



Click to Print or Select 'Print' in your browser menu to print this document.

Page printed from: *Corporate Counsel*

Mattress Maker Losing Sleep Over Website Reviews

Stephanie Forshee, Corporate Counsel

June 23, 2016

In the past couple of years, Casper Sleep Inc. signed up for affiliate marketing through sites like Mattress Nerd, Sleepopolis and Sleep Sherpa, but it soon decided the companies did not fairly disclose to customers that its mattress reviews weren't completely unbiased. Casper dropped the services, and its high ratings across the websites allegedly went downhill.

Now the company is suing the three website owners for deceptive marketing practices.

Casper is a two-year-old New York-based startup that disrupted the mattress industry when it sold \$100 million worth of its bed-in-a-box mattresses that are "the size of a mini fridge" in its first year. And the company has been raved about by major media outlets like TIME, Fast Company and TechCrunch.

The company is based online, making social media mentions and online reviews integral to the company's success. "Because consumers rely on these reviews in lieu of testing the mattresses themselves prior to purchase, the honesty and integrity of the reviews and the reviewers are essential to avoid consumer deception," the company wrote in court filings.

Jonathan Truppmann stepped into the role of vice president of business development and legal at Casper in February 2015. Soon after, the company had second thoughts about its relationships with Mattress Nerd, Sleep Sherpa and Sleepopolis—all of which, Truppmann says, were representing themselves online as unbiased, independent reviewers, while they were collecting a commission from competitors when customers click through to their sites via a link or use a coupon code. "These [three sites] are a few that stuck out to us as particularly egregious," he says.

Casper filed the three separate lawsuits on April 29 of this year in the federal district court in Southern New York. All three suits make similar claims, alleging that the website operators are misrepresenting themselves as independent sources and not making clear disclosures, as outlined by the Federal Trade Commission's advertising guidelines.

In the court filings, Casper claims it had more positive feedback on the sites when it paid them a commission for affiliate marketing. In November 2014, Mattress Nerd gave an analysis of three mattresses (Casper, Saatva and Tuft & Needle), concluding that: "Casper has the best value for your money." However, the site updated its post in July 2015 after Casper ended its relationship with them. "Shortly after writing this, a mattress company called Leesa came out, and I feel it's an incremental improvement over Casper," the post now reads. (Casper believes Leesa is a Mattress Nerd customer and pays a commission to Mattress Nerd).

The three websites do make affiliate disclosures on their websites, but Truppmann says they are not conspicuous enough. For example, on Mattress Nerd's website, there is a disclaimer that reads, in part, "My only compensation is when I help match a reader to the right product, and that reader makes the purchase through a link on my site. In this way, I can act as a brand-agnostic and retailer-agnostic salesman."

Tim Bukher of Thompson Bukher in New York is representing Mattress Nerd, and said in an email, "We believe Casper's claims to be unfounded and that our client's constitutionally protected speech is not, in any event, 'deceptive' within the meaning of the Lanham Act."

Mattress Nerd filed a motion to dismiss on Thursday, in which it points out that it maintains an affiliate relationship with Amazon.com and earns a commission when consumers click through to buy mattresses sold on Amazon's site. This includes hyperlinks it has for Casper mattresses and, therefore, Mattress Nerd arguably has just as much of an incentive to sell Casper's products as its competitors.

The other defendants have yet to respond to the complaints in court, and they did not immediately respond to requests for comment.

Since the lawsuits were filed, Truppmann points out some changes have been made to the review websites. Mattress Nerd, for example, [added an affiliate disclaimer](#) to its home page, [images from Wayback Machine show](#).

Gonzalo Mon, advertising attorney for Kelley Drye & Warren, is not working on the case, but says the defendants' responses could reveal new information in the suits. As of now, he believes Casper has a case.

Mon points out the FTC and New York Attorney General Eric Schneiderman have taken action related to affiliate marketing, but he has seen few private lawsuits. Still, the FTC's guidelines will play a role in the Casper lawsuits, specifically where the commission requires companies to conspicuously disclose if an individual is compensated for his or her testimonial about a product.

"These disclosures should be unavoidable," Mon says. Businesses should feel confident "there's not a path to their website where consumers can look at that review and not have access to that disclosure. Consumers aren't going to hunt for a disclosure if they have no clue there's a disclosure to be found."

Mon also notes that it was wise for Casper to take action into its own hands, since the FTC typically goes after the "bigger player," or the party paying for the marketing—which in this case would have been Casper's competitors like Leesa, not the mattress review sites themselves.

Truppmann knows the suits are no sure thing. "There have been a lot of filings in other industries related to affiliate marketing and disclosures. Not a lot [of private lawsuits] have gone very far," Truppmann says.

But Casper went ahead because the company was allegedly losing out on millions of dollars in sales due to the marketing practices, according to the filings. Truppmann wouldn't comment as to what the company is expecting in terms of damages, only that Casper would like to see the affiliate marketing websites clearly disclose that they are being compensated by many of the companies it reviews.

Casper is being represented by Frankfurt Kurnit Klein & Selz in these suits. Truppmann declined to go into any specifics of Casper's communication with the three website owners or regulators prior to the filings, but he says, "It's not something where we decided to run to court. [Litigation] was the last thing we wanted to do."

Truppmann says he expects from these websites just what he is advocating with Casper: transparency

in the sales process. He isn't even against affiliate marketing, "as long as it's fair." He empathizes with other GCs in other industries, and he advises them to "go through the consumer journey and see what your consumers are experiencing [when they search online]."

That's the best way, Truppman says, to "keep the marketplace honest."

Copyright 2016. ALM Media Properties, LLC. All rights reserved.