

ARTICLE

Influencer False Ad Settlement Shows Small Biz Is Fair Game

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The state of Texas recently announced a settlement in its case against Brittany Dawn Davis, which alleged that the social media influencer had intentionally misled consumers. The enforcement action highlights a renewed regulatory interest in cracking down on individuals and businesses using deceptive marketing.

Brittany Dawn is a health and fitness influencer with a following of over 1 million people across Instagram and TikTok. She built a following posting inspirational fitness content on her social media, and began selling personalized health and fitness plans on her website in 2014.

Consumers paid as much as \$300 to sign up for Dawn's personalized fitness plans.

Central to the appeal for customers was the promise from Dawn that she would provide individual coaching, customizing macronutrients based on the consumer's height, weight, goals and activity level, and promising that she would adjust this approach as needed throughout the duration of the plan.

However, consumers allege that instead of receiving the personalized coaching that they paid for, they received obviously generic responses.

The lawsuit, filed in February 2022 by Texas Attorney General Ken Paxton in state court, accused Dawn of engaging in "false, misleading and/or deceptive acts" in violation of Texas law.

According to the complaint, Dawn represented to her paying clients that she would provide one-on-one coaching, nutritional advice and weekly check-ins as part of a personalized fitness plan, and then failed to provide those services.

The state of Texas sought not only monetary damages to repay consumers, but also civil penalties of up to \$10,000 per violation. The trial was set to begin May 15. The amount that the matter settled for has still not been made public.

In the current moment of cultural fascination about scammers — think Fyre Festival, Anna Delvey and the so-called Tinder Swindler — the lawsuit against Dawn is yet another recent example demonstrating that states and the federal

government are more willing than ever to crack down on business practices that mislead consumers, particularly in the emerging Instagram influencer market.

The state attorney general's complaint named both Dawn in her individual capacity and Brittany Dawn LLC, a limited liability company of which Dawn is the CEO and managing member.

State laws such as the Texas Deceptive Trade Practices Act and others like the Federal Trade Commission Act aimed at consumer protection may typically be associated with crackdowns on large industries, like big tobacco, that have harmed consumers in high-profile ways and led to lengthy class actions.

But the case against Dawn indicates that misleading claims by small businesses and even individual influencers are fair game in the government's eyes.

In the past few years, the Texas Attorney General's Office has announced new crackdowns on technology-driven operations ranging from illegal robocalls pitching fraudulent credit card services to online contact lens seller Vision Path Inc. accused of misrepresenting their services.

The FTC is also now closely scrutinizing products and advertisements offered within the emerging influencer and social media markets.

For example, last year the FTC announced changes that would tighten its guidelines around the use of fake reviews on social media — aimed at brands who hire influencers to post a positive review of a product, while intentionally hiding that they were paid to do so.

And earlier this year, the agency sent notice letters to hundreds of businesses with a clear warning: Deceitful or unsubstantiated product claims will be met with substantial civil penalties.

With these warning letters and a growing body of resources on the FTC's website specifically aimed at influencers and the businesses that work with them, it's clear that the agency is paying attention and willing to take action.

In recent years, especially in the wake of the COVID-19 pandemic and false claims by businesses about the health properties of their products, the FTC and Congress have signaled a push for stronger consumer protection laws.

In 2021, members of Congress with support from the FTC introduced a bill, the Consumer Protection and Recovery Act, that would give the FTC greater power to come after deceptive business practices and seek tens of thousands of dollars in penalties.

Against this backdrop, it is no wonder that the complaints of consumers who felt cheated by Dawn's business practices got the Texas attorney general's attention.

The cultural obsession with scammers has put a microscope on deceptive trade practices, and the outcome of the Dawn case may have far-reaching legal implications for other influencers, small businesses and online marketers who may want to be careful what they promise consumers.

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