

Hot Topics for Nonprofits in Cause Marketing: Enforcement

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Enforcement: How have these laws been enforced?

- A. Misrepresentation is the primary target in most states — *i.e.*, false ads where funds do not in fact go to charity.
- B. In 1999 the Georgia Attorney General's office investigated a General Mills promotion for Yoplait yogurt. The manufacturer had promised on the outside of specially marked Yoplait lids to donate 50¢ for each returned lid. A statement under the lid said the company's total donation would only be up to a maximum of \$100,000. The state said that this disclosure — made only after the product was purchased — was inadequate to avoid consumer deception. The manufacturer settled the matter by agreeing to make additional donations to match what would have been given without the \$100,000 cap. **NOTE:** It is not clear whether disclosure of the \$100,000 cap on the outside of the packages would have rescued the promotion. While it certainly would have helped, some state regulators believe that a cap is inherently deceptive unless it is set high enough to assure that *all* (or virtually all) sales made during the promotion will result in a donation of the advertised, per-unit amount to the charity; otherwise the consumer normally has no way to know when a cap has been reached and may be induced to buy a product in the belief that the purchase will aid the charity when that is no longer the case.
- C. How about a guaranteed minimum donation? Is that materially misleading? The answer may depend on the level of the guarantee and the anticipated sales. There have been no enforcement actions, but if the guaranteed amount exceeds the donation that would be generated by anticipated sales, the result could be that consumer purchases no longer affect the donation.
- D. Honest offers by reputable commercial sponsors generally have not been targets for aggressive enforcement of technical requirements of commercial co-venture registration.
1. But beware of "solicitation" disclosures that may be required in commercial co-venture offers. If a state requires such disclosures it may contact the *charity* on the theory that the co-venture offer is a form of solicitation being made on behalf of the charity. The requirements generally can be satisfied with POS materials or package inserts.
 2. Some states also may be strict in their definition of a "professional solicitor" if they sense that a commercial co-venture offer in any way seeks a "contribution" from the consumer beyond the ordinary cost of a product, or if the co-venturer is in any way "compensated" by the charity.
 3. Be aware, also, of local ordinances in California, Florida and Texas. Local authorities may need to be contacted for details, though national programs that comply with standard commercial co-venture disclosures do not typically encounter problems.
- E. State and federal authorities have focused on a number of promotional campaigns that may have suggested a greater sponsorship or endorsement *by the charity* of the manufacturer than in fact was warranted.
1. Arthritis Foundation — McNeil Consumer Products Company

In the face of allegations that use of the Arthritis Foundation's name and logo in advertisements for pain relievers was misleading, McNeil and the Foundation agreed in a voluntary compliance order to cease the campaign. Complicating facts included unsubstantiated statements in ads that the products were "new," that the Foundation had "helped to create" the products, and that a portion of the purchase price of each product would help the Foundation when in fact the manufacturer's donation was a fixed amount

plus a percentage of sales if a certain threshold was reached, which it apparently was not. The settlement included provisions for McNeil to pay refunds to consumers upon request, and for payment by McNeil of almost \$2 million in costs, fees and additional donations to arthritis research.

2. Sunbeam Products v. American Medical Association

No. 97C 6313 (N.D. Ill. 1997). This was a private action for breach of contract. The AMA agreed to an exclusive arrangement to allow Sunbeam to put the AMA's name and logo on several products, including blood pressure monitors, heating pads, thermometers, etc. In return, the AMA would receive payments in the form of royalties from the sale of the products. When the plan became public, the AMA's own membership protested. Realizing its error (and recognizing the appearance of a conflict of interest), the AMA sought to terminate the deal. Sunbeam, fearing that the public would view the termination as an AMA vote of no-confidence in Sunbeam's products, sued to enforce the contract. The case settled with the AMA paying almost \$10 million in damages. This case is widely viewed as one of the strongest factors leading to the proposed multistate guidelines.

3. SmithKline Beecham and the American Cancer Society

SmithKline agreed to pay the American Cancer Society \$1 million per year (plus certain royalties) for the right to use the Society's name in connection with marketing the NicoDerm patch and Nicorette gum. The ads prominently featured the Society's logo, plus the slogan "Partners in Helping Quit." The Society did not in fact endorse or approve the products as being any more effective than others in helping smokers quit their habit. In fact, the Society had a policy against endorsing products. In a settlement with 12 states, SmithKline agreed to pay \$2.5 million for costs, fees and donations to smoking cessation initiatives.

4. In the matter of Eskimo Pie Corp., F.T.C. Docket No. C-3597 (1995).

The manufacturer agreed to stop running ads that said, "Now Eskimo Pie and the American Diabetes Association are partners in providing the pure pleasure of frozen novelties to everyone!" The Association had not endorsed the advertised product.

5. Benckiser Consumer Products — FTC Consent Agreement, 61 Fed. Reg. 10347 (1996)

Advertising for Benckiser's "EarthRite" line of products claimed that a portion of EarthRite's proceeds would be donated to non-profit environmental groups. The FTC alleged that Benckiser had not made any such donations since it started selling EarthRite products in 1992. Benckiser agreed to stop making such claims, unless they were true, and to disclose "clearly, prominently and in close proximity" to any such claim the method of determining the amount of the donation.

6. Internet Promotions

State authorities are starting to pay attention to e-commerce sites that promise to pay a percentage of purchases to a charity designated by the consumer. Sometimes the donation is never made. Or it is made only after a threshold is reached, and the consumer has no way to know this. Also, the web site may list the selected charities in such a way as to suggest sponsorship, affiliation or endorsement by the charities when this is not the case. Expect to see enforcement action in this area.

- F. There is a subgroup of the National Association of Attorneys General called NASCO (National Association of State Charity Officials). It meets formally once a year and its members consult each other informally between formal meetings to discuss enforcement issues. Current issues of concern can be viewed at the Association's website www.nasconet.org.
- G. The Better Business Bureau/Philanthropic Advisory Service will inquire into charitable promotions that come to its attention, determine whether the organizations comply or will agree to comply with its guidelines, and produce a report available to the public based on its investigation.
- H. As in many areas of advertising law, private class actions may pose a bigger risk than regulatory action. An example is *Demetsenare v. Germanotta*, 2:11-cv-12753-BAF-LJM (E.D. Mich.), a complaint filed on June 24, 2011, alleging that Lady Gaga (a/k/a Stefani Germanotta) engaged in false and misleading business practices when she advertised on her website that "all proceeds" from the sale of certain rubber wristbands via her website would benefit tsunami and earthquake relief efforts in Japan, when, allegedly, some of the \$5.00 purchase price was retained by the seller, along with some or all of the sizable "shipping charges" for the product, which ranged up to \$23.00 depending on the method of shipment selected by the purchaser. Whether the allegations are true or not, the fact that the complaint was filed shows that the class-action bar has discovered cause-marketing activities as potential targets.
- I. What are the consequences of failing to comply?
1. "Letter of the law" provides for a range of penalties, including criminal penalties in some states.
 2. As a practical matter, failing to comply with technical filing requirements has been treated leniently, except for extreme cases – although compliance later can end up costing more than complying up front. If deception is suspected, expect stricter enforcement and harsher penalties.
 3. The Multistate Guidelines suggest the possibility of increased enforcement under state unfair trade practices laws.
- J. How hard is it to comply?
1. For commercial co-venturers, generally not hard.
 - a) Much of the burden falls on charity, especially if the charity is not already registered in all states.
 - b) But ad disclosures don't always fit with the approach the marketer wants to take.
 2. For professional fund-raiser/paid solicitor, and fundraising counsel, compliance nationally for a single promotion would be a costly administrative burden.
- K. IRS Scrutiny
- Expect to see more attention from the IRS toward all forms of cause marketing. Public attention has focused on charities for a number of reasons, including high salaries of charity officers, allegations of misleading practices following 9/11, disputes over valuation of in-kind donations, and general concern about charities becoming more closely and actively involved with businesses.

Ways to Make Compliance Unnecessary

- A. If compliance is too burdensome, can you structure a promotion that doesn't require compliance?
1. Yes. The question is whether it's the kind of promotion you want to run.
 2. Examples:
 - a) Name of charity publicized on pack or at POS and no other activities conducted.
 - i. OK under most state laws.
 - ii. But may be covered by any state that says simply advertising the name of the charity in connection with a sale is enough (e.g., Massachusetts).
 - iii. Also may trigger some disclosure requirements under the new Multistate Guidelines, especially if the product is one that the charity might appear to have endorsed.
 - b) Purchase of licensed goods for use as premiums.
 - c) Sponsorship and publication of support, without other representations.
 - d) Voiding in "problem" states. Makes holes in a national promotion.
 - e) Agencies should emphasize the promotional value of cause-related programs (versus the benefits to charity) when enlisting manufacturer participation in such programs. If possible, agencies should work for and be compensated by the manufacturer, not the charity.
 - f) Manufacturers should not charge more for their products when conducting a charitable sales promotion. Even if they are considered commercial co-venturers, this helps to avoid treatment as a professional fund-raiser/paid solicitor.
 - g) Manufacturers should not state or imply the consumer will contribute to a charity through them. This will help avoid treatment as a professional fund-raiser. Rather, manufacturers should state *they* will contribute [X¢] when the consumer buys the manufacturer's product. If a marketer does invite direct contributions by consumers, it is important to avoid any "compensation" for the marketer.
 - h) If you supply products to a charity for resale by the charity (such as door-to-door sales of candy bars by school groups), make clear that you are merely a supplier to the charity, and that the charity conducts its own sales to its members and the public. The more you function simply as a seller of goods to the charity, the less likely you will be deemed a commercial co-venturer or "fundraising counsel."

International

- A. Charity Registration. Many countries require a charity to be registered in the country before any fundraising can be conducted on its behalf.
- B. Charity Spending. Some countries require any money raised for a charity in that country to remain and be spent by the charity in that country.

- C. Fundraiser Registration. Some countries might deem the CCV company to be a form of fundraiser with a registration requirement.
- D. Tax Issues – Donations. Any amount you treat as a “donation,” might not qualify for deductions or other beneficial treatment in a given country if paid outside the country.
- E. Tax Issues – Intra-company. If sponsor pays money from an entity in one country to a related entity in another country before disbursing to the charity, there might be tax issues.
- F. Consumer Perception. Consumers in any given country might not respond well to an offer benefiting a foreign charity.
- G. Consult Local Counsel. Before running a program in a foreign country, it is advisable to consult knowledgeable counsel in that country.

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