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SHOULD MEDIA OUTLETS BE HELD LIABLE FOR DECEPTIVE ADVERTISING

by

Randal M. Shaheen*

FTC's STAFF REPORT

Near the end of 2002, FTC issued a Staff Report entitled "Weight Loss Advertising: An Analysis of Current Trends." The Report concludes that despite unprecedented FTC enforcement activity, the use of false or misleading claims in weight loss advertising is rampant. The Report also notes the potential effectiveness of media screening standards in reducing the amount of blatantly deceptive advertising and encourages increasing adoption of such standards, notwithstanding the failure of past such efforts by FTC. Although the Report stopped short of calling upon the Commission to hold media outlets that fail to exercise such screening legally responsible, at least one Commissioner at the time seemed to be suggesting such a position.

COMMISSION LETTER ALERTED MAJOR RETAIL CHAINS OF POTENTIAL LIABILITY

In a speech in the spring of 2002, former FTC Commissioner Sheila F. Anthony noted that "all parties who participate directly or indirectly in the marketing of dietary supplements have an obligation to make sure that the claims are presented truthfully." She also noted that the Commission had sent a letter to major retail chains carrying a particular supplement, alerting them to their potential liability if they participated in deceptive marketing. ("Combating Deception in Dietary Supplement Advertising, April 16, 2002 www.ftc.gov/speeches/anthony/disp2.htm) In a more recent article, former Commissioner Anthony again called on the media to take on a more responsible role. She noted that the FTC staff was developing a list of potentially false diet claims that should make it easy for media outlets to screen out obviously false ads. She concluded, rather ominously, by stating that the First Amendment does not protect fraud. ("Let's clear up the diet-ad mess: But the Federal Trade Commission needs help and it's looking to get it from Media" Advertising Age, Feb. 3, 2003, p.18)

It may well be that the Commission is simply trying to cajole a reluctant media into voluntarily playing a larger role in ad screening by warning of possible civil liability. However, to the extent that the Commission seriously intends to pursue such a course, it is embarking upon a policy that is neither legally sound nor socially desirable.

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HISTORY OF FTC REGULATION OF PARTIES OTHER THAN ADVERTISERS

FTC's Authority as to Deceptive Advertising Rests Primarily in Section 5 of The FTC Act

FTC's authority with respect to deceptive advertising rests primarily in Section 5 of the Federal Trade Commission Act, which prohibits "unfair or deceptive acts or practices in commerce." *See* 15 U.S.C. Section 45(a)(1).

Initially, FTC took a narrow view of who could violate Section 5. In its 1949 decision in Bristol-Myers, 46 FTC 162 (1949), the Commission found Bristol-Myers had falsely represented the results of a survey of dentists on toothpaste usage. With respect to the advertising agencies, although they admittedly participated in the creation of the advertisements, the Commission dismissed the complaint "in the exercise of its sound discretion":

> "[A]lthough these respondents participated in the dissemination of the advertising found to be false or misleading, they at all times acted under the direction and control of respondent Bristol-Myers Co., their employer, with whom rested the final authority and responsibility for such advertising, and for the further reason that the practices found to be against the public interest will be stopped by the order to cease and desist issued against Bristol-Myers Co." (Bristol-Myers, 46 FTC 176.)

By at Least 1960, FTC Was Entering Into Consent Orders With Ad Agencies

FTC's position in Bristol-Myers was relatively short lived. By at least 1960, FTC was entering into consent orders with advertising agencies. *See*, e.g., Standard Brands, Inc., 56 FTC 1491 (1960). In 1961 an agency litigated and lost on the issue of its liability. *See* Colgate Palmolive Co., 59 FTC 1452 (1961). In Colgate the deception related to a purported demonstration of shaving cream being shaved off sandpaper, when in actuality Plexiglas was used. The agency, Ted Bates, not surprisingly argued that it should not be held responsible because it had acted as the "agent" of Colgate in preparing the ads. The Commission, however, without so much as a nod towards its earlier precedent, called Bates' contention "curious." The Commission stated "[w]e know of no doctrine that permits one to evade liability for actions for which he is as directly responsible as this, regardless of whether be acted solely in his own interest or also for the benefit of another." (Colgate Palmolive Co., 59 FTC at 1471.) On appeal, the U.S. Court of Appeals for the

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First Circuit expressed some misgivings about the agency's liability but concluded that "[w]here, as here, the Commission was warranted in finding that the advertising agency was an active, if not the prime, mover, we could not say that the Commission lacked either jurisdiction or discretion." (Colgate-Palmolive Co. v. FTC, 310 F.2d 92 (1st Cir. 1962). The Court, however, remanded the case to the Commission for further clarification. (Colgate-Palmolive Co. v. FTC, 310 F.2d 89, 92, 95 (1st Cir. 1962).)

On remand, the Commission found that Bates originated the advertisement and knew that the product could not perform as claimed. FTC concluded that this was not a case where the ad agency was "wholly without knowledge" or "any suspicion of the falsity of the claim." Colgate, 62 FTC at 1277-78.

> "[I]t would be strange indeed if Bates, as the moving party in originating, preparing and publishing the commercial, and having full knowledge not only that the claim was false but that the "proof" offered to the public to support it was a sham, should be relieved from responsibility." (*Id.*)

On appeal again before the First Circuit, the Court affirmed, stating that "[w]e see no reason why advertising agencies, which are now big business, should be able to shirk from at least prima facie responsibility for conduct in which they participate." (Colgate-Palmolive Co. v. FTC, 326 F.2d 517, 523-24 (1st Cir. 1963).)

FTC: Ad Agencies Have Affirmative Duty to Investigate Veracity of a Claim

The "wholly without knowledge or any suspicion of the falsity" standard lasted for a decade. In 1973, in ITT Continental Baking Co., 83 FTC 865 (1973), it was Ted Bates again who argued that it should not be liable because it neither knew nor had reason to know that the claims were false. (ITT Continental Baking Co., 83 FTC at 968.) The Commission, however, held that advertising agencies have an affirmative duty to investigate the veracity of a claim:

> "Unless advertising agencies were under a duty to make independent checks of information relied upon to frame their advertising claims, the law would be placing a premium on ignorance." (ITT Continental Baking Co., 83 FTC at 969.)

This remains the law today. An advertising agency may be held responsible for deceptive advertising where the agency actively participated in the

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creation of the advertisement and knew or should have known that the advertisement was false. (The Commission, however, has recognized that advertising agencies are not well equipped to assess the reliability of scientific or technical studies–as opposed to what claims an advertisement makes. In the case of technical substantiation, the Commission has required only that the agency ascertain that the substantiation is facially adequate and not obviously flawed.)

FTC Entered Into Order
With Catalogue Company

Over time, however, the Commission has stretched its theory of advertising agency liability to cover other actors as well. For example, the Commission entered into an order with a catalogue company that offered for sale products manufactured and sold by independent third parties. In requiring substantiation, the Commission's order did not distinguish between claims created by the catalogue company and claims by the manufacturer which the catalogue merely parroted. (*See* Right Start, 116 FTC 619 (1993).) In addition, the Commission recently attempted unsuccessfully to hold a celebrity endorser responsible for a product's deceptive claims. (*See* FTC v. Garvey, 2002 WL 31744639 (C.D. Cal. Nov. 25, 2002).)

ANALYSIS OF POTENTIAL MEDIA OUTLET LIABILITY

An attempt to hold a media outlet liable for disseminating a deceptive advertisement could be seen as nothing more than a logical extension of the Right Start consent. If a catalogue company can be held responsible for doing nothing more than republishing claims disseminated by a manufacturer, then why not a media outlet for disseminating the same claims? Although only the catalogue company is directly selling a product to the consumer, both companies profit from the claim's dissemination. But is there a legal basis to hold the media outlet responsible? Past Commission and court precedents suggest not.

While a media outlet arguably might know or should have known that a weight loss ad was deceptive, what has happened to the active participation standard that the courts and Commission have fashioned? For example, in an appeal of an order entered against an advertising agency, the Fifth Circuit stated:

> "Is one carrying out the will of another to be held responsible for the results of his actions? It appears to us that the proper criterion for deciding this question should be the extent to which the advertising

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agency actually participated in the deception." (Carter Products, Inc. v. FTC, 323 F.2d 523, 534 (5th Cir. 1963) (upholding liability because agency developed the marketing concept.))

SIXTH CIRCUIT UPHELD AN AGENCY's LIABILITY

In another agency appeal, the Sixth Circuit upheld an agency's liability based upon a showing that the agency had offered general marketing consultation, formulated advertising plans and originated the advertising ideas. (Doherty, Clifford, Steers & Shenfield, Inc. v. FTC, 392 F.2d 921, 928 (6th Cir, 1968).) Based upon these precedents, in what way has a media outlet participated in creating the deceptive representations?

Further, if the active participation standard is to be swept aside then why stop at holding media outlets liable? Any company that profits from and facilitates the sale of the product could be held responsible. What about the company that prints the advertisement, the one that manufactures the product, the retailers that sell it or in the case of magazine advertisements, the United States Post Office that delivers the magazine or flyer to consumers' doors. Any of these entities could have looked at the advertising material and known that the claims must be false. How many different parties must a manufacturer satisfy before its advertisement finds it way into the hands of consumers? Finally, why stop at advertising? Couldn't other parties involved in the advertising and sale of a product be held to have an obligation to at least facially explore whether there are other problems with the product–for example, safety problems.

Even if the legal problems associated with media outlet liability were not insurmountable, there are sound policy reasons why the Commission should not extend liability in this fashion.

First, an FTC order–the violation of which may result in substantial civil penalties–which is entered against a media outlet threatens to have a disproportionately greater competitive impact than one entered against an advertiser. An advertiser's order affects only how it markets and promotes its own products. However, a media outlet order would likely apply to advertisements for products sold by numerous manufacturers. Advertisers may avoid a media outlet under an FTC order, in favor of its competitors, so as to avoid the extra scrutiny its ads may receive from a media outlet fearful of civil penalties. Further, the media outlet may unnecessarily reject

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advertising, losing the advertisers to its competitors, because it feels the need to be cautious in evaluating the substantiation of claims for products manufactured and sold by a third party.

POTENTIAL COMPETITIVE PROBLEMS

The potential competitive problems do not stop there. FTC orders typically contain a provision requiring periodic submission of compliance reports. These reports must demonstrate that the respondent is in compliance with the order and usually provide documentation sufficient for the FTC staff to scrutinize advertisements covered by the order that were disseminated during the compliance period. Advertisers may be understandably leery of placing ads with a media outlet where they may become part of a compliance report to FTC.

FTC STAFF WAS PREPARING LIST OF UNSUPPORTABLE WEIGHT LOSS CLAIMS

Former Commissioner Anthony's article previewed the fact that the FTC staff was preparing a list of unsupportable weight loss claims. In December of last year, the FTC released a media guide on weight loss claims–"Red Flag Bogus Weight Loss Claims: A Reference Guide for the Media on Bogus Weight Loss Claim Detection." FTC, however, stopped short of requiring media outlets to reject advertisements containing one of the red flags, settling only for encouraging them to do so.

For the reasons stated above, FTC did well to reject the temptation of requiring media outlets to follow the Guide. Publishing a list is no answer to the legal question as to whether media outlets have sufficient culpability to be held responsible for deceptive advertising. Nor does it really make the problem of deciphering substantiation any easier. Surely the unscrupulous advertisers FTC is largely worried about are sophisticated enough to stay clear of any FTC list. A claim can be modified slightly or an additional "active" ingredient included such that the product or its claims no longer match precisely with its counterpart on the FTC list. For example, rather than make a "red flag" claim of two pounds or more of weight loss per week without diet or exercise, a company can make a two pounds per week weight loss claim with only five minutes of exercise once a week. Media outlets would once again be left to fend for themselves with respect to claims or clinical testing substantiation.

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Further, the list concept sounds strikingly similar to a prior restraint. After all, if media outlets, under pain of sanction, are told not to disseminate certain advertisements, they are unlikely to be circulated. This is a far more severe

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sanction than that which FTC typically imposes on advertisers. An advertiser ordinarily is prohibited from making certain representations *unless* those representations can be substantiated. *Thus, the advertiser is free to continue advertising, but subject to penalties if it lacks adequate substantiation.* Suppose that in the world former Commissioner Anthony posits an advertiser comes up with new substantiation for a product or claim on FTC's blacklist. It may be legitimate or it may not, but how does that issue get resolved? Even if a media outlet had the sophistication to review the substantiation, it would do no good to present it to them. As long as the product remained on the FTC list the media outlet dare not run the claim. Possibly the advertiser could present the new substantiation to FTC in the hope of being removed from the list but there is no specific mechanism for this at present or any assurances that such a review would take place in a timely manner. In short, the proposed use of a "black list" is potentially a far greater restraint than any currently used by FTC.

CONCLUSION

No one can dispute that deceptive weight loss claims are rampant, and FTC's goal of reducing their number is laudable. Having successfully recruited advertising agencies, and to a lesser extent, the television networks, to the role of private policeman, it is seductively tempting to deputize even more parties. Doing so through voluntary encouragement is perfectly appropriate. Indeed, FTC recently prevailed in a court challenge to its authority to send retailers a letter informing them of a recent consent order against a product they carried. Creative solutions like this, as well as the recent voluntary Media Guide on weight loss claims should be explored and encouraged. However, expanding the scope of those who can be held liable for deceptive advertising is not the answer. Such a solution would face substantial legal hurdles as well as raising a number of significant policy issues.

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