

Antitrust and Federal Regulation Alert

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Aggressive Consumer Protection Enforcement

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The current Federal Trade Commission (FTC) is very focused on aggressive enforcement of the consumer protection laws. It has announced particular emphasis on enforcement actions against marketers that utilize deceptive or misleading health-related claims. On October 21, 2010, the First Circuit Court of Appeals upheld a district court decision finding Defendants, marketers of popular dietary supplements, liable for deceptive advertising and ordering them to disgorge more than \$48.7 million in profits. The FTC's complaint alleged that Defendants had no "reasonable basis" to support the health-related claims in their infomercials.

The First Circuit's decision is a ringing endorsement of, and buttresses, the Commission's hard-nosed approach in this area. Now armed with an appellate affirmance of several important points, despite the recent election results that might suggest otherwise, one would expect this enforcement program to continue unabated. The Court affirmed the legal standard proffered by the FTC, which only requires the FTC to show that a claim lacks adequate substantiation, not that the claim is "actually false." The Court also endorsed the FTC's rigorous evidentiary approach, requiring defendants to have some "scientific evidence" to support their claims. And finally, the Court held that damages can be based upon defendants' gross receipts rather than their actual profits, which significantly increased the award of damages in this case.

Background

From 2002 through 2004, Defendants Donald Barret and Robert Maihos ("Defendants") marketed and sold the products "Coral Calcium" and "Supreme Greens" through the use of infomercials they produced and distributed through their companies Direct Marketing Concepts, Inc., ITV Direct, Inc., and BP International. The infomercials for both products relied on experts who claimed that a host of diseases—ranging from cancer to heart disease—are caused by a condition called "acidosis," or high body acidity:

Are you getting the minerals? And if you're not, you will become acidic and you will get one of the major diseases. You can have heart disease, cancer, lupus, fibromyalgia, multiple sclerosis. Name the disease, they're all caused by acidosis...

Both infomercials also alleged that the "cure" for acidosis, and the diseases it causes, is to alkalize the body through the use of their products:

So if we can change the body's fluids and tissues to a more alkaline base, now you have an environment that is no longer conducive for the proliferation or growth of a degenerative condition...

In June 2004, the FTC filed a complaint in the United States District Court for the District of Massachusetts

alleging that Defendants' infomercials constituted "deceptive advertising" in violation of 15 U.S.C. §§ 45 & 52. In July 2008, the district court granted summary judgment against Defendants, holding that both infomercials were misleading as a matter of law. And in August 2009, after a bench trial, the district court entered two Final Orders and Judgments permanently enjoining Defendants from running their deceptive infomercials and ordering Defendants to disgorge over \$48.7 million in profits.

Proving Lack of Reasonable Basis

The FTC alleged Defendants were liable for deceptive advertising because they had no "reasonable basis" to support the health-related claims in their infomercials. Defendants' uncontested claims at issue on appeal were (1) that coral-derived calcium supplements cure cancer, multiple sclerosis, and other degenerative diseases by rendering acidic bodies more alkaline, and they are 100% absorbed by the human body; and (2) that Supreme Greens cure cancer and cause weight loss by rendering acidic bodies more alkaline.

To succeed on a theory of lack of "reasonable basis" for a claim, the Court held that the FTC must: (1) demonstrate what evidence would in fact establish such a claim in the relevant scientific community; and (2) compare the advertisers' substantiation evidence to that required by the scientific community to see if the claims have been established. As the Court explained, "[w]here the advertisers lack adequate substantiation evidence, they necessarily lack any reasonable basis for their claims. And where the advertisers so lack a reasonable basis, their ads are deceptive as a matter of law."

Defendants argued the FTC was also required to prove the infomercials were "actually false" in accordance with *FTC v. Enforma Natural Products, Inc.*, 362 F.3d 1204 (9th Cir. 2004). But the Court dismissed Defendants' argument, holding that such proof is only required where the FTC is proceeding on a theory of "actual falsity," not where the FTC alleges lack of "reasonable basis."

The Court Endorses FTC's Rigorous Evidentiary Test

On the issue of relevant standards in the scientific community, the FTC produced four expert declarations which demonstrated that the claims at issue could be substantiated by a double-blind, placebo controlled human study. Although the Court noted that "other scientific evidence" may be sufficient and a "double blind study is not necessarily required," it found that the expert declarations adequately established that "some scientific evidence is required for substantiation."

On the second prong, the FTC relied on the same expert declarations to establish that Defendants' evidence was inadequate to support their claims. The experts, who had each conducted a review of scholarly literature, generally declared that: (1) there was some evidence that calcium might help to prevent colorectal cancer but no evidence that calcium cures cancer; (2) there was some evidence that calcium might lower blood pressure but none that it cures heart disease; and (3) there was no evidence or scholarly research to support any of Defendants' remaining claims.

In response, Defendants argued that it was reasonable for them to rely on the opinions of the "doctors" appearing in their advertisements as well as what the Court termed "popular science and pseudo-scientific articles" and one "preliminary study" in making their claims. But upon looking deeper into Defendants' evidence, the Court held that it fell well short of the "rigorous standard of scientific reliability" established by the FTC.

Puffery and General Disclaimers Not Enough to Salvage Claims

The Court also rejected Defendants' assertion that their claims amounted to mere puffery which was further attenuated by the presence of general disclaimers. Defendants made specific and measurable claims regarding the effects of their products that, in the eyes of the Court, went far beyond puffery as a matter of law. And Defendants were not protected by their disclaimers, which the Court held were not "sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression."

Gross Receipts as Basis for Calculating Damages

Defendants hotly contested the district court's award of damages, arguing that under the rule enunciated in *FTC v. Verity Int'l, Ltd.*, 443 F. 3d 48 (2d. Cir. 2006), damages should be limited to actual profits, not gross receipts. In *Verity*, the Court limited damages to actual profits because unrelated, non-party middlemen partook of the proceeds from defendants' scheme before the defendants themselves received payment. But the Court refused to apply the *Verity* rule here, holding that its application was limited to circumstances where a non-party middleman takes some of the profits. Since no such middlemen existed in the present case, the Court held that the district court did not err in resting its damages determination on the Defendants' gross receipts rather than their net profits.

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