

**Advertising and Unfair Competition:
Federal and State Enforcement**

Remarks by Commissioner Pamela Jones Harbour

American Law-Institute-American Bar Association (ALI-ABA)

- the Commission's continuing interest in ensuring that expert endorsers are, indeed, experts in their field, and that they rely on competent scientific evidence when they endorse claims made for products; and
- the Commission's use of strong and appropriate remedies.

II. DECEPTIVE FORMAT

Ads are required to be truthful and non-misleading. An advertisement is deceptive if it contains a material misrepresentation or omission that is likely to mislead consumers, acting reasonably under the circumstances, to their detriment. One way that ads can be deceptive is through their format. If your client produces an infomercial to sell a product, the client should consider whether consumers will know they are watching a commercial, or whether the program will attempt to deceive consumers into thinking they are watching an unbiased informational program or independent talk show. If the program format represents an attempt to deceive consumers, the program should be changed.

¹ FTC v. Window Rock Enterprises, Inc., et al., No. CV04-8190 DSF (JTLx)

What was deceptive about the format of these programs? Let's look at them.

- Both infomercials use a talk show format with a “host” and a “guest.” Greg Cynaumon is the “host” of a show called “Breakthroughs” and Donald Barrett appears as “host” of “Today’s Health” on “ITV.”
- In the CortiSlim commercial, Cynaumon and a female co-host are seated on a couch, with Dr. Shawn Talbott as their guest.
- In the Supreme Greens commercial, Barrett and “Dr.” Alex Guerrero are seated at a desk – like a desk on a news program – with a city skyline in the background. The “ITV” logo is shown throughout the infomercial.
- The guest is introduced as an independent doctor. No financial ties to the host are mentioned. However, Talbott and Cynaumon were part of a joint venture to create, manufacture, and market CortiSlim and CortiStress.
- The shows are presented as “controversial” or “newsworthy.”
- The shows discuss at length general issues related to the product, without mentioning the product being promoted. For example, Talbott speaks about his alleged scientific breakthroughs concerning cortisol and CortiSlim or CortiStress. Similarly, Guerrero speaks about his alleged scientific breakthroughs with regard to acid in the body. Throughout the Supreme Greens infomercial, the bottom of the screen states, “Are all health problems caused by an acidic body?”
- The “guest” is asked to respond to “viewers” questions, including “general health questions.”
- Each show suggests that it is distinct from the product sellers. For example, the host presents the toll-free number shown on the screen as a number to call for

“more information,” rather than as a number to call to place an order. Viewers also are told to mention the name of the show, which has arranged for them to get a “substantial price discount.” When the toll-free number is shown, no disclaimer is presented to indicate that the “Breakthroughs” or “Today’s Health” programs are actually paid advertisements for CortiSlim, CortiStress, or Supreme Greens.

- “Paid advertisement” disclosures appear only briefly, at the very beginning and end of the programs.

In June 2004, the district court in the *Supreme Greens* case entered a preliminary injunction prohibiting the defendants from making the challenged disease-cure claims, and also prohibiting the dissemination of any advertisement that misrepresents itself as something other than a paid advertisement.³ For any advertisements longer than fifteen minutes in length, the order mandates that a disclosure be presented immediately before each showing of ordering instructions for a product or service. The disclosure must read: “THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR [THE PRODUCT, PROGRAM, OR SERVICE].”⁴

The presence or absence of a particular element in an infomercial is not a determining factor in whether a given program has a deceptive format. The net impression of the program matters most. However, each of these factors may contribute to the overall creation of a deceptive format. Thus, if your clients market products through infomercials (of any length), each client should ask himself: “Am I adequately conveying to consumers that this program is a paid advertisement, not an independent program?”

³ *Direct Marketing Concepts*, preliminary injunction at 17-18.

⁴ *Id.* at 18-19.

⁵ Federal Trade Commission Staff Report, *Deception in Weight-Loss Advertising Workshop: Seizing Opportunities and Building Partnerships to Stop Weight-Loss Fraud* (Dec. 2003), available at <http://www.ftc.gov/os/2003/12/031209weightlossrpt.pdf>.

⁶ Available at <http://www.ftc.gov/bcp/online/pubs/buspubs/redflag.pdf>; see also FTC News Release, *FTC Releases Guidance to Media on False Weight-Loss Claims* (Dec. 9, 2003), available at <http://www.ftc.gov/opa/2003/12/weightlossrpt.htm>;

<http://www.ftc.gov/opa/2002/06/bizopswe.htm>; FTC News Release, *FTC, States Help Consumers "Ditch the Pitch" of Unscrupulous Telemarketers and Cold-Call Sellers* (Oct. 18, 2001), available at <http://www.ftc.gov/opa/2001/10/ditch.htm>; FTC News Release, *Law Enforcers Target "Top 10" Online Scams* (Oct. 31, 2000), available at <http://www.ftc.gov/opa/2000/10/topten.htm>; FTC News Release, *FTC Acts to Protect Consumers Whose "Travel Unraveled"* (Aug. 23, 2000), available at <http://www.ftc.gov/opa/2000/08/travelunravel.htm>; FTC News Release, *FTC Helps Consumers Avoid The "Trip Trap"* (Aug. 3, 1999), available at <http://www.ftc.gov/opa/1999/08/triptrap.htm>; FTC News Release, *"Operation Cure.all" Targets Internet Health Fraud* (June 24, 1999), available at <http://www.ftc.gov/opa/1999/06/opcureall.htm>; FTC News Release, *FTC Announces "Operation Vend Up Brokehp006" Releases*

We hope that these publications and others will act responsibly in the future, by rejecting claims that are patently false.

If your clients are considering advertising and marketing programs for weight loss products, or if you represent media sources that might consider running such ads, I urge you to consult the “Red Flag” media guide, which is available on the Commission’s website. The guide provides an easy first step for the media to determine which weight loss claims are outrightly false. However, you also should be aware that *any* weight loss claims made in ads must be substantiated *before* the ad airs. Any of your clients who market a weight loss product or any dietary supplement also should consult the Commission publication, “Dietary Supplements: An Advertising Guide for Industry,”¹² as well as the Food and Drug Administration’s regulations on “Statements Made for Dietary Supplements Concerning the Effect of the Product on the Structure or Function of the Body.”¹³

IV. EXPERT ENDORSERS

Next, I would like to turn to the topic of expert endorsers. Ads touting particular benefits for a consumer’s health may use doctors or scientists to convey those claims. Consumers rely

¹² BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION, DIETARY SUPPLEMENTS: AN ADVERTISING GUIDE FOR INDUSTRY (rev. Apr. 2001), *available at* <http://www.ftc.gov/bcp/online/pubs/buspubs/dietsupp.htm> (hyperlinked version) *or* <http://www.ftc.gov/bcp/online/pubs/buspubs/dietsupp.pdf> (printable version).

¹³ 21 C.F.R. § 101.93(f)-(g) (2005); *see also* FDA Talk Paper, *FDA Finalizes Rules for Claims on Dietary Supplements* (Jan. 5, 2000), *available at* <http://vm.cfsan.fda.gov/~lrd/tpdsclm.html>; Regulations on Statements Made for Dietary Supplements Concerning the Effect of the Product on the Structure or Function of the Body; Final Rule, 65 Fed. Reg. 999 (Jan. 6, 2000), *available at* <http://www.cfsan.fda.gov/~lrd/fr000106.html>.

heavily on the opinions of doctors and scientists, and therefore place additional emphasis on any statements they make.

Prior to making any product claims, an expert endorser must possess at least the level of substantiation that experts in the field would agree is reasonable. For health or safety claims, the Commission typically has required a relatively high level of substantiation, usually “competent and reliable scientific evidence.”¹⁴ Such evidence is typically defined as “tests, analyses, research, studies, or other evidence based upon the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.”¹⁵

The Commission recently has focused on doctors who make claims that are not properly substantiated. For example, my colleague, Commissioner Leary, recently stated in an American Medical Association publication¹⁶ that the Commission is intensifying its focus on physician endorsers because “there is a heightened public concern about specific health care issues” and because the high level of esteem that doctors hold in the United States lends added credibility to a product when a physician endorses it. Commissioner Leary stated that deceptive commercials that use physician endorsements “taint the whole profession.” I wholeheartedly agree. In fact, I think that any doctor who becomes a defendant in a deceptive advertising case

¹⁴ See, e.g., *Brake Guard Products, Inc.*, 125 F.T.C. 138 (1998), available at <http://www.ftc.gov/os/1998/01/brakeguaop.pdf>; *Automotive Breakthrough Sciences, Inc., et al.*, 126 F.T.C. 229 (1998), available at <http://www.ftc.gov/os/1998/09/d09275opi.htm>; see also FTC DIETARY SUPPLEMENTS ADVERTISING GUIDE, *supra* note 12.

¹⁵ *Brake Guard*, *supra* note 14; *Automotive Breakthrough Sciences*, *supra* note 14; FTC DIETARY SUPPLEMENTS ADVERTISING GUIDE, *supra* note 12.

¹⁶ Tanya Albert, *Doctors who tout iffy “cures” will face critical eye of FTC*, 47 AM. MED. NEWS (Sept. 27, 2004), available at <http://www.ama-assn.org/amednews/2004/09/27/gvsa0927.htm>.

should be referred to his or her state medical board, so that the board can determine whether the doctor is violating any of the board's own ethical requirements.

V. REMEDIES

The Commission recently has focused on obtaining strong and appropriate remedies. Last September, the Commission entered a final consent order to Kentucky Fried Chicken Corporation ("KFC") after certain ads aired.¹⁷ The Commission's complaint challenged allegedly deceptive claims about the relative nutritional value and healthfulness of KFC's fried chicken as compared to a Burger King Whopper, as well as the chicken's compatibility with popular weight-loss programs.

While I applauded staff for bringing a national advertising case and for the strong injunctive relief they obtained, I issued a separate statement in the *KFC* case.¹⁸ In my view, companies should not be permitted to reap monetary benefits from their deceptive practices, especially where the health and safety of consumers are compromised. My statement encouraged the Commission to find ways to seek monetary relief in any similar cases that may arise in the future.

In addition to permanent injunctive relief stopping the deceptive conduct at issue, it is imperative that the Commission examine what types of remedies are appropriate in national advertising cases— especially when a company appears to have exploited a national health crisis,

¹⁷ FTC News Release, *KFC's Claims That Fried Chicken Is a Way to "Eat Better" Don't Fly* (June 3, 2004), available at <http://www.ftc.gov/opa/2004/06/kfccorp.htm>; see generally In the Matter of KFC Corp., FTC. Dkt. No. C-4118 (decision and order issued Sept. 9, 2004), available at <http://www.ftc.gov/os/caselist/0423033/0423033.htm>.

¹⁸ *KFC Corp.*, Statement of Commissioner Pamela Jones Harbour, available at <http://www.ftc.gov/os/caselist/0423033/040917statementharbour0423033.pdf>.

such as obesity. Consumers place great trust in national advertisers. When that trust is broken by false, deceptive, or misleading statements, the advertiser may need to repair that trust – perhaps by ensuring that corrected information is provided to the consumer, or through redress for any harm the consumer actually may have suffered as a result of the deceptive ads.

VI. CONCLUSION

Thank you for your time today. And remember: if you see an ad for something that looks “too good to be true” – it probably is.