

# #MarketingLaw - Fake News, Auto-Renewal Subscription Plans, Influencers and the Latest from the FTC

November 20, 2017 – The TMCA

by Fara Sunderji



We are back from the 2017 ANA/BAA Marketing Law Conference, Break Through: Legal Strategies for Dynamic Businesses. It was a great three days in Chicago of educational seminars and networking with colleagues, clients, friends and the FTC. If you didn't make it this

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- Fara Sunderji

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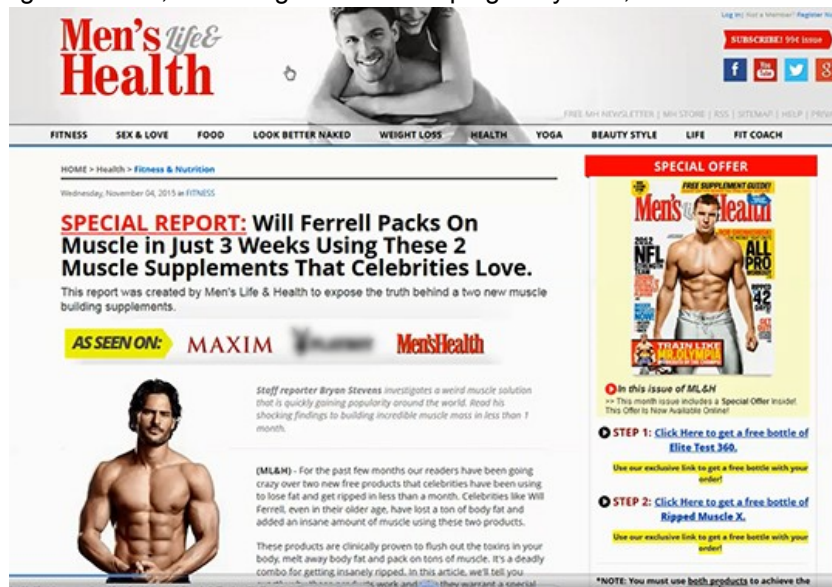
- Trademark, Copyright + Advertising
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year, don't worry – here's a quick wrap-up of the highlights:

- **Influencers** – Continuing from last year's focus on influencers, many of the sessions, including those with staff members from the FTC, touched on influencer marketing and the necessity of clear and conspicuous disclosures. Everyone from micro influencers (once called mommy bloggers), esports players, celebrities and even dog influencers (hello [Doug the Pug](#)) made an appearance in conference discussions. The FTC staff discussed the [warning letter campaign](#) from earlier in the year and the first ever [enforcement action against individual influencers](#), who just happened to own the company they were advertising, but didn't tell you that. We learned that the FTC continues to watch influencers and it is not out of the question that we will see an enforcement action brought against an influencer who is independent from the brand he or she endorses.
- **Auto Renewal Subscription Plans** – In a session on the top legal developments of the year, Leslie Fair, Senior Attorney at the Bureau of Consumer Protection at the FTC and author of the FTC's [Business Blog](#), and Martin Zwerling, Deputy Director of the NAD, talked about negative option plans. A "negative option" is an arrangement where goods or services are sent to you automatically unless you tell the seller that you do not want them. Subscription plans have become very popular these days – it's no longer just the cheese of the month club, but much more popular programs like

BarkBox, Blue Apron, Birchbox, Amazon subscription plans and Fabletics. Negative options are also often associated with free trial offers or special deals. The panel discussed a recent NAD case in which it concluded that the advertiser needed to clearly and conspicuously disclose – in immediate proximity to the introductory discount offer – the material terms of the offer. Leslie Fair also hinted that we'd see an FTC action involving negative options plans very soon... and that happened the very next day!

- **Fake News** – The day after the conference ended, the FTC announced a settlement with a long list of weight-loss, muscle-building, and wrinkle-reduction advertisers who were using fake news to trick consumers. As detailed in the complaint, a group of 19 companies used look-a-like media websites with domain names that appeared to be real news or magazine sites, such as goodhousekeepingtoday.com,



menshealth.com--i.link, and womenshealth.com. These pages featured stories about celebrities, like Paula Deen, Dr. Oz and Jennifer Aniston, who supposedly used the products and experienced dramatic results. Once consumers were impressed by these fake celebrity endorsements, they were tricked into signing up for a negative option plan without any disclosure of how and when to opt out. The complaint also alleged that the advertisers made unsubstantiated health claims about their products. This triple whammy led to a \$179 million judgment, which was partially suspended upon the payment of \$6.4 million in cash (!). Based on the panel discussion at the conference, all of these issues will remain as enforcement priorities for the FTC, the NAD and State AGs.

- **Chatbots** – A number of the conference sessions pointed to the increasing use of chatbots – automated communication tools powered by AI – by brands on messaging platforms such as Facebook Messenger and voice services such as Alexa. The FTC is expected to increase its focus on chatbots in the near future, including on disclosures and privacy issues unique to these services.

We can't wait to see what happens at next year's ANA/BAA Marketing Law Conference – See you then (November 7-9, 2018).