, lab work, or consultation costs.

   FTC Takes Action Against Telemedicine Firm NextMed Over Charges It Used Misleading Prices, Fake Reviews, and Deceptive Weight Loss Claims to Sell GLP-1 Weight-Loss Programs | Federal Trade Commission

2. In amending its complaint in a joint action with the State of Connecticut against an auto dealership for deceptive pricing practices, the FTC signaled its continuing focus on hidden fees. The FTC alleged that the Nissan dealership charges inadequately disclosed charges or added fraudulent fees to contracts for car purchases or leases, including inflated or duplicative fees for pre-owned certification, and added additional fees onto state mandated fees.

   Chase Nissan/Manchester City Nissan | Federal Trade Commission

Financial Fraud

1. The FTC brought an action against a debt relief service that it alleged targeted veterans and seniors and defrauded consumers of an estimated $100 million and obtained a temporary restraining order in federal district court. The FTC alleged that the defendant companies and individuals falsely claimed to reduce consumers' debt, posed as consumers' banks and credit bureaus or representatives of the federal government and misled them into paying for their supposed debt relief services.

   FTC Halts Illegal Debt-Relief Operation that Falsely Impersonated Businesses and the Government, Harming Consumers | Federal Trade Commission

2. FTC settled with Ecom Genie Consulting in a case alleging that it falsely claimed that consumers could earn significant profits from selling goods through online e-commerce stores that the defendants would establish and operate on their behalf. The settlement includes a monetary judgment and permanently bans Steven J. Mayer and Ecom Genie Consulting from any involvement with the sales, marketing, or operations of any business opportunity to sell goods through online e-commerce stores. In March 2025, the FTC secured similar settlements from the other defendants in this case.

   FTC Action Against E-Commerce Business Opportunity Scam Results in Permanent Bans for Owner and his Companies | Federal Trade Commission

3. In a similar case, the FTC settled with FBA Machine (formerly Passive Scaling) concerning allegations the company deceived consumers that its AI-powered online storefronts would produce guaranteed income. The

company and its owner, Bratislav Rozenfeld, will be permanently banned from selling business opportunities and have a monetary judgment against them.

FTC Obtains Permanent Ban of E-Commerce Business Opportunity Scheme Operator | Federal Trade Commission

Workshops

1. FTC and the Justice Department's Antitrust Division, along with the Department of Commerce and the Department of Health and Human Services, jointly held three listening sessions to discuss ways to make prescription drugs more affordable for Americans by promoting competition by increasing generic and biosimilar availability. The first workshop was held on June 30 and the second on July 24. The final workshop was held on August 4.

   FTC and DOJ to Host Listening Sessions on Lowering Americans' Drug Prices Through Competition | Federal Trade Commission

2. FTC held a day-long workshop on July 9, 2025 on Unfair or Deceptive Trade Practices in "Gender-Affirming Care" for Minors, which examined whether consumers are being or have been exposed to false or unsupported claims about "gender-affirming care" and potential harms to consumers. On July 28, 2025, the FTC issued a press release announcing a Request for Information seeking public comment on any issues relevant to the FTC's consideration of this topic.

   FTC to Host July 9 Workshop on Unfair or Deceptive Trade Practices in "Gender-Affirming Care" for Minors | Federal Trade Commission

Class Actions

Deceptive Pricing and Subscriptions

TaskRabbit was hit with a proposed class action in California Superior Court alleging that its online marketplace, which matches freelance labor with people searching for help with tasks, hides its fees. The complaint argues that TaskRabbit lures consumers with the promise of a simple, flat, hourly rate for work and then, once the consumer has selected a "tasker" and entered personal information, charges a fee that is not included in the advertised hourly price.

Cross v. TaskRabbit, Inc., 4:25-cv-06161 (CA Sup. Ct. July 22, 2025)

A plaintiff filed a putative false advertising class action against Alaska Airlines in California federal court alleging that the airline's Flight Pass program promised subscribers a clear upfront fixed cost for a set number of flights per month, but that the airline hid additional taxes, fees, and "premium charges" for desirable flights, and also had onerous cancellation policies.

Burton v. Alaska Airlines Inc., 3:25-cv-06156 (N.D. Cal. July 16, 2025)

Recently, a plaintiff brought a consumer protection class action alleging that two Panamanian corporations used deceptive and illegal "automatic renewal" tactics to trick consumers into paying for unwanted subscriptions for internet privacy and data security products. Plaintiff alleges that defendants intentionally misled consumers into believing they can subscribe for a discrete period of time but the subscriptions automatically renewed and "disclosures" regarding the ongoing charges were hidden. Plaintiff alleges that defendants' enrollment and post-purchase practices violate the Illinois Automatic Contract Renewal Act and the common law.

Sasgen v. Nordvpn S.A., No. 1:25-cv-06822 (N.D. Ill. June 20, 2025)

100% or Free-of Claims

Ninth Circuit: Affirms Grant of Class Certification in Deceptive Marketing Case

The Ninth Circuit affirmed a district court's grant of class certification in a putative consumer class action alleging that Johnson & Johnson Consumer Inc. violated California's deceptive marketing and consumer protection laws by marketing and selling "Neutrogena Oil-Free Face Moisturizer for Sensitive Skin" when it did, in fact, contain oils and oil-based ingredients. The Ninth Circuit held that "the district court did not abuse its discretion in finding that common issues predominate with respect to materiality and reliance." The Ninth Circuit further stated that "the district court's decision that materiality, and so the inference of reliance therefrom, are subject to common proof even if the class understood "oil-fee" in slightly different ways was not an abuse of discretion."

Noohi v. Johnson & Johnson Consumer Inc., No. 23-55190, 2025 U.S. App. LEXIS 18547 (9th Cir. July 25, 2025)

A plaintiff recently commenced a class action alleging that Tree Top Inc. deceptively labels some of its apple juice products as made with "100% apple juice" or made from "100% USA apples," despite the addition of ascorbic acid, which is a synthetic preservative. Plaintiff alleges that defendant has violated California's False Advertising Law, California's Consumers Legal Remedies Act, California's Unfair Competition Law and that this is a breach of express warranty.

Borowsky v. Tree Top Inc., No. 3:25-cv-05533 (N.D. Cal. July 1, 2025).

Recent Dismissals

Eastern District of New York: Promotion Not Deceptive Where Its Terms Were Conspicuous and Fully Disclosed the Eligibility Requirements

On July 28, 2025, the Eastern District of New York dismissed a class action alleging that DraftKings, Inc., a gambling and entertainment corporation, engaged in deceptive marketing by running a promotion promising new users a $1,000 deposit bonus for signing up to its platform, which plaintiff alleged violated section 349 (prohibiting deceptive acts or practices) and section 350 (prohibiting false advertising) of the New York General Business Law. The court held that plaintiff failed to allege that the promotion could deceive a reasonable consumer because its terms "fully disclosed the requirements to be eligible for the full value of the Promotion in a conspicuous manner." The court further concluded that a reasonable consumer would not be misled to think that merely signing up for an account would entitle them to the full $1,000 deposit bonus when the terms specified that users can "receive *up to* $1,000 in bonus funds."

Aminov v. DraftKings, Inc., 1:24-cv-08472, 2025 U.S. Dist. LEXIS 144018 (E.D.N.Y. July 28, 2025)

N.D. California: Suit Alleging PFAS in "Gentle" Baby Wipes Dismissed Due to Failure to Allege Product Could Cause Harm

The Northern District of California dismissed a putative class action alleging that Kimberly-Clark Corporation's advertising for its Huggies Simply Clean Fragrance Free Baby Wipes was misleading because it omitted and concealed that the wipes contained "dangerous levels" of PFAS (per-and polyfluoroalkyl substances). Plaintiffs alleged that the packaging representations (the wipes are "gentle," "simply clean," "hypo-allergenic," "dermatologically tested," "paraben free," and plant-based) would suggest that the product is free from harmful or toxic ingredients. However, the district court held that plaintiffs failed to allege that the product could cause harm. As to plaintiff's argument that the "plant-based" claim conveys the message that the wipes are free from PFAS, the court recognized that the claim had a prominent qualifier, that the product is "70%+" plant-based, and concluded that the qualifier "disposes of the notion that a reasonable consumer could plausibly think the wipes contain zero 'non-natural' ingredients. The court also noted that other courts have reviewed "natural" and "filtered" claims and concluded that the claims do not convey the message that the product is free from all chemicals.

Erickson v. Kimberly-Clark Corp., No. 24-cv-07032, 2025 U.S. Dist. LEXIS 144435 (N.D. Cal. July 28, 2025)

Ninth Circuit: Data Storage Plan Statements Not Ambiguous or Misleading When Considered in Context

The Ninth Circuit affirmed the dismissal of a proposed class action claiming that Apple misled consumers about how much iCloud storage they were getting, finding that no reasonable person would expect the 200GB plan plaintiff bought would be in addition to Apple's free 5GB and that Apple's conduct was not deceptive.

Bodenburg v. Apple, Inc., No. 24-3335, 2025 U.S. App. LEXIS 18251 (9th Cir. July 23, 2025)

N.D. California: Case Dismissed Due to Flawed Testing

The Northern District of California dismissed without leave to amend a putative class action alleging that The Procter & Gamble Company mislabeled its "Tampax Pure Cotton*" tampon products by omitting the presence of organic fluorine and thereby rendering its affirmative representation of "100% organic cotton" literally false. The court held that even though this was a new theory that varied from plaintiffs' earlier complaints it still failed for the same reason. The court concluded that the allegations that organic fluorine is present were implausible because they rested on flawed testing. The court noted that there were no allegations: (i) about whether the organic fluorine may be indicative of natural sources or some unspecified man-made chemical or contaminant; (ii) about whether the presence or absence of any other substance might bolster plaintiffs' interpretation of their testing's findings; or (iii) beyond the bare allegation that the testing detected "above trace amounts . . . well within the detection limits."

Bounthon v. The Procter & Gamble Co., No. 3:23-cv-00765 (N.D. Cal. July 7, 2025)

NAD Focus

Influencer Marketing and Endorsements

In a Fast-Track SWIFT case, The Procter & Gamble Company (P&G) challenged competing personal care products company Dr. Squatch, LLC's failure to ensure that its paid affiliates disclose their material connections in their social

media posts promoting Dr. Squatch products. While the posts included a disclosure stating that "creator earns commission," it failed to disclose that Dr. Squatch also offered additional affiliate rewards, allowing influencers to earn incentives beyond the usual affiliate link commission. P&G argued that these additional rewards were a material connection that must be clearly and conspicuously disclosed according to the FTC's Guides Concerning the Use of Endorsements and Testimonials. Additionally, P&G argued that the disclosure was not sufficient because it did not indicate the full nature of the influencers' compensation or the entities behind the compensation. NAD stated that Dr. Squatch has taken steps to ensure that the posts comply with the FTC Guides and voluntarily and permanently discontinued the advertising at issue.

Dr. Squatch, LLC (Cosmetics/Beauty Products/Toiletries), Report #7481, *NAD/CARU Case Reports* (July 2025)

Concerned that consumers may not understand that they are seeing advertising rather than independent and objective content, NAD brought a challenge against EIA Marketing which ranks debt consolidation companies on TrustedCompanyReviews.com, a review website. Noting that TrustedCompanyReviews receives compensation from affiliate partners, NAD concluded that the affiliate partners reviews were not impartial and constituted advertising. NAD recommended that EIA Marketing: (1) identify the companies from which it receives commissions; (2) revise its disclosure to appears at the top and bottom of every webpage and make clear that TrustedCompanyReviews receives commissions from affiliate partners and that the reviews, rankings, and product information of its affiliates constitute advertising; and (3) make clear that while it makes commissions from links to its affiliates, that it is not paid to publish content and does not permit any third party to control or otherwise approve its content.

EIA Marketing (Websites/Web Services), Report #7425, *NAD/CARU Case Reports* (July 2025)

Health Claims

NAD determined that Olly PBC provided a reasonable basis for claims made for its Lovin' Libido dietary supplement related to desire, drive, arousal, satisfaction, and lubrication. Competitor Bayer Healthcare LLC challenged Olly's claims that touted the sexual benefits of its Lovin' Libido product that relate to ashwagandha, an individual product ingredient. NAD reviewed Olly's advertising to determine whether it conveyed the message that the Lovin' Libido product, rather than ashwagandha, provided the claimed benefits. NAD noted that of the eight express claims, five specifically name ashwagandha as providing the expected benefit (for example, ashwagandha "helps boost desire"). The three remaining claims, NAD found appear in contexts that make clear that ashwagandha is the source of the claimed benefits.

NAD also reviewed Olly's evidence to determine if it supported that ashwagandha provides the claimed benefits in women uninterested in and unsatisfied with sex. Olly provided seven randomized clinical trials ("RCTs") studying the sexual health benefits of ashwagandha. NAD determined that Olly's evidence provided a reasonable basis for its claims regarding the sexual health benefits of ashwagandha in its Lovin' Libido product. However, NAD observed that the claimed benefit of improvements in "sensation," was not directly addressed by any of the RCTs and NAD determined that the studies did not relate to the specific claimed benefit of "sensation." Thus, while NAD determined that Olly provided a reasonable basis for its claims related to desire, drive, arousal, satisfaction and lubrication, NAD determined that the studies are not a good fit to support claims related to sensation and recommended that the sensation reference be discontinued.

Olly PBC (OLLY's Lovin' Libido and Mighty Mojo), Report #7428, *NAD/CARU Case Reports* (July 2025)

On appeal, a panel of the National Advertising Review Board recommended that Essor Group, Inc. discontinue certain claims for its Boka brand of oral care products, which contain Nano-hydroxyapatite (n-Ha), rather than fluoride. The claims were challenged by P&G, whose oral care products contain fluoride. First, the panel recommended that Essor

discontinue its "remineralization" claims ("Remineralizes teeth," including variations such as "remineralizes enamel," and "helps fortify the surface of teeth"), concluding that Essor lacked the requisite competent and reliable science to support its remineralization claims because, in part, none of the studies it provided were on Boka-formulated toothpastes. Second, the panel recommended that Essor discontinue its claim that its toothpaste whitens teeth, finding that Essor provided no evidence of testing on its own products. Third, the panel recommended that Essor discontinue the claim that "Boka mouthwash has prebiotics to maintain a healthy microbiome (that's science speak for preserving the good bacteria) so you can have fresher breath" finding that this claim lacked a reasonable basis because there was no testing on the product or studies that provide the causal connection that this prebiotic would provide fresher breath.

Essor Group, Inc. (Boka Oral Care Products), Report #7412, *NAD/CARU Case Reports* (July 2025)

Superiority Claims

In a Fast-Track SWIFT case, Human Interest Inc. challenged superiority claims made by Guideline, Inc., its competitor in the retirement benefits market. Both companies offer 401(k) plans to businesses through partnerships with Gusto, Inc., which offers payroll and HR solutions. If a Gusto customer wants to offer a 401(k) plan, they can select a provider, such as Human Interest or Guideline. At issue were the express claims "We're Gusto's #1 retirement partner" and "Most popular 401(k) with Gusto customers," and the implied claim that more Gusto customers select Guideline for their 401(k) program than any other 401(k) provider. Human Interest alleged that the claims were unsupported because it is now Gusto's most popular 401(k) partner. Guideline submitted evidence that it has the most active plans among Gusto providers, as SEC filings from both companies show that Guideline outpaces Human Interest in its total number of clients with plans.

While NAD determined that the record established that Guideline has the most active plans of Gusto's 401(k) providers, NAD questioned whether the message reasonably conveyed went beyond the highest number of active plans with Gusto customers. NAD found that one message reasonably conveyed is that Gusto customers are currently selecting Guideline for their 401(k) plan more often than any other provider. However, while the record demonstrated that Guideline is the leader in the total number of active 401(k) plans among Gusto customers, but Guideline did not demonstrate which 401(k) provider is currently being selected by more Gusto customers. Thus, NAD recommended that Guideline either discontinue the claims "We're Gusto's #1 retirement partner" and "Most popular 401(k) with Gusto customers," or modify the claims to disclose the basis for the claims is the number of active accounts with Gusto customers.

Guideline, Inc. (401(k) Program), Report #7476, *NAD/CARU Case Reports* (July 2025)

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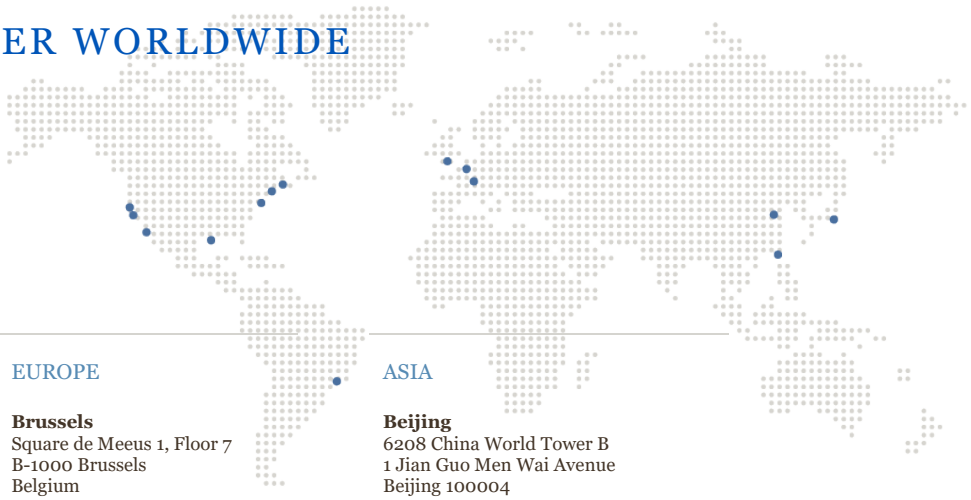

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** In April 2025, Simpson Thacher announced plans to expand its Bay Area presence with an office in San Francisco.*