

You Snooze, You Lose! Inadequate Disclosures in Native Advertising

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If you've never had insomnia, consider yourself lucky. For the rest of us still awake at 3:00 am trying to count sheep, the promise of a plush

mattress made out of clouds seems like a dream come true. With social distancing measures now in place, some mattress companies have continued to meet high demand through direct to consumer marketing and sales and many have turned to native advertising in the form of consumer review websites to reach even more insomniacs. But advertisers should take heed that their native advertising doesn't evolve into a nightmare scenario in violation of the Federal Trade Commission's ("FTC") disclosure requirements. The TMCA has covered native advertising issues numerous times (see [FTC Settles Charges with Misleading Websites](#) and [Advertising Your Glowing Online Reviews](#)).

Casper Sleep, Inc. ("Casper") recently challenged two of its competitors before the Better Business Bureau's National Advertising Division (NAD) for review websites allegedly moonlighting as misleading advertising campaigns. In NAD Case #6369 (05/15/2020), Casper challenged Amerisleep, LLC ("Amerisleep") for making false implied claims of superiority of its mattresses through seemingly independent reviews and ratings on the

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websites SleepJunkie.org and SavvySleeper.org. In NAD Case #6367 (05/14/2020), Casper challenged Whitestone Home Furnishings, LLC dba The Saatva Company (“Saatva”) for making false implied claims of superiority through ratings and reviews featured on the websites consumermattressreport.com, bestmattresspicks.com, top10mattressesonline.com, and mattressreviewer.org, as well as a false express claim of superiority in the featured tagline “America’s best-reviewed luxury sleep brand.”

Saatva was able to throw the covers off the alleged implied claims of superiority, as it claimed its relationship with the websites was as an affiliate only and thus it had no control over the website content. With insufficient evidence in the record to the contrary, Casper failed to establish that Saatva had a material connection to the challenged websites or that the statements constituted advertising by Saatva. Saatva was warned, however, that its express claim “America’s best-reviewed luxury sleep brand” should be discontinued as an unsubstantiated claim to the extent it was based on ratings from review sites that are not representative of reviews across the entire luxury mattress product category, used metrics that were irrelevant to a reasonable consumer’s purchasing decision, or had undisclosed material connections to products reviewed on the sites.

Meanwhile, the NAD reviewed Amerisleep’s overall content on the websites SleepJunkie.org and SavvySleeper.org and found its disclosure insufficiently clear and conspicuous to communicate that they are advertising websites owned and operated by Amerisleep. Amerisleep’s disclosure stated: “We may receive financial compensation for products purchased through links or codes on this website. [SleepJunkie.org / SavvySleeper.org] is owned by Healthy Sleep, LLC, which is affiliated with Amerisleep, LLC.” The disclosure statement was also in small font compared to the content on the rest of the webpages, did not appear on every page, and the drop-down menu obscured the disclosure language—all of which worked together to make the disclosure ineffective in the total context of each website. Further, reviews with titles like “Best Mattress Reviews of 2020” that always featured Amerisleep mattresses as the highest recommended products were viewed as akin to saying “we think our mattresses are better than the rest” instead of an objective third-party assessment of the relative benefits of those products compared to competitor products.

Don’t sleep on the takeaways from these cases: affiliate links featuring product reviews or endorsements require an obligation to disclose the relationship with the retailers providing revenue from those links. Advertisers must therefore disclose these material connections clearly and conspicuously. Moreover, the disclosure statement will be evaluated in context of the overall website, making the format just as important as the content.