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SECTION OF ANTITRUST LAW VOL . 10 NO. 1, FALL 2001

LETTER FROM THE EDITOR

Consumer Protection – aside from certain criminal laws, is there a more important role for law enforcement? Indeed, consumer protection can encompass *physical* safety, *fiscal* safety, and, increasingly, *information* safety, each of which is addressed in this edition of *Consumer Protection Update*.

Ohio Attorney General Betty Montgomery identifies protecting the elderly and other vulnerable populations as one of her priorities. As she notes, physical health is at stake for those who are susceptible to health fraud and to the increased costs associated with both anticompetitive and deceptive practices. General Montgomery also identifies privacy as *the* issue of the new century. Her candid and thoughtful interview with Bob Langer provides valuable insight into the policies of a key state law enforcer.

John Villafranco and Sapna Delacourt have given us a clear analysis of a number of recent cases ruling on the enforceability of "click-wrap" agreements. If you don't yet know the term "click-wrap," welcome to the twenty-first century and do not fail to read this article.

Gonzalo Mon provides a helpful and timely summary of laws directed at charitable promotions. This article is an ideal starting point for practitioners whose clients may wish to tie their promotions to a charitable cause.

We also offer a summary of FTC Chairman Timothy Muris's recently announced privacy agenda. While we continue to ponder the need for omnibus privacy legislation, it is clear that our clients must be more mindful than ever of existing laws, and potential amendments to them, as outlined in Chairman Muris's twelve-point plan.

The Consumer Protection Committee is a vital and active committee of the Antitrust Section. We are eagerly seeking new members and those who wish to participate in our listserv. Please contact any of the committee leaders listed on the next page, if you would like to join the committee. If you want to join the listserv, please contact John Villafranco. In addition, we are actively soliciting articles for our next newsletter. Please let me know if you have an article, or an idea for one, that you would like us to consider.

With appreciation to all of our contributors,

Joyce Plyler
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In This Issue

Interview Of Ohio Attorney General Betty Montgomery *

Consumer Protection Update ("CPU"): What do you see as the most important consumer protection issues to which NAAG should devote its resources during your tenure?

Montgomery: Obviously, telemarketing fraud, cross-border telemarketing fraud and serving our under-served population, our seniors and our most vulnerable populations. Predatory subprime lending kind of issues. Oftentimes, it is protecting our vulnerable populations – those less capable of defending themselves or knowing that they are being scammed.

The privacy issue, for me personally, is the issue of the twenty-first century. We have yet to, and we will not for a long time, figure out where the line needs to be drawn between legitimate information sharing and the point where most of us have our lives open like a book – from medical to financial – to our private affairs. And, I worry about that.

CPU: It is interesting you say that. As Chair of the Consumer Protection Committee of the Section of Antitrust Law of the ABA, I have now helped to organize and moderate several major privacy programs, which included representatives from the states, the FTC, the EU and the private sector. We will continue to explore these issues over and over again because new issues arise seemingly every day; for example, the recently enacted USA Patriot Act and how terrorism impacts perceptions of consumer privacy.

Montgomery: Enormous.

CPU: That's a story, which of course has not been well developed as yet.

Montgomery: What I really fear is that we are going to wake up 20 years from now, or even 10 years from now, and realize that we have given away the essential privacy that we as individuals in this country have enjoyed. Much as the Second Amendment was intended to (and this is an awful metaphor I know) but much as the Second Amendment was intended by the framers to allow farmers and merchants to protect their homes from invading governments and marauders, I think we will find that the computer, as our best friend, has become that kind of stalking menace. Ultimately, I think we put at risk the very privacy that has been so cherished in this country. I sound like a libertarian – I am not trying to. But I do worry about that.

CPU: Do you think there are likely to be initiatives from NAAG to deal with consumer privacy issues?

Montgomery: I think we are trying to figure a way through the Gramm-Leach-Bliley Act and some of the policy decisions at the federal level, whether it is DNA or financial information or what information insurance companies can have about us. We are just

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* The Honorable Betty Montgomery, the 45th Attorney General of Ohio, is the current Chair (Convener) of the Consumer Protection Committee of the National Association of Attorneys General. Attorney General Montgomery was reelected to serve a second four-year term in November 1998. She was formerly a criminal prosecutor and a state senator.

The Attorney General was interviewed by Bob Langer, Chair of the Consumer Protection Committee of the ABA, Section of Antitrust Law. Before entering private practice, Bob served as the Connecticut Assistant Attorney General in charge of Antitrust and Consumer Protection and as Chair of the NAAG Multistate Antitrust Task Force from 1990-1992.

Leadership of the Consumer Protection Committee (2001-2002)

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The leadership of the Consumer Protection Committee would like to thank Womble Carlyle Sandridge & Rice for their design and formatting of the *Consumer Protection Update*.

working through it issue by issue, and in this society that is the way you would like to think. You could have a global approach, but quite frankly it's too enormous a project. We just need to make certain that privacy concerns are in front of us every time we think about lowering barriers or making it easier to transfer information or keeping track of individuals' private lives. We have to make certain that we are aware that we are giving up freedoms in doing that.

CPU: Do you think that it is more likely to manifest itself in terms of federal legislation that is likely to be uniform throughout the country, or do you think that states are likely to act on their own and not necessarily uniformly?

Montgomery: I am not sure I am qualified to answer that. I think as a former legislator that you will have bits and pieces popping up in every state addressing individual circumstances that have presented themselves in a state. So you are going to have that. That is a natural process of lawmaking, but there are some things that will have to be addressed federally. Whether it is the banking system or the mail system or what is shared in terms of the public health or the insurance industry with regard to our private medical information and the like. Some of that really begs for a national solution, but quite frankly I don't think it's going to be that neat. I think we are going to have both federal and state legislative initiatives occurring at the same time, and then ultimately, as in all these hard issues, we will try to clean out some of the underbrush and achieve some consistency across the states in terms of uniformity in laws. But that will not come easily and it is going to be years in the unfolding.

CPU: In terms of your NAAG Consumer Protection Committee responsibilities, what do you see with respect to coordination between the states and the Federal Trade Commission?

Montgomery: I can tell you that the FTC is doing a better job in communicating with the states about congressional testimony and initiatives that they may have, and we visit with the FTC fairly regularly. We have done some fairly successful public sweeps, including direct mail, funeral packages and marketing scams. So we have worked closely with the FTC and I am looking forward to a good working relationship with the new Administration.

CPU: Through the aegis of NAAG should there be a Consumer Protection Task Force Chair similar to that which has been in place for many years as part of the NAAG Multistate Antitrust Task Force? Has any thought been given to whether it is even a good idea, whether it could possibly function, or whether consumer protection is so different in form from antitrust that it really could not work that way?

Montgomery: There is both a practical and probably an institutional response to that. I will say to you that there are many states that do not have, because of their size and/or their authority or lack of authority, an antitrust section per se. I do not think you could say that about consumer protection sections in any state attorney general's office. You also have a different culture between an antitrust section and a consumer section. We had a dramatic struggle, and Ohio was one of the four states doing this, to try to develop a uniform protocol on multistates in the consumer area.

CPU: When was that?

Montgomery: That was just in the last several years, and it was greeted with mixed results. I think we have worked large multistates much better, but we have had the growing pains of working with very diverse populations and very diverse legal systems and personalities. The consumer sections have been rooted in the 70s entrepreneurial, white hat, charge ahead kind of approach. The difference is, I think, the consumer section does not wear a suit and a jacket, and the antitrust section does. Antitrust is more regularized and antitrust cases generally take longer. There is a protocol in place, they have a history of working together and so, there is a different culture at work. In consumer, they are more entrepreneurial. It's more like the cavalry. They are off over the hill looking over small skirmishes to see where the danger is and attacking and fainting back. Antitrust tends to be the column behind them moving carefully and inexorably, but consumer tends to move in and out. We have worked to bring a little more discipline into the process, I think quite successfully. It is going to take a while, but it means that we have a lot of invested consumer chiefs who have been there for years. So making those changes tend to be a little more difficult, even if their attorneys general wish to make those changes. Thus, introducing multistate protocols was in some states very painful and viewed as intrusive.

CPU: That is a terrific answer. There is also less uniformity in terms of state consumer protection laws. There is much greater uniformity in the analytics of antitrust than there is in consumer protection.

Montgomery: That is a very good point. The nature of consumer laws tends to be more localized than global. When one thinks of antitrust most people think nationally – they think trustbusters – even though those laws historically came through the states. When we think of consumer protection, generally we are thinking of who is scamming ma and pa down the street. It is a state-by-state kind of thing, so we have state laws which are used, as

opposed to a national model. And they are not consistent, as you say.

I do think your question about uniformity is important. We are working toward that. It just is going to take a while because of the nature of the differences. But in terms of the differences, even here you see for example a perfect case of a large multistate that we probably would not have been in ten years ago. You correct me if I'm wrong, it would be Publishers Clearing House. We had a huge split among the states – Ohio led one side and, I think, Missouri led the other. This was in terms of what we should be doing on that case. We worked together and then got to the fork in the road. One group of states felt so strongly about proceeding to court or seeking more remedies. So you have a difference in philosophy. Some of it breaks down along party lines, but much of it breaks down along the traditions of the office itself. The natural default for some states is the lawsuit, and I cannot tell you that the natural default for me is the lawsuit. We certainly have plenty of lawyers and we could bring the lawsuits, but our whole job is compliance and you can achieve compliance through litigation or you can achieve compliance through settlement. Obviously the fine line is where is the legitimate compromise?

CPU: When I was in charge of both antitrust and consumer protection for my state, we could often obtain 90% of what we wanted within six months, but if we sought the extra 10%, it would take another five years. The key was recognizing that we would not be able to address so many other matters of importance if we chose to fight for the last 10%.

Montgomery: Right. Exactly. The difference is that the front line lawyer may be a very good lawyer and may be excellent at handling the case but, when it gets to the point of an overarching decision to bring the case or settle it, the attorney general has many things that he or she must consider in that decision. Whether it is 90% of something now, rather than 100% of something, and a lot more expense later, and assuming you can get the additional 10%, what are the resources of the office? That's a genuine concern to any attorney general on any major case – how much is this costing me to prosecute? How much staff time am I putting in here and what does that mean to my other clients when I am spending this much time on that? Obviously, for an elected attorney general, depending upon what position he or she has taken, that too will make a difference in terms of what is his policy. How does this case fit in the overall scheme of what is happening in government at this time, because time and place do intersect in a very important way in the litigation process. What I did before September 11th may be something different than I might do after September 11th.

CPU: And I think there is no area where that is going to intersect more or be more difficult to sort out than in the consumer privacy area.

Montgomery: Absolutely.

CPU: Just a couple more questions. One of the issues that has come up over and over again is whether state attorneys general ought to be granted direct authority to enforce Section 5 of the FTC Act in federal court. In that way, states would, through multidistrict litigation rules, find themselves in a single forum, which would be, for some purposes, extremely efficient – as it is for antitrust. Do you believe that state attorney general Section 5 authority will become a NAAG initiative?

Montgomery: Well, the advantages to such authority would be that historically states have encouraged federal legislation enabling them to enforce federal law in federal court, and it would enable states to obtain nationwide injunctive relief. The disadvantages are that it is not clear whether the states could also obtain nationwide restitution, and again, that may be an issue. I do not know whether we will be given it or not. We generally do not step away from expanded authority – more tools in our toolbox – but whether that happens or not I just do not know. We probably would support it, but it is hard to say right now, to be honest with you.

CPU: In your capacity as Chair of the NAAG Consumer Protection Committee, I am confident that you will have a central role in this issue of Section 5 FTC authority for state attorneys general. I just have one more question. Putting on your Attorney General of Ohio hat, what are your consumer protection priorities, both in terms of cases and legislation?

Montgomery: Well, I can say that I have probably spent a great deal of time on the vulnerable population. We spent the last several years focusing on consumer issues that directly affect our aging, younger and indigent populations. Those who are less likely to have access to, or understand, the court system – most directly our senior citizens. Under the rubric of protecting our vulnerable population, I also want to look into the antitrust area, particularly at prescription drugs, and the antitrust implications of some of the generic drugs versus patented drugs. That is driving our healthcare cost nationally and it is an area where I think attorneys general around the country are focusing their attention. We can make a dramatic impact, not only on the cost of healthcare, but also on the real health of our senior citizens – who truly oftentimes are choosing between medication and food – and at a time when they are probably not even equipped to make those decisions. I really think that is an area where we should be

focusing our attention. In the few cases where we have been involved, it has been pretty rewarding.

CPU: I am very appreciative that you have taken the time to speak with me. Thanks so much.

Montgomery: Thanks Bob. Thanks for your kindness.

Offer [Click] Acceptance: Enforceability Of Software Terms Of Service

By John E. Villafranco and Sapna Delacourt*

In recent months, a number of reported cases have struggled with the concept of offer and acceptance in the context of "click-wrap" agreements. The problem arises when a computer user downloads software onto his or her computer and is asked to review and either accept or reject the terms of service. With the click of a mouse, that user may accept the terms and may continue to use the product, subject to the software's conditions. Recent cases have considered this act of acceptance and argued that consumers should or should not be bound by certain provisions – such as forum selection and binding arbitration clauses – contained within these click-wrap agreements. At first blush, it appears as if courts entrusted with deciding these cases have done so unevenly, with varying degrees of deference to new technology. Through summary and analysis of these cases, this article concludes that (for the most part) a common and predictable legal principle binds each of these decisions: offer and informed acceptance equals contract.

Meeting of The Minds

Think back to the first week of law school and that old English case involving two ships by the same name, "Peerless."[1] Maybe you can even remember thinking – hmmm. . . . that makes sense – no contract where there has been no "meeting of the minds."

Very little has changed, really. A case decided this summer, *Specht v. Netscape Communications Corp.*,150 F.Supp.2d 585 (S.D.N.Y. 2001), relied on the reasoning in *Peerless* in finding that click-wrap agreements are enforceable between software manufacturers and consumers only when a "meeting of the minds" has occurred between the parties. The court distinguished click-wrap agreements from so-called "browse-wrap" agreements, by which consumers download and use software without taking any action that manifests their assent to the terms of the associated agreement.

In *Specht*, consumers downloaded the Netscape software "SmartDownload" free of charge from an Internet shareware website operated by a third party. Users merely clicked on the "Download" icon on the screen to initiate the download. A reference to a license agreement was visible only if consumers scrolled to the website's next page where the user would see an invitation to review a license agreement. The license agreement stated, "Please review and agree to the terms of the *Netscape SmartDownload software license agreement* before downloading and using the software." Visitors were not required to affirmatively assent to the license agreement or view the license agreement before downloading the software.

The judge determined that the contract was not enforceable because the consumers who obtained SmartDownload were not required to indicate their agreement to the license as a precondition for using the software. In other words, a "meeting of the minds" did not take place and a contract between the user and the software provider was never formed. The *Specht* court decided that the affirmative action of "clicking" an icon to "accept" an agreement is the necessary equivalent of an express declaration stating, "I assent to the terms and conditions of this agreement." Anything less – no contract.

Compare this approach to that of the National Conference of Commissioners on Uniform State Laws (NCCUSL), which has proposed legislation that would govern software agreements – the Uniform Computer Information Transactions Act (UCITA). Under UCITA, manufacturers of computer software, multimedia products, and computer data and databases are not required to

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[1] *See Raffles v. Wichelhaus*, 159 Eng.Rep. 375 (Ex.1864) (where the parties made a contract for the delivery of a shipment of cotton from Bombay to England on the ship *Peerless*. Unbeknownst to either party, there were two ships of that name sailing from Bombay on different dates. One party thought the contract referred to one of the ships, and the other to the second ship. The court held that there was no contract because there was no agreement between the parties regarding the terms of the contract, i.e., no "meeting of the minds.").

inform users of licensing restrictions until after the consummation of a transaction, such as when a consumer opens the software box or after a consumer purchases and downloads software online. The consumer is not bound by the terms of the agreement, however, until after having expressly accepted the terms of the software agreement. In other words, the "meeting of the minds" does not occur at point of purchase; it occurs after all material terms and conditions have been disclosed to the consumer.

The NCCUSL believes that UCITA strikes an appropriate balance by relying on core contract principles, while at the same time recognizing that there is a unique quality to electronic software that requires special consideration. The problem, however, is that UCITA goes a step further than the court was willing to go in *Specht* by not requiring a *knowing* acceptance. Perhaps this is one reason UCITA has been adopted only in Maryland and Virginia and its prospects for adoption in other states are questionable.

The Offeror Is Master of The Offer

The *Specht* decision is consistent with the approach taken by the courts since first considering the validity of click-wrap agreements in the mid-1990s. In those cases, the courts relied on the principle that the vendor, as master of the offer, may require the user to accept terms that in retrospect may be disadvantageous because the buyer can reject disadvantageous terms by canceling the transaction or returning the product.

In *ProCD, Inc. v. Zeidenberg and Silken Mountain Web Services*, 86 F.3d 1447 (7th Cir. 1996), a case involving a license that appeared on the user's screen every time the software ran and limited use to non-commercial purposes, the court analogized to transactions in which the exchange of money precedes the communication of detailed terms. For example, when a consumer purchases a concert ticket, attendance implies assent to the terms and conditions on the back of the ticket whether the terms are advantageous or disadvantageous to the concert-goer. The court held that the same is true in the context of the sale of consumer software products – the user cannot pick and choose among terms.

Similarly, in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997), the court followed the reasoning of *ProCD* and held that an arbitration clause was a binding term of sale. The customer agreed to purchase a computer over the phone and received the terms and conditions related to the sale in the mail with the product. The list of terms governed the sale unless the customer returned the computer within thirty days. The court ruled that Hill's failure to return the product within the specified time period bound him to the terms of the sale dictated by Gateway.

Perhaps the biggest battles in this area have concerned the enforceability of forum selection clauses contained within click-wrap agreements. The general rule is that forum selection clauses are presumptively valid and enforceable; such clauses enhance contractual and economic predictability while conserving judicial resources. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (Supreme Court reversed the Ninth Circuit's refusal to enforce a forum selection clause on the back of a cruise line passenger ticket). The rationale behind *Carnival Cruise Lines* is that commercial entities and consumers benefit from forum selection clauses because they eliminate confusion about where a suit arising from the contract must be brought and defended. Litigants are spared the time and expense of pretrial motions to determine the correct forum, thus conserving judicial resources that otherwise would be devoted to hearing and deciding those motions. The savings realized by commercial entities by limiting the fora in which they may be sued are consequently passed on to consumers in the form of lower prices. The only exception arises in cases where enforcement of the forum selection provision is unreasonable or unjust. Notably, this exception is not triggered by mere inconvenience or the additional expense of traveling to another forum.

Recent cases decided in Florida and the District of Columbia follow the reasoning of the *ProCD* and *Hill* decisions in considering whether a forum selection clause is enforceable. In *America Online, Inc. v. Booker*, 781 So. 2d 423 (Fla. Dist. Ct. App. 2001), the court enforced a forum selection clause in a breach of contract action brought by consumers as a class against America Online ("AOL") based on the theory that the courts should not interfere with the legitimate expectations of contracting parties. AOL's terms of service specified Virginia as the forum for any actions against the company – a jurisdiction which does not provide a mechanism for class action law suits. A lack of class action procedure was held to be an insufficient basis to render an otherwise valid forum selection clause unenforceable. Because the forum selection provision was obtained through a freely negotiated agreement which was not shown to be unreasonable or unjust, the plaintiffs could not defeat the terms of the otherwise valid contract simply because the cause of action was brought on behalf of a class of plaintiffs. Furthermore, the appeals court justified the holding on the general contract principle that parties have the right to control the terms of an agreement. Bargaining for the right

to control the specific forum in which a party will be called to defend is within the purview of that party's rights as the master of the offer. A user may reject disadvantageous terms by canceling the transaction or returning the product.

The same result was reached in *Forrest v. Verizon Communications, Inc.*, No. 01CA405 (D.C. Super. Ct. July 30, 2001), involving a forum selection clause in an online contract between consumers who registered and entered into access agreements with Verizon Communications, Inc. and Verizon Internet Services. The terms of the forum selection clause required litigation to take place in Virginia and a choice of law provision designated Virginia as the state law that would control. In upholding the clause, the court held that there were legitimate reasons for Virginia to be the forum for litigating the dispute: Verizon's Internet Service headquarters are in Reston, Virginia and many of the company's operations take place in Virginia. The defendants' selection of Virginia as the situs of litigation therefore was considered a permissible attempt to limit the forum in which it could be sued.

Public Policy May Override the Contract

Of course there are exceptions to the rule – another lesson from that first week of law school – particularly when public policy and the state of California are involved. This summer, a California appellate court reviewing a similar forum selection clause rejected the rationale of the *Booker* and *Forrest* courts on public policy grounds. The court held that AOL's forum selection clause was unfair and unreasonable because the remedies available to consumers in Virginia, the forum of choice for AOL, were not comparable to those in California. *America Online, Inc., v. The Superior Court of Alameda County*, No. A092813, 2001 Cal. App. LEXIS 473, (Cal. Ct. App. June 21, 2001). The court noted that California law favors contractual forum selection clauses so long as they are entered freely and voluntarily and their enforcement is not unreasonable. The situation was different here, the court concluded, because the forum significantly impaired the rights of California consumers by subjecting them to Virginia laws that are not as favorable to plaintiffs as are California laws. Because California law in many instances tends to be more pro-plaintiff than those of other states, this holding could have significant ramifications for click-wrap agreements, at least in California.

Conclusion

What should a software vendor make of all this? The answer is more predictable than you might think. First, there needs to be a meeting of the minds, which means that a consumer should be presented with the terms and conditions and asked affirmatively to "Accept." A "browse-wrap" agreement is not likely to be upheld. Second, the vendor, as master of the offer, is free to include whatever terms are appropriate, short of a contract of adhesion. As long as a consumer who is unhappy with those terms can choose not to use or can return that product, the contract is likely to be upheld, based on the weight of existing precedent. Where there is demand, the market will supply better terms. And finally, in California, as with so many other issues of consumer protection law, all bets are off.

Buying From The Heart: Rules For Charitable Promotions

By Gonzalo E. Mon[*]

In the wake of the terrorist attacks on September 11, 2001, charitable organizations have seen an overwhelming increase in the amount of donations they have received. According to New York Attorney General Elliot Spitzer, as of November 6, 2001, charities had already collected over $1 billion for families of the attack victims.[1] In addition to money donated directly to charitable organizations, some of the funds collected have come from promotions in which for-profit corporations donate a percentage of their sales to a charity.

Unfortunately, at the same time these corporations have been running their charitable promotions, other companies have used the September 11 tragedy as an opportunity to trick people into making donations to fraudulent or nonexistent charities. Little, if any, of the money that is sent to these unscrupulous companies ever makes it to the intended recipients. Government officials at both the federal and state levels have taken notice of these schemes and are beginning to take actions against companies that run fraudulent charitable promotions.

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[1] New York Attorney General Elliot Spitzer, Testimony Before the Committee on Energy and Commerce, U.S. House of Representatives (Nov. 6, 2001).

I. Regulation at the Federal Level

Faced with reports of an increase in charitable solicitation fraud, Congress passed the USA Patriot Act of 2001[2] on October 26, 2001. The law, in relevant part, amends the Telemarketing and Consumer Fraud and Abuse Prevention Act[3] to cover fraudulent charitable solicitations and requires any person engaged in telemarketing for the solicitation of charitable contributions, donations, or gifts to disclose promptly and clearly the purpose of the telephone call, as well as any other disclosures that the Federal Trade Commission (the "FTC") deems appropriate. The FTC is currently considering amendments to its Telemarketing Sales Rule[4] to implement this new authority.[5]

In testimony before Congress on November 6, 2001, FTC Bureau of Consumer Protection Director J. Howard Beales III testified that the Commission stepped up its efforts to detect and deter fraudulent charitable fund-raising schemes after September 11.[6] Central to this monitoring effort is the FTC's Consumer Sentinel, an online consumer complaint database and investigation tool that can be accessed by hundreds of law enforcement organizations.[7] From September 12, 2001 through October 25, 2001, the Consumer Sentinel received almost 200 disaster-related complaints, 24 percent of which were related to charitable solicitations.[8] The FTC has worked with other agencies to investigate some of these complaints.

Although the FTC is, in most instances, barred from suing nonprofit organizations under the FTC Act,[9] the Commission has actively pursued for-profit organizations that have engaged in fraudulent charitable solicitations. Over the past decade, the Commission has filed more than 25 cases in federal district courts, challenging deceptive fundraising practices by for-profit solicitors.[10] More recently, the FTC organized two "sweeps" of multi-state, multi-agency law enforcement actions targeting fraudulent charitable solicitations. Director Beales promised that the Commission would continue to closely monitor charitable solicitations in its ongoing efforts to deter fraud. In addition, the FTC plans to help educate consumers about how to spot potentially fraudulent solicitations.[11]

II. Regulation at the State Level

Although state laws that regulate charitable promotions have been getting more attention in recent months, these laws are not new. In fact, most states have existing statutes that regulate charitable solicitations in one form or another. Any company that plans to sponsor a charitable promotion needs to be aware of what types of activities are covered by these statutes and what these statutes require.

While some state regulations focus primarily on charitable organizations or professional fundraisers, almost half the states have enacted laws that apply to for-profit entities that partner with charitable organizations to further their respective goals.[12] The most common form of this sort of legislation describes a for-profit entity as a "commercial co-venturer" when that entity promotes its products or services by representing that their purchase or use will benefit a charitable organization or cause.[13] Depending on the statutory definition of a "commercial co-venturer," a company running a

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[2] USA Patriot Act, Pub. L. No. 107-56, __ Stat. __ (2001).

[3] 15 U.S.C. § 1601 *et seq*. (2001).

[4] 16 C.F.R. § 310 (2001).

[5] Director J. Howard Beales III, Testimony Before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, U.S. House of Representatives (Nov. 6, 2001) <http://www.ftc.gov/opa/2001/11/charitablesolicitationfraud.htm> ("Beales Testimony").

[6] *See id*.

[7] *See* <http://www.consumer.gov/sentinel>

[8] *See* Beales Testimony, *supra* n. 5.

[9] Section 5(a)(2) of the FTC Act states: "The commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2) (2001). A "corporation" is defined as any company or association "incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members . . . . *Id*. at § 44. *See also Community Blood Bank of Kansas City, Inc. v. FTC*, 405 F.2d 1011 (8th Cir. 1969).

[10] *See* Beales Testimony, *supra* n. 5.

[11] *See id*.; FTC Guides to Giving Wisely <http://www.ftc.gov/bcp/conline/edcams/badge/>.

[12] Such laws have been enacted in Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Louisiana, Maine, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Virginia, Washington and Wisconsin.

[13] *See, e.g*., Ala. Code § 13A-9-70(4) (2001); Ark. Code Ann. § 4-28-401 (2001).

charitable promotion may have to comply with a given state's charitable solicitation laws.

A. General Statutory Requirements

Most state commercial co-venturer statutes apply to advertising or sales campaigns that represent that the purchase or use of goods or services offered by the commercial co-venturer will benefit, in whole or in part, a charitable organization or purpose.[14] While the terms of these statutes vary by state, they generally require that a co-venturer: (1) enter into written contracts with the charitable organization that will benefit from the promotion; (2) keep accurate records during the promotion; and (3) include certain disclosures in all advertisements.

1. Contract Requirements

In general, the company's contract with a charitable organization should contain the following provisions:

- A statement describing the charitable purpose of the promotion;
- The time period within which the promotion will take place;
- If applicable, the per-unit amount of money the charity will receive;
- If applicable, the maximum dollar amount the charity may receive;
- The manner in which the charity's name will be used;
- A provision for final accounting and the date by which it will be made; and
- The date and the manner in which the funds will be given to the charity.

In some states, a copy of the contract has to be filed with a government agency before the promotion commences.[15]

2. Record-Keeping Requirements

Many states require that commercial co-venturers maintain accurate records regarding their promotions.[16] These records should generally reflect how many consumers participated in the promotion as well as the total amount of money that was given to charity. These records should be maintained for at least three years from the conclusion of the promotion.

3. Advertising Requirements

In some states,[17] advertisements for the promotion may be required to include the following disclosures:

- The name and contact information for the charity;
- The charitable purpose of the funds;
- The amount of money that will be given to the charity, including any cap on donations; and
- A statement that the donation will not be tax-deductible to the consumer.

Some states also require a co-venturer to obtain written permission to use a charity's name in advertisements.[18]

B. Registration and Bonding

Alabama,[19] Maine[20] and Massachusetts[21] have similarly-worded statutes that generally define a commercial co-venturer as "[a]ny person who for profit or commercial consideration, conducts, promotes, underwrites, arranges, or sponsors a sale, performance, or event of any kind which is advertised, and which will benefit, to any extent, a charitable or religious organization." If a company falls within this definition, the company may have to comply with these state statutes' registration and bonding requirements.[22] The amount of the bond required ranges between $10,000 and $25,000, depending on the state.

Although the Illinois Charitable Trusts Act does not specifically discuss commercial co-venturers, the language of the Act may be broad enough to cover such entities in some instances.[23] As a result,

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[14] *See, e.g.*, Colo. Rev. Stat. § 6-16-103(3), (4) (2001); Conn. Gen. Stat. § 21a-190a(8), (9) (2001).

[15] *See, e.g.*, Ala. Code § 13A-9-71(i); S.C. Code § 33-56-70 (2001).

[16] *See, e.g.*, N.Y. Exec. Law § Art. 7-A § 173(2) (2001); Or. Rev. Stat. § 128.848 (2001).

[17] *See, e.g.*, N.Y. Exec. Law § Art. 7-A § 174-c; Wash. Rev. Code § 19.09.100 (2001).

[18] *See, e.g.*, Fla. Stat. 496.414 (2001); Or. Rev. Stat. § 128.856.

[19] Ala. Code § 13A-9-70(4).

[20] Me. Rev. Stat.§ 5003 (2001).

[21] Mass. Gen. Laws ch. 68, § 18 (2001).

[22] *See* Ala. Code § 13A-9-71(h); Me. Rev. Stat.§ 5008; Mass. Gen. Laws ch. 68, § 24.

[23] The Illinois Charitable Trusts Act generally applies to "any person, individual, group of individuals, association, corporation, not-for-profit corporation, estate representative, or other legal entity holding property for or solicited for any charitable purpose." 760 Ill. Comp. Stat. 55/3 (2001).

companies running charitable promotions may also be subject to Illinois registration requirements.[24]

III. Other Sources of Guidance

In addition to federal and state regulations, companies that want to sponsor a charitable promotion should be aware of guidance issued by other groups such as the Council of Better Business Bureaus (the "BBB") and the National Association of Attorneys General ("NAAG") regarding solicitations.

A. BBB Standards for Charitable Solicitations

In 1982, the BBB promulgated its "Standards for Charitable Solicitation."[25] Although many of the BBB's standards apply only to charitable organizations, and not to commercial co-venturers, some apply more broadly to any organization that solicits for charity. For example, the BBB states that for all direct contact solicitations, such as personal and telephone solicitations, the company must disclose: (a) its name and its relationship to the charity; (b) the name of the charity; and (c) the reasons for which the funds are being solicited.[26]

With respect to solicitations that are made in conjunction with the sale of goods, services or admissions to events, a company must make certain disclosures in all advertisements and at the point of solicitation. The company must again identify the charity that will benefit from the promotion. In addition, the company must provide a source from which written information is available and disclose the actual or anticipated portion of sales or the admission price that will benefit the charity.[27] Of course, all advertisements for the promotion must be accurate and truthful in all regards, including the description of the problem for which funds are being raised.

B. NAAG's Report on Nonprofit Product Marketing

In 1999, NAAG published the *Preliminary Multistate Report on Nonprofit Product Marketing*.[28] The Report was prepared by the attorneys general of sixteen states[29] and the District of Columbia Corporate Counsel in response to the increase in advertising campaigns in which companies use the names or logos of charitable organizations. These advertisements often state that a charity will receive a percentage of sales. Many also convey that the charity has either endorsed a particular product or held it to be superior to other products in that category. In a number of cases, though, NAAG found these representations to be untrue.

The Report states that advertisements that misrepresent that a charity has endorsed a product or found the product to be superior to other products may violate false advertising laws or unfair and deceptive trade practices acts. If an ad uses a charity's name or logo, the advertiser may be required to clearly and conspicuously disclose that the charity has not endorsed the product or determined its superiority, if that is the case.[30] Moreover, if an advertiser has paid to use the charity's name or entered into an exclusive sponsorship agreement, the ad should state that as well.[31] NAAG also notes that advertisements should not mislead or confuse consumers regarding how a charity will benefit from a purchase.[32]

FTC Chairman Muris Announces Privacy Agenda

By Joyce E. Plyler[*]

Federal Trade Commission Chairman Timothy Muris announced his much-anticipated privacy agenda in early October. Outlining a twelve-point plan, Muris pledged to use the FTC's "full arsenal of tools" to more aggressively enforce existing laws. Muris promised to increase resources devoted to

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[24] *See id*. at 55/5.

[25] *See* <http://www.give.org/standards/cbbbstds.asp>.

[26] *See id*. at C.4.

[27] *See id*. at C.5.

[28] NAAG, *A Preliminary Multistate Report on Nonprofit Marketing* (Apr. 1999). Although the report is labeled as a "preliminary" report, NAAG determined that a subsequent report would not be necessary.

[29] Arkansas, California, Connecticut, Florida, Illinois, Kentucky, Maryland, Minnesota, Missouri, New Jersey, New Mexico, New York, Pennsylvania, Texas, Vermont and Wisconsin.

[30] *See id*. at 37 - 42.

[31] *See id*. at 43 - 47.

[32] *See id*. at 45.

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privacy by 50% but declined to recommend new legislation without further study.

The October 4 speech[1] offers important insights into the priorities of the new Chairman. Focusing on the consequences of the misuse of information, Muris commented on a hierarchy of consumer concerns: risks to physical security; the risk of economic injury; and the aggregate harm of unwanted intrusions into daily life. Muris appears equally concerned with online and offline uses of information. With obvious disdain for the "barely comprehensible" privacy notices required by the Gramm-Leach-Bliley Act, Muris pronounced "we can do better" in a call for greater study of the need for and challenges of online privacy legislation.

Chairman Muris warned that the FTC would expand its review of privacy policies and would even seed lists with names to ensure that promises regarding disclosures to third parties are honored. The FTC will target cases through improvements in its complaint handling system and by seeking referrals from seal programs and other entities.

Some privacy promises will engender closer scrutiny. Muris stated that the FTC will keep "a close eye" on claims touting the privacy or security features of particular products and will give priority to complaints that companies have failed to meet their promise to comply with the European Union Safe Harbor Principles.

Muris declared that every division of the Bureau of Consumer Protection will be involved in executing the enforcement plan. He identified the following twelve points as key to the new privacy agenda:[2]

- **Creating a National Do-Not-Call List** Muris will propose amending the Telemarketing Sales Rule to create a national do-not-call list by which consumers could make one call to remove their names from telemarketing lists. Other amendments also may be recommended.

- **Beefing Up Enforcement Against Fraudulent and Deceptive Spam**

- **Helping Victims of ID Theft** The FTC will use the data it collects to spot patterns, will develop criminal referral packages, and will help create a universal fraud affidavit to assist victims.

- **Putting a Stop to Pretexting** The FTC will continue to pursue cases of "pretexting" (obtaining personal financial information through pretext) as now prohibited in the Gramm-Leach-Bliley Act.

- **Encouraging Accuracy in Credit Reporting and Compliance with the Fair Credit Reporting Act** The FTC will increase efforts to ensure that consumers are notified when credit report information is the reason for a denial of credit, insurance or employment, and to ensure that all participants in the credit reporting system meet their obligations regarding the accuracy of a consumer's credit information.

- **Enforcing Privacy Promises** New efforts will focus on cases involving sensitive information, transfers of information as part of a bankruptcy or reorganization, and the failure of companies to meet commitments made under the European Union Safe Harbor Principles. The FTC also will investigate claims touting the privacy and security features of products and services.

- **Increasing Enforcement and Outreach on Children's Online Privacy**

- **Encouraging Consumers' Privacy Complaints** The FTC is developing a campaign to let consumers know that they should report their privacy-related complaints to the FTC.

- **Enforcing the Telemarketing Sales Rule** The FTC will increase enforcement of the privacy provisions of the Telemarketing Sales Rule, especially restrictions on harassing calls and the hours during which calls are allowed.

- **Restricting the Use of Pre-acquired Account Information** The FTC will increase its efforts to ensure that pre-acquired lists of names and credit card numbers of potential telemarketing customers are not used to bill consumers for goods or services they don't want. This may include amendments to the Telemarketing Sales Rule.

- **Enforcing the Gramm-Leach-Bliley Act** The FTC will take enforcement action, increase consumer awareness, and host an interagency workshop.

- **Holding Workshops**

[1] The full text of Muris's speech is available at http://www.ftc.gov/speeches/muris/privisp1002.htm

[2] The full text of the agenda is available at http://www.ftc.gov/opa/2001/10/privacyagenda.htm

DON'T MISS THESE UPCOMING COMMITTEE PROGRAMS

Spring Meeting 2002

General Session Program:
"Advertising and Marketing Disclosures: The Conflict Between Client Needs, Consumer Wants and Legal Standards"
Wed., April 24, 2:00 – 3:30

Plus: Our Annual Advertising Law Update

Visit our webpage for more details:
http://www.abanet.org/antitrust/committees/counsel/comm_consumer.html

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