

The Indirect Regulation of Influencer Advertising

TAMANY VINSON BENTZ & CAROLINA VELTRI*

ABSTRACT

As social media and influencer marketing become ever more ubiquitous, laws and regulators struggle to keep up. This Article analyzes how regulatory authorities try to enforce existing regulations by focusing their efforts on holding marketers, rather than individual influencers, accountable for false or misleading advertising on digital platforms. This Article also explores whether civil courts could or even would hold social media influencers liable for the content of their posts.

I. INTRODUCTION

Product endorsements are not new. From Babe Ruth endorsing tobacco to Brook Shields endorsing Calvin Klein underwear, every generation has its own iconic endorsers. The use of endorsements over social media, however, has blurred the line between direct advertisement and endorsement. It has also given rise to the new industry of social media influencers. This Article addresses whether the use of product endorsement marketing over social media has also blurred the lines between marketer and influencer and whether social media influencers are subject to federal regulations governing marketers or liable under consumer statutes.

Traditionally, advertisements featuring endorsers were prepared and broadcast by brands, advertising agencies, and production companies as part of the brand's overall marketing strategy. The commercials were well edited and would air over mainstream media outlets, like television. The brands and their agents controlled all the aspects of the advertisements. This meant the brands were usually held responsible for any misrepresentations or confusion resulting from the statements made during the endorsement. The same is not always true when it comes to endorsements on social media since social media influencers have more control over their posts than an endorser in a traditional commercial. In fact, many social media influencers want to remain unscripted so they can be viewed as authentic by their audience.

Social media platforms are increasingly powerful marketplaces. Seven out of ten Americans currently use social media.¹ From 2005 to 2015, the number of eighteen to twenty-nine-year-old Americans who used social media skyrocketed from twelve percent to well over ninety percent.² While this growth may be leveling out as social media becomes integrated into daily lives, the number of Americans using social

* Tamany Vinson Bentz is a partner and Carolina Veltri is an associate with DLA Piper LLP (US), focusing on intellectual property and advertising disputes.

¹ *Social Media Fact Sheet*, PEW RESEARCH CENTER (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [https://perma.cc/4LDC-PKR5].

² Andrew Perrin, *Social Media Usage: 2005-2015*, PEW RESEARCH CENTER (Oct. 8, 2015), <https://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/> [https://perma.cc/HG5L-FMS5].

media is certainly not decreasing.³ Indeed, using social media is part of most Americans' daily routine.⁴

The frequency of use and the number of users has turned social media platforms, like Facebook, into powerful marketing platforms. Consumer product companies, though, are not the only ones making money off of social media advertising. Social media influencers are growing in popularity and income—some social media influencers make tens of thousands of dollars for a single social media post and hundreds of thousands for a campaign.⁵

Advertisers are taking notice. In a 2019 global study, advertising agency Zenith reported that in the past decade, internet advertising has risen from twelve percent of total global spend in 2008 to forty-two percent in 2018.⁶ According to the report, online video and social media are “the driving forces of internet adspend growth” and Zenith forecasts these categories “to grow at average rates of 19% and 14% a year respectively between 2018 and 2021.”⁷

Influencer marketing on Instagram alone is a billion-dollar industry.⁸ Consumers, and the marketers who follow, flock to Instagram because this style of casual, ostensibly candid ads feels authentic and more trustworthy than traditional advertising.⁹

The scale of social media and its unscripted nature can sometimes have dangerous consequences. For example, in a since-deleted post, influencer Erin Ziering advertised Allergan breast implants with a pink tutu and an empowering message on breast cancer awareness.¹⁰ That same month, in an instance of tragic irony, Allergan pulled the implants from European markets in response to a notice from Food and Drug Administration (FDA) that individuals with the implants are at a higher risk of developing an implant-associated type of lymphoma.¹¹ Unlike traditional advertising

³ Andrew Perrin & Monica Anderson, *Share of U.S. Adults Using Social Media, Including Facebook, Is Mostly Unchanged Since 2018*, PEW RESEARCH CENTER (Apr. 10, 2019), <https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/> [<https://perma.cc/GJ3D-6MFB>].

⁴ *Social Media Fact Sheet*, *supra* note 1.

⁵ Clare O'Connor, *Earning Power: Here's How Much Top Influencers Can Make on Instagram and YouTube*, FORBES (April 10, 2017), <https://www.forbes.com/sites/clareoconnor/2017/04/10/earning-power-heres-how-much-top-influencers-can-make-on-instagram-and-youtube/#4bfff24db4> [<https://perma.cc/YKJ2-UTT2>].

⁶ Jonathan Barnard, *Advertising Expenditure Forecasts March 2019*, ZENITH (Mar. 2019), <https://www.zenithmedia.com/wp-content/uploads/2019/03/Adspend-forecasts-March-2019-executive-summary.pdf> [<https://perma.cc/BL46-LET6>].

⁷ *Id.*

⁸ *Instagram Influencer Marketing Is a \$1.7 Billion Dollar Industry*, MEDIAXIX (Mar. 7, 2019), <https://mediakix.com/blog/instagram-influencer-marketing-industry-size-how-big/> [<https://perma.cc/CP58-QJHR>].

⁹ Suzanne Zuppello, *The Latest Instagram Influencer Frontier? Medical Promotions.*, VOX (Feb. 15, 2019), <https://www.vox.com/the-goods/2019/2/15/18211007/medical-sponcon-instagram-influencer-pharmaceutical> [<https://perma.cc/9UU7-8FF5>].

¹⁰ *Id.*

¹¹ *Id.*

media, such as TV, the social media post did not have, among other things, extensive side effect disclosures.¹²

II. FTC MOST COMMONLY FOCUSES ENFORCEMENT ON MARKETERS AND THEIR RELATIONSHIP TO SOCIAL MEDIA INFLUENCERS

Federal Trade Commission (FTC) has taken action to enforce its regulations against social media advertising, but its efforts most often focus on whether any “material connections” between the marketer and influencer are disclosed, as opposed to the content of the social media posts. Its efforts also tend to focus on marketers, i.e., sponsors of social media posts, not the influencers themselves. To date, FTC has yet to take significant enforcement steps against social media influencers directed at the substance of a social media post.

FTC developed Endorsement Guides, codified at 16 C.F.R. § 255, and intended to “give insight into what FTC thinks about various marketing activities” and “reflect the basic truth-in-advertising principle that endorsements must be honest and not misleading.”¹³ The principles reflected in FTC’s Endorsement Guides apply equally to social media advertisements and influencers.

Under the guidelines, an endorsement is “any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.”¹⁴ FTC has concluded that social media advertising is an endorsement.¹⁵ The regulations require that an endorser be a bona fide user of the product and that any endorsement “reflect the honest opinions, finding, beliefs, or experience of the endorser” and “may not convey any express or implied representation that would be deceptive if made directly by the advertiser.”¹⁶ The regulations make clear that liability for violations rests with the advertiser *and* the endorser.¹⁷

Nonetheless, until recently, FTC’s enforcement of its Endorsement Guidelines had only been directed at marketers. For example, in 2010, FTC launched an investigation into Ann Taylor LOFT for providing gifts to influencers who attended a promotional event.¹⁸ Even though Ann Taylor LOFT had included a sign at the event that the influencers should disclose that they were given gifts in their respective social media posts, FTC took issue with whether or not it was clear that the influencers were made aware of the sign or of the requirement to disclose the gifts.¹⁹

¹² *Prescription Drug Advertising | Questions and Answers*, U.S. FOOD & DRUG ADMIN. (June 19, 2015), https://www.fda.gov/drugs/prescription-drug-advertising/prescription-drug-advertising-questions-and-answers#non_requirements [<https://perma.cc/TP6V-KXT7>].

¹³ FED. TRADE COMM’N, *THE FTC’S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING* (2017).

¹⁴ 16 C.F.R. § 255 (2009).

¹⁵ *THE FTC’S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING*, *supra* note 13.

¹⁶ 16 C.F.R. § 255.1.

¹⁷ *Id.*

¹⁸ Fed. Trade Comm’n, Div. of Advertising Practices, *Closing Letter* (Apr. 20, 2010).

¹⁹ *Id.*

In April 2017, FTC showed it was willing to enforce its guidelines against social media influencers by reaching out, for the first time, directly to influencers.²⁰ It sent over ninety letters to “educate” social media influencers, including Kourtney Kardashian, Victoria Beckham, and Jennifer Lopez, “about their responsibilities under truth-in-advertising laws and standards, including FTC’s Endorsement Guidelines.”²¹ Here too, FTC did not focus on the content of the endorsements. Rather, it focused on whether any “material connection” between an endorser and the marketer was “clearly and conspicuously disclosed.”²²

Since then, FTC has continued to take enforcement steps against social media advertising. While its efforts have expanded to the content of social media posts, it has specifically avoided direct enforcement against influencers.

In June 2019, FTC teamed up with FDA and sent four warning letters to manufacturers of e-cigarette products, citing certain Instagram posts that advertised the companies’ products. The letters stated that the posts violated the Federal Food, Drug, and Cosmetic (FD&C) Act because they failed to include the required nicotine warning. The letters further stated that the posts violated FTC regulations because they were deceptive advertisements that failed to disclose material health or safety risks. Importantly, FTC and FDA indicated they would enforce the laws against the companies themselves irrespective of whether the posts were sponsored posts or third-party posts.

In March 2020, FTC continued its pattern of enforcement against advertisers and not social media influencers. FTC filed a complaint against Teami, LLC and its owners Adi Halevy and Yogev Malul.²³ The Complaint alleges that Teami made unsubstantiated efficacy claims about its tea products, including posts by social media influencers with weight loss claims.²⁴ While the Complaint identifies social media influencers by name and quotes the content of their posts, none of the named influencers were otherwise included in this litigation. This is true even though many of the social media influencers made representations about the efficacy of the product. For instance, a post by Rasheed Buckner, who has 8.4 million Instagram followers, stated: “@teamiblends 30 day detox is where it’s at for kickstarting weight loss. I’ve only been drinking this detox now for a week and already lost over 5 pounds and my bloating is gone . . . Trust me, I’ve tried other products like this and wasted my money and time, this is the real deal.”²⁵

In both of these instances, the FTC regulations would apply equally to marketers and influencers because the regulations prohibit deceptive advertising by endorsers. In other words, if the e-cigarette or Teami posts were deceptive and the company can be liable for the deception, then the influencer can also be held liable for the deception. Nevertheless, it appears based on its previous conduct that FTC would prefer to target its enforcement efforts against advertisers as opposed to social media influencers.

²⁰ FED. TRADE COMM’N, FTC STAFF REMINDS INFLUENCERS AND BRANDS TO CLEARLY DISCLOSE RELATIONSHIP (2017).

²¹ *Id.*

²² *Id.*

²³ Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. Teami, LLC*, No. 8:20-cv-518 (M.D. Fla. Mar. 5, 2020).

²⁴ *Id.* at 16–17.

²⁵ *Id.* at 11.

From a regulatory perspective this may be the most efficient method of enforcement—one action against a marketer could in theory correct multiple social media influencer posts if the marketer can control the content of the posts. This enforcement approach leaves open the question of whether there are consequences for influencers when they make misleading statements, including statements to millions of followers.

It does not appear that FTC will be refocusing or expanding its enforcement efforts to include influencers any time soon. On February 12, 2020, FTC announced it is seeking public comment on its Guides Concerning the Use of Endorsements and Testimonials in Advertising.²⁶ Commissioner Rohit Chopra released a statement regarding the review, and focused his comments on the large companies that use influencer marketing, but not on the influencers themselves.²⁷ Specifically, Commissioner Chopra “hope[s] the Commission will consider taking steps beyond the issuance of voluntary guidance,” including requirements for technology platforms that facilitate and profit, either directly or indirectly, from influencer marketing, and specifying requirements that companies must abide in their contractual arrangements.²⁸

III. FDA FOCUSES ENFORCEMENT ON MARKETERS

FDA also plays a significant role in regulating social media advertising. Like virtually every other product category, food and drugs are advertised via social media on a regular basis. It appears that FDA, like FTC, is relying on marketers to act as intermediaries to enforce advertising requirements on social media posts.

FDA does not yet have formal guidelines directed at endorsers or social media advertising. Years ago, FDA issued draft guidelines titled, “Guidance for Industry—Internet/Social Media Platforms: Correcting Independent Third-Party Misinformation About Prescription Drugs and Medical Devices.”²⁹ The draft guidelines made clear that as far as FDA was concerned, influencer marketing statements were statements by the marketer:

A firm is responsible for communications that are owned, controlled, created, or influenced, or affirmatively adopted or endorsed, by, or on behalf of, the firm. A firm is thus responsible for communications on the Internet and Internet-based platforms, such as social media, made by its employees or any agents acting on behalf of the firm to promote the firm’s product, and these communications must comply with any applicable regulatory requirements.³⁰

²⁶ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 85 Fed. Reg. 10,104 (Feb. 21, 2020) (to be codified at 16 C.F.R. pt. 255).

²⁷ FED. TRADE COMM’N, STATEMENT OF COMM’R ROHIT CHOPRA REGARDING THE ENDORSEMENT GUIDES REVIEW, COMM’N FILE NO. P204500 (2020).

²⁸ *Id.*

²⁹ U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY – INTERNET/SOCIAL MEDIA PLATFORMS: CORRECTING INDEPENDENT THIRD-PARTY MISINFORMATION ABOUT PRESCRIPTION DRUGS AND MEDICAL DEVICES (2014).

³⁰ *Id.*

Likewise, FDA issued additional draft guidance regarding postmarketing submissions for prescription human and animal drugs and biologics. The document, titled “Guidance for Industry—Fulfilling Regulatory Requirements for Postmarketing Submissions of Interactive Promotional Media for Prescription Human and Animal Drugs and Biologics,” also indicates that marketers are most likely responsible for influencer posts.³¹ FDA ties responsibility to how much control a marketer has over a post, as opposed to whether the marketer paid for the post. If a marketer has “any control or influence on the third-party site, even if that influence is limited in scope,” then the marketer is responsible for the post.³²

While its guidelines on the subject may not be final, FDA has taken steps to enforce its regulations against social media posts. In one of the most high-profile examples of such advertising, Kim Kardashian promoted Diclegis, a prescription medicine used to treat nausea and vomiting associated with pregnancy. The since-deleted post made the following claims:

OMG. Have you heard about this? As you guys know my #morningsickness has been pretty bad. I tried changing things about my lifestyle, like my diet, but nothing helped, so I talked to my doctor. He prescribed me #Diclegis, and I felt a lot better and most importantly, it’s been studied and there was no increased risk to the baby. I’m so excited and happy with my results that I’m partnering with Duchesnay USA to raise awareness about treating morning sickness. If you have morning sickness, be safe and sure to ask your doctor about the pill with the pregnant woman on it and find out more www.diclegis.com; www.DiclegisImportantSafetyInfo.com.³³

While Kardashian expressly stated she was partnering with Duchesnay USA, the drug’s manufacturer, thereby complying with FTC guidance, FDA took issue with the post and sent a warning letter to Duchesnay, not to Kardashian.³⁴ In the warning letter, FDA concluded Kardashian’s post “is misleading because it presents various efficacy claims for DICLEGIS, but fails to communicate any risk information.”³⁵ FDA recognized that the post directed viewers to “find out more” at www.diclegis.com and www.DiclegisImportantSafetyInfo.com, but found that “this does not mitigate the misleading omission of risk information.”³⁶ FDA further admonished that the post “is misleading because it fails to provide material regarding DICLEGIS’ full approved indication, including important limitations of use,” specifically, that the post “fail[ed]

³¹ FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY – FULFILLING REGULATORY REQUIREMENTS FOR POSTMARKETING SUBMISSIONS OF INTERACTIVE PROMOTIONAL MEDIA FOR PRESCRIPTION HUMAN AND ANIMAL DRUGS & BIOLOGICS (2014).

³² *Id.*

³³ U.S. FOOD & DRUG ADMIN., Warning Letter to Duchesnay, Inc. (Aug. 7, 2015), <https://www.fda.gov/media/93230/download>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

to convey that DICLEGIS has not been studied in women with hyperemesis gravidarum.”³⁷

In addition to requiring Duchesnay to take down its misleading advertisements, FDA further required Duchesnay to create “a comprehensive plan of action to disseminate truthful, non-misleading, and complete corrective messages” about the issues raised in the letter.³⁸ FDA did not reach out to Kardashian directly and instead relied on Duchesnay to produce the corrective messaging with the instruction that “[t]o the extent possible, corrective messaging should be distributed using the same media . . . that the violative promotional material was disseminated.”³⁹ In response, Kardashian posted a “#CorrectiveAd” on her Instagram account, which specifically referenced FDA’s letter:

#CorrectiveAd I guess you saw the attention my last #morningsickness post received. The FDA has told Duchesnay, Inc., that my last post about Diclegis (doxylamine succinate and pyridoxine HCl) was incomplete because it did not include any risk information or important limitations of use for Diclegis. A link to this information accompanied the post, but this didn’t meet FDA requirements. So, I’m re-posting and sharing this important information about Diclegis. For US Residents Only.

Diclegis is a prescription medicine used to treat nausea and vomiting of pregnancy in women who have not improved with change in diet or other non-medicine treatments.

Limitation of Use: Diclegis has not been studied in women with hyperemesis gravidarum.

Important Safety Information

Do not take Diclegis if you are allergic to doxylamine succinate, other ethanolamine derivative antihistamines, pyridoxine hydrochloride or any of the ingredients in Diclegis. You should also not take Diclegis in combination with medicines called monoamine oxidase inhibitors (MAOIs), as these medicines can intensify and prolong the adverse CNS effects of Diclegis.

The most common side effect of Diclegis is drowsiness. Do not drive, operate heavy machinery, or other activities that need your full attention unless your healthcare provider says that you may do so. Do not drink alcohol, or take other central nervous system depressants such as cough and cold medicines, certain pain medicines, and medicines that help you sleep while you take Diclegis. Severe drowsiness can happen or become worse causing falls or accidents.

Tell your healthcare provider about all of your medical conditions, including if you are breastfeeding or plan to breastfeed. Diclegis can pass into your breast milk and may harm your baby. You should not breastfeed while using Diclegis.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

Additional safety information can be found at www.DiclegisImportantSafetyinfo.com or www.Diclegis.com. Duchesnay USA encourages you to report negative side effects of prescription drugs to the FDA. Visit www.fda.gov/medwatch or call 1-800-FDA-1088.⁴⁰

FDA has also issued warning letters regarding companies' conduct on social media. For example, FDA sent a warning letter to Zarbee's, Inc., citing the company's "liking" consumer posts on Facebook.⁴¹ FDA concluded that "liking" posts, which did not comply with FDA rules and guidelines, constituted endorsing or promoting the posts, which in turn was violative of FDA rules.⁴²

However, it seems likely that FDA's regulation of social media advertising will increase as FDA recently proposed studies on "Endorser Status and Explicitness of Payment in Direct-to-Consumer Promotion."⁴³ The proposed studies will examine different types of endorsers (i.e., celebrity, physician, patient, or influencer) and will examine whether the presence of a disclosure of their payment determines participant reactions to the endorsement.⁴⁴ Recognizing the widespread use of influencer endorsements in direct-to-consumer pharmaceutical advertising, FDA hopes to gain insight into how disclosures affect consumers' "recall, benefit and risk perceptions, and behavioral intentions" in connection with advertised products.⁴⁵ These studies are consistent with FTC's focus on the disclosure of connections between an influencer and marketer, as opposed to the content of an influencer's post.

IV. THE FIRST AMENDMENT IS UNLIKELY TO PROTECT SOCIAL MEDIA INFLUENCERS

Although purely commercial speech, like an influencer post, was once considered outside of the First Amendment's protections,⁴⁶ courts today recognize that "[t]he commercial market place, like other spheres of our social and cultural life, provides a forum where ideas and information flourish," and, therefore, "even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment."⁴⁷ However, the Constitution "affords a lesser protection to commercial speech than to other constitutionally guaranteed expression."⁴⁸

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Supreme Court held that restrictions on commercial speech would be subject to

⁴⁰ Kim Kardashian (@kimkardashian), INSTAGRAM (Aug. 30, 2015), https://www.instagram.com/p/7B07j_uSww/?utm_source=ig_embed [<https://perma.cc/MWB8-FJ6Z>].

⁴¹ U.S. FOOD & DRUG ADMIN., Warning Letter to Zarbee's, Inc. (June 27, 2014), <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/zarbees-inc-429329-06272014>.

⁴² *Id.*

⁴³ Agency Information Collection Activities; Proposed Collection; Comment Request; Endorser Status and Explicitness of Payment in Direct-to-Consumer Promotion, 85 Fed. Reg. 4,994 (Jan. 28, 2020).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

⁴⁷ *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993).

⁴⁸ *U.S. v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993).

intermediate scrutiny.⁴⁹ Application of this scrutiny on commercial speech, however, has become less and less strict as courts see an increasing governmental interest in truthful, non-misleading advertising. For example, in *Zauderer v. Office of Disciplinary Counsel*, the Supreme Court upheld a state rule requiring specific disclosures in advertisements and holding that the state regulation need only be “reasonably related to the State’s interest in preventing deception of consumers.”⁵⁰ Accordingly, the government, including through its agencies such as FTC and FDA, can rightfully compel advertisers and social media influencers to make certain disclosures to prevent the deception of consumers.

V. INFLUENCERS MAY BE SUBJECT TO CIVIL LIABILITY

Social media advertising is so new that there is not a lot of precedent on whether social media influencers can be held liable for their misleading posts. What little precedent exists fails to ultimately determine the liability issue.

In the past, private plaintiffs have attempted to sue endorsers for allegedly misleading advertisements, but courts have yet to definitively hold that such endorsers can be liable to consumers directly. For example, in *In re Diamond Mortgage Corp. of Illinois*, investors in a Ponzi scheme brought suit against an actor who had appeared in commercials endorsing the “investment opportunity.”⁵¹ In denying the actor’s summary judgment motion, the court held that, as an endorser, the actor “had a duty pursuant to the FTC Guides to substantiate the truthfulness of the endorsements and obtain independent and reliable information regarding the financial stability” of the endorsed investment.⁵² The case later settled, and the question of whether this duty had been breached was never answered.

Other cases facing this question have side-stepped it, with courts instead rendering the issue of endorser liability moot.⁵³ In *Kramer v. Unitas*, the Eleventh Circuit held that a football player who in radio advertisements “merely introduced the company and suggested that the audience call and investigate for themselves” did not “endorse” the product at-issue.⁵⁴ Similarly, in another case, purchasers of the weight loss supplement Zantrex-3 brought a proposed class action suit, alleging, among other things, that spokesperson Nicole “Snooki” Polizzi violated several consumer protection statutes, misrepresented the supplement’s effectiveness, and was unjustly enriched.⁵⁵ The court granted Polizzi’s Rule 12(b)(6) motion to dismiss, finding that the lead plaintiff lacked an injury-in-fact traceable to Polizzi because her purchase of Zantrex-3 predated Polizzi’s endorsement.⁵⁶ Still more cases settle and avoid court decisions on this issue all together.⁵⁷

⁴⁹ Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n, 447 U.S. 557, 566 (1980).

⁵⁰ *Zauderer v. Office of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 628 (1985).

⁵¹ *In re Diamond Mortg. Corp. of Ill.*, 118 B.R. 575 (Bankr. N.D. Ill. 1989).

⁵² *Id.* at 583.

⁵³ See *Kramer v. Unitas*, 831 F.2d 994 (11th Cir. 1987).

⁵⁴ *Id.* at 998.

⁵⁵ *Brady v. Basic Research, LLC*, 101 F. Supp. 3d 217 (E.D.N.Y. 2016).

⁵⁶ *Id.* at 229.

⁵⁷ See, e.g., *Brady*, 101 F. Supp. 3d at 217.

Recent decisions indicate, however, that courts may be leaning against holding endorsers liable and are instead focusing on marketers and merchants. In 2016, the Ninth Circuit affirmed dismissal of several breach of warranty claims under California law against “merely the celebrity spokesperson” of a dietary supplement, holding that the California Commercial Code required the defendant to be a “seller” of the goods in order for such warranties to apply and that the spokesperson in question was not a “seller” because he never held title to the goods nor passed title onto plaintiffs.⁵⁸ Similarly, in *Davis v. Byers Volvo*, the Ohio Court of Appeals rejected efforts to hold a celebrity endorser liable under Ohio consumer protection law for appearing in a commercial for a car dealership.⁵⁹ The court declined to opine on the plaintiff’s assertion that “celebrity endorsers commit unfair and deceptive acts when they endorse negligent service providers” because the plaintiff failed to “produce any evidence that [the celebrity spokesperson] had knowledge of the quality” or “ma[de] any statement attesting to the quality” of the advertised services.⁶⁰ In the same case, the Ohio Court of Appeals, while noting that “if FTC rules and guides apply, then [the spokesperson’s] statements violated those rules and guides and constituted deceptive acts or practices,” declined to actually apply FTC guidelines because the complained-of services were received before the guidelines were published.⁶¹

There will no doubt be further developments in this area of the law as social media advertising increases and the value of social media influencers increases. Until that happens, it remains to be seen whether there will be civil liability for social media influencers.

VI. CONCLUSION

Overall, it is unlikely social media influencers will be held directly liable for misleading advertisements. Regulatory authorities are more focused on holding marketers accountable for the content of a social media post. There is an efficiency to addressing social media posts directly with the marketers rather than piecemeal with social media influencers that is beneficial for regulatory authorities. Furthermore, the legal precedent around whether social media influencers could be held civilly liable for misleading posts is still developing. It remains to be seen whether courts are willing to hold social media influencers liable for the content of misleading posts.

⁵⁸ *Luman v. Theismann*, 647 Fed. App’x 804, 807 (9th Cir. 2016).

⁵⁹ *Davis v. Byers Volvo*, 2012 Ohio 882, 2012 Ohio App. LEXIS 752 (Ohio Ct. App. 2012).

⁶⁰ *Id.*

⁶¹ *Id.*