

California Unfair Competition Defense Podcast
Greenberg Traurig, LLP
Episode 12

Speaker 1 ([00:00](#)):

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Greg Nysten ([00:15](#)):

Hello, everyone. This is Greg Nysten, co-host of the Unfair Competition Podcast. We are back after a hiatus and very happy to be here again. I have with me today a new co-host, Adil Khan, with whom I have worked for around 14 years and was a previous guest on the show. Adil, do you want to say a few words?

Adil Khan ([00:33](#)):

Good afternoon. Happy to join again on the podcast and happy to join you, Greg, as co-host.

Greg Nysten ([00:39](#)):

Today's guest is Ed Chansky, our partner at GT and our FTC guru. We're very happy to have him here today. We thought that it'd be a good idea in part to have episode about FTC updates and hot topics because among other things, there are cases under the fraudulent prong of the UCL holding that matters arising, for example, under Section 5 of the FTC Act, are substantially congruent is the phrase used to cases under the fraudulent prong. So there is a relationship in many ways between both areas of the law, and thus we thought it would be a good idea to do an episode relating to developments in this area. Ed, can you give us an overview of what you'll be talking about today?

Ed Chansky ([01:21](#)):

Sure. Thanks, Greg and Adil. Great to be here with you. The FTC on consumer issues has been as active or more so in the last few years than in the last 50 years. Sometimes we refer to Rule-A-Palooza is underway. A couple of years ago, the Supreme Court took away the FTC's ability to get restitutionary damages in cases they bring against alleged false or deceptive advertising. In response, the FTC has been on a path toward enacting more regulations because a rule that is embodied within an actual regulation violation of that gives rise to monetary damages that the agency can recover. Some of the areas and some of the hot button things made in USA claims, drip pricing and junk fees. More about that later on the definition, but that's when you don't see the full amount right up front when you're shopping for something.

([02:27](#)):

Fake or misleading consumer reviews. This has been going on for years. It's a big issue with the FTC. There they have pending regulations, although they've updated their guidelines. Auto-renewal subscription terms. Again, pending regulations but lots of enforcement action. The Green Guides, environmental claims. They've sent out a notice of proposed rulemaking. Those may be in for an update. Same with The Children's Online Privacy Protection Act. The list just goes on and on. I've mentioned why this is happening, but it's also reflective of priorities of the current administration. President Biden has

spoken out about the junk fee issue for example, and we may see more of that coming along in the future.

Adil Khan ([03:15](#)):

Thanks for that overview, Ed. Can you start by telling us about some of the hot topics that you see coming up these days?

Ed Chansky ([03:21](#)):

It's funny, a lot of these individual topics get lumped under a label that the FTC has adopted called dark patterns. We're not talking about Barnabas Collins. This isn't Dark Shadows on TV from 50 years ago for those old enough to remember, but it's a new label on old issues. It's taking old wine and new bottles, but it's also reflecting an increased intensity where the FTC is focusing on practices that some in the business community might think are just good marketing, and the FTC is questioning and saying, "Does that cross a line? Does it become deceptive?"

([04:01](#)):

Let's start. The first good example are the endorsement guidelines. Now, these have been around for decades, and these are the ones that basically say if someone comes on and says, "I loved the product." First, that should be an honest opinion. But also if there's a material connection with the advertiser, think of someone who's interviewed outside the movie theater. "I loved the movie. It's terrific." And it turns out that they're an employee of the press department of the movie studio. That's something that's material. It would affect a reasonable consumer's view of the credibility of the speaker. That should all be disclosed.

([04:40](#)):

So what the FTC most recently has done is they're broadening out the definition of what is an endorsement to say, "Well, that can just include regular consumer reviews." Think online shopping today. You got lots of reviews, and there's concern about manipulation of the reviews. Companies might go out and solicit reviews, but only from those customers who they know had a good experience with the product. Worse, they might offer an incentive and say, "Post a five star review, and we'll give you a \$10 coupon in your next purchase." That's absolutely forbidden. Under the banner of moderation of reviews for acceptable content on the site, they might decide, "Oh gee. Somebody who didn't like the product and gave it a low rating, we're going to take that one down and thereby influence and manipulate and change the overall star rating." So this kind of cherry-picking. Some of the really nefarious tactics are hiring and paying people to post a negative review on someone else's site. So there are just lots of things that are going on. The FTC is looking at all of that.

([05:47](#)):

In connection, another related thing, the auto-renewal area. Now many states, including California, have laws on this. If you sign up for a program, and your credit card will be charged repeatedly, you're supposed to agree to that affirmatively. The terms are supposed to be very clear. You get a reminder notice required by statute prior to the annual renewal occurring, all of those steps. The FTC previously has had guidelines on this, not an actual regulation. Refer back to what I said a few minutes ago to increase the ability to impose financial sanctions by the FTC. They're moving towards a regulation on this.

([06:29](#)):

Similarly, same thing on so-called junk fees or drip pricing. The regulation is pending. It's very similar to the California law Civil Code 1770(a)(29) I think it is. And the basic concept is you shouldn't go see a

price for something, anything, and then during the journey before checkout, suddenly the price starts to increase. There's a this fee, there's a that fee, there's a fee fee, there's a resort fee, there's a ticket fee. And they're saying, "No, no, no, no, no." Upfront give the all-in price. You can exclude sales tax and/or shipping that might be variable that you don't know until you've entered your shipping address at the end.

[\(07:10\)](#):

One little last piece on this. There is an interesting distinction. On the federal side, the requirement is that the all-in price be the most prominent one. On the state side under the California statute, the all-in price must be the only one that's listed, although later an itemization and breakdown can be given. There was an interesting exemption to that recently enacted after the statute came in for restaurants. If they have a mandatory service charge, they can under California law say, "All menu prices subject to an X percent service fee." But under the federal regulation, if that takes effect, you can't do that. So go figure.

Adil Khan ([07:52](#)):

And just for our listeners who might not be as familiar, the statute being referenced there, California Civil Code 1770, that's the Consumer Legal Remedies Act, the CLRA. And if you're interested in learning more about that junk fee statute and the amendments and the exceptions for restaurants, SB 478 and SB 1524, GT has put out a few alerts that you can review online. Some of those were written by myself in conjunction with some colleagues in our restaurant and hospitality group and our government affairs group. Riley Lagesen, Alice Keller, and some others. So if you're interested in learning more about the California junk fee statute, those resources are available online.

Greg Nysten ([08:36](#)):

Ed, how about those dark patterns you mentioned? What are those about?

Ed Chansky ([08:39](#)):

Yeah. That's a great question, and as I mentioned before, dark patterns is this patch-all label for all kinds of things that a layperson might just say, "That's sneaky. You shouldn't do that." But by putting a name on it, the FTC is trying to elevate and draw more attention. Let's just start with an initial one like endorsements. I talked about this in the context of consumer reviews. You see things online sometimes, "24 other people are viewing this listing right now." They're trying to light a fire under you to think, "Oh wow, this must be really fun." Is that true, or are they just making it up? If they're just making it up, they're trying to excite you and think this product is hot. Maybe it's not.

[\(09:30\)](#):

Deceptive consumer testimonials, we've talked about that. Compensating people, paying them to give a good review, paying them to give a bad review of someone else, using results that are not typical. "Oh, I lost 50 pounds in a week doing this." Even if that's true, if the typical result is two pounds, that needs to get disclosed as well. Using celebrities when they don't actually use the product, or maybe they endorse the product but do it in a context of their personal social media feed where it wouldn't otherwise be clear to a viewer that this is really a paid placement rather than the spontaneous outpouring of enthusiasm for the product. Those are just some examples in the endorsement area.

Adil Khan ([10:16](#)):

So some of these dark patterns also relate to ways to make the consumer feel like there's pressure through the use of countdown clocks and scarcity and urgency. Can you tell us about some of those?

Ed Chansky ([10:29](#)):

Great point, and I mentioned that before, like, "Oh, 24 people are watching this right now." Maybe they are, maybe they're not. Or, "Only one left in stock." "Oh gee, if I'm interested, I better order it right now." "20 other shoppers have this item in their cart right now." Or a countdown clock, "This offer expires in five minutes." Very often it doesn't. They're just going to start that clock up again, and they're going to have the same offer available all the time. And so this psychological manipulation. Now again, some marketers would say these are historically used techniques. What's wrong with it suddenly now? Well, you really have to think hard. If the way you're exciting someone is false, be prepared. Someone is going to attack it, and if it's not the FTC, it may be class action lawyers.

Greg Nylan ([11:22](#)):

What about these situations where shoppers are prevented from being able to compare prices easily or make it hard for them to cancel their accounts or these accounts that live on forever, if you will? What about those situations?

Ed Chansky ([11:35](#)):

Great question. You have two things there. One of them is on obfuscation issue. Complicated word, sorry if I mispronounced it. But in the obfuscation, maybe you don't list what the full price is. You say, "Just pay \$10 per week." But you don't really make clear how many weeks that's going to be. More common probably would be the roach motel, the program that you sign up for auto-renew. I mean, think about it at home. How many of us have streaming channels we've signed up for and have forgotten about, we don't watch very often? But who goes back to check about \$4.99 a month? But that becomes an annuity for the company, can be a very profitable source of money to them. Even more so if they then make it difficult to cancel.

([12:25](#)):

And sometimes, okay, it was easy with a click to sign up. But oh, you want to cancel? Well, now you have to print out and fill out a form and put a stamp on it and mail it somewhere or call some line where they understaff it, and once you do get through to somebody, they put a sales pitch on you to try to stay. Or they transfer you to another department, and then the call drops. And pretty soon you give up because for \$4.99 a month, this isn't worth your time. All of that kind of stuff. Again, I'm not saying anyone listening to this call does things like that, but the FTC is really pushing and saying cancellation of an auto-renew program or subscription should be as easy as the enrollment process, and they've put the mantra, "Click to cancel" on there. That doesn't necessarily mean just one click, but you should be closer to that end of the spectrum than to the kinds of things I was talking about a moment ago.

Adil Khan ([13:20](#)):

So we spoke earlier a little bit about junk fees and hidden fees at the FTC level and in California, but my understanding is this is actually part of a broader category, different ways that businesses are accused of either hiding information or sneaking them in. Can you tell us about that bucket of dark patterns?

Ed Chansky ([13:40](#)):

You can have pre-checked boxes on a site that suddenly you thought you were ordering one thing, but two or three accessories that maybe you would like this too, but without you ever checking those boxes and affirmatively selecting them, they're just being added to your checkout. There's a real concern on that front with children who may not understand as well if they're playing a video game, and then maybe there are nice upgrades to get skins or extra items in the game. And the kid just by continuing to play, it's saying somewhere in fine print, "Oh yeah, the credit card will be charged." They don't see that. They don't understand that. It's a whole litany of things there.

[\(14:23\)](#):

Relating back also to the drip pricing, some convenience fee. I think you order tickets to an event, it says \$99 for the ticket, but then there's a ticket delivery fee and a ticket printing fee. Why is there a ticket printing fee if I print it at home on my own printer? Or don't even print it at all, but just download it into my phone, but they still charge the fee. These are the kinds of things that come up in that area.

Greg Nylén [\(14:50\)](#):

Can you tell us about the area involving situations where the advertiser or the manufacturer, whoever's displaying the information, in effect runs interference by putting additional fees in tiny font versus subtotal for example? Or using formatting to distract a potential purchaser from other information or facts, that kind of thing?

Ed Chansky [\(15:14\)](#):

Sure. Again, great question. The graphics on the page, certain things are pulsating like a beacon at you in bright letters to buy now. But if you don't want to buy, maybe you have to search for something that's in a faint gray on gray background, similar kind of thing. Maybe even in the privacy realm where you're trying to decide, "Well, do I want cookies or not?" Query whoever would, but a lot of us are too lazy to click to turn them off. But sometimes you click, and then it's hard to figure out, where do I click next if I want to turn some on or some off?

[\(15:49\)](#):

So the FTC is willing to look at size and location of disclosures and prominence on the page, even in the absence of specific regulatory requirements. There are very few laws. I mean, other than the surgeon general's warning on cigarettes, there are very few laws that specify exactly the size and location of a disclosure. The normal requirement is just clear and conspicuous, which the FTC has now updated to say doesn't mean easy to find. It means hard to miss. There's a difference there. They're elevating the visibility they want. They want your mother, your grandmother, anybody who's looking at this to easily understand and see the important information.

Adil Khan [\(16:36\)](#):

And I appreciate there's some overlap between these categories, but it seems to me that coercion plays a role too. Can you talk a little bit about that?

Ed Chansky [\(16:44\)](#):

Sometimes things will happen automatically. We talked about that with the kids in the video where maybe just continuing to play is going to incur a charge that they didn't know about. Nagging is one. We've probably all seen it, where we continue to get reminders. "Are you sure you don't want this?" You click no, and then they ask you again, and then the next week they ask you again. Pre-checked boxes. I

can't tell you how often I get asked, "Well, isn't a pre-checked box a form of consent?" Maybe, although generally that's not considered to be consent.

[\(17:17\)](#):

And then you can have that double or triple negative next to it. "Well, click here if you don't not want to receive." "Huh, what am I doing?" Those are kinds of examples. Or again, back to video games, they advertise, "Oh, free play available." But your free play is in such a downgraded or primitive form of the game that if you really want to enjoy it, by definition, you have to start paying for upgrades. So it's a little bit of a bait and switch. Oh yeah, you can play for free, but then you find out the experience is so unsatisfying that you wind up paying anyway.

Greg Nysten [\(17:54\)](#):

How about the situations involving asymmetric choice, if you will, for example, trying to guilt people by giving them an option if they want to avoid the transaction saying, "I really don't want to have a good deal here." Or things like that?

Ed Chansky [\(18:10\)](#):

That is a good one, yes. Trying to make you feel like you're an idiot if you don't agree to what we're trying to sell you. That's a great example, Greg. And others repeat things we've talked about, where you've got the uncheck this box if you prefer not to receive emailed up... What? It was a pre-checked box, and then it was a double negative. Very hard to follow. And I also mentioned, again in privacy, where accepting the cookies and continuing is in a nice bold blue box, but the reject is grayed out in smaller type, and it may be hard to find. These are just a variety of techniques. I realize there's overlap, but I hope everyone's getting the flavor, that the FTC is really trying to look at these things from the consumer's perspective and to try to level the playing field a little bit, especially online where the company holds most, if not all of the cards on the presentation.

Adil Khan [\(19:09\)](#):

Thanks, Ed. That's really helpful, and especially as practitioners in California, I think it's wise to pay attention to the different theories that the FTC is coming up with because that's ripe ground for the plaintiff's bar in constructing their theories and consumer class actions and the other types of cases that our listeners are concerned with. Any final thoughts about these dark patterns, Ed?

Ed Chansky [\(19:32\)](#):

I think we've really provided a pretty good overview. I hope people have learned a little bit today, and I thank you, Adil and Greg, for the opportunity.

Adil Khan [\(19:41\)](#):

So before we sign off, I'll turn things over to Greg for his film review of the movie Perfect Days.

Greg Nysten [\(19:48\)](#):

Yes. I wanted to keep this tradition going just to break things up for a bit at the end. This episode's recommendation is for a movie directed by Wim Wenders, my favorite film director. If you haven't seen any of his movies, he directed Wings of Desire, for example, Paris, Texas, some other great movies. And this one is really meditation on a screen. I wouldn't call it slow. It's really more meditative, but I never thought I would love a movie about cleaning toilets before, but that's really what it's about. And it's

about a character in Japan who does just that, and I will say the toilets themselves are astounding. I had no idea they have these amazing bathrooms in Tokyo.

[\(20:26\)](#):

But he learns, and you can just tell from his daily patterns, which is what this film is about, how to appreciate every moment of every day. And there's a Japanese word called [foreign language 00:20:35], which refers to the phenomenon where the quality of light as it filters through foliage. That's just one example of something he appreciates to the point where he just repetitively takes pictures of that happening through the trees every day and stores the photographs in this really extremely organized way. So it's a beautiful film. You get to see aspects of the main character's life reveal themselves over the course of it, and I just highly recommend it to anybody.

Adil Khan ([20:59](#)):

I've seen the film, and I loved it as well. So I think that's a fantastic recommendation. Thanks to our listeners for joining, and thanks to Ed for being with us. If folks have questions, feel free to email us at ucdefense@gtlaw.com. Thanks, and we'll see you next time.