



June 22, 2010



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Diet Supplement Manufacturer Settles False Claims Suit for \$2.5 Million

The maker of the dietary supplement Mega-T has agreed to pay a \$2.5 million settlement in a class action suit that accused the company of making false weight loss claims regarding its product line.

The lawsuit, filed by Denise Wally in California state court last year, alleged that CCA Industries, Inc., made false and misleading claims about its line of Mega-T dietary supplement products. According to the company's advertising and product packaging, use of the line of products, which includes Meta-T Ultra, Mega-T Plus, Mega-T Effervescent, Mega-T Green Tea Dietary Supplement, and the Mega-T Dietary Supplement, could result in rapid weight loss, up to two pounds per week. However, after the company received a draft complaint of a second lawsuit in New Jersey state court based on similar allegations, it agreed to settle the case, announcing the preliminary settlement agreement as part of a Securities and Exchange Commission filing.

Under the terms of the settlement agreement, CCA Industries will pay out \$2.5 million, which will be used to reimburse customers up to \$10 for each Mega-T product. Claimants must produce a receipt (or six bottles of a product if they do not have the receipt) in order to be reimbursed. In addition, the company agreed to injunctive relief that prohibits it from making claims without scientific proof



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and to change Mega-T's product packaging, although it will continue to sell the line in its current packaging until October 31, 2010. Final court approval of the settlement agreement's terms is still required.

In a statement, the company stated that it denied all of "the allegations of any wrongdoing and liability in regard to its advertising," but believed in light of the "costs, risks, and the substantial disruption of its business by the litigation," it was in the company's best interest to settle the case.

To read the agreement in *Wally v. CCA Industries, Inc.*, click [here](#).

Why it matters: The makers of dietary supplements face scrutiny not only from consumers and plaintiffs' lawyers, but also the Federal Trade Commission and Congress, which is considering new legislation that would further implement and enforce the 1994 Dietary Supplement Health and Education Act (DSHEA). The proposed legislation would allocate funds to the Food and Drug Administration to enforce DSHEA and require the FDA to make annual reports on its actions. Increased regulation of dietary supplements was also discussed at a recent hearing of the Senate Special Committee on Aging, where the Government Accountability Office presented a report, noting the prevalence of marketers making impermissible disease treatment claims about dietary supplement products or claims unsupported by current science.

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FTC v. Kellogg, Part II

For the second time in the last 12 months, the Kellogg Company has agreed to advertising restrictions imposed by the Federal Trade Commission related to health benefit claims made about its food products.

Last July, the FTC barred Kellogg from making claims that Frosted Mini-Wheats cereal was "clinically shown to improve kids' attentiveness by nearly 20%." Specifically, the company was barred from "mak[ing] any representation, in any manner, expressly or by implication ... about the benefits, performance, or efficacy of [Kellogg's Frosted Mini-Wheats cereal or any other morning food or snack food] for cognitive function, cognitive process, or cognitive health, unless the representation is true, non-misleading, and, at the time made, [Kellogg] possesses and relies upon competent and reliable scientific evidence that substantiates

UPCOMING EVENTS

June 23, 2010

Webinar

Topic: "Dietary Supplement Claims Compliance: Is the FDA Redefining the Supplement Standard?"

Speakers: [Linda Goldstein](#) and [Ivan Wasserman](#)
[for more information](#)

June 30, 2010

Location-Based Digital Marketing Forum

Topic: "With location-based technology growing exponentially, how do you build or adapt marketing strategies?"

Speaker: [Tony DiResta](#)
Santa Monica, CA
[for more information](#)

September 24, 2010

ACI Conference

Topic: "Sweepstakes, Contests, and Promotions"

Speaker: [Linda Goldstein](#)
New York, NY
[for more information](#)

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the representation.”

At the same time, the company launched a new ad campaign for its Rice Krispies cereal, which included product packaging claiming the cereal “now helps support your child’s immunity,” and that “Kellogg’s Rice Krispies has been improved to include antioxidants and nutrients that your family needs to help them stay healthy.”

The decision to run these claims so close to its prior FTC settlement did the company no favors, as noted by two members of the Commission in a concurring statement to the consent order. “What is particularly disconcerting to us is that at the same time that Kellogg was making promises to the Commission regarding Frosted Mini-Wheats, the company was preparing to make problematic claims about Rice Krispies,” Commissioner Julie Brill and Chairman Jon Leibowitz wrote.

Under the expanded order, the company is prohibited from making claims about any health benefit of any food unless the claims are backed by scientific evidence and are not misleading. The new order also specifies the definition of “competent and reliable scientific evidence,” stating it is required to be “sufficient in quality and quantity based on standards generally accepted in the relevant scientific field when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true.”

Kellogg has already faced regulatory action for its claims about Rice Krispies. Last November it agreed to stop using certain immunity-boosting claims after the San Francisco city attorney sent the company a letter, and in December 2009, the company settled with the Oregon Justice Department over the same immunity claims, agreeing to destroy 2 million units of packaging and donating the cereal to charity organizations.

To see the front label of the Rice Krispies packaging, click [here](#):

For the back label, click [here](#).

To read the 2009 Consent Order, click [here](#).

To read the 2010 Consent Order, click [here](#).

And the concurring statement in the 2010 Order, click [here](#).

Why it matters: The order is just the latest example in a series of attempts by the FTC to crack down on health claims made on food labeling and packaging, including last year’s order involving Frosted

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Mini-Wheats. Food companies should be careful when making health claims, especially those aimed at children.

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Groups Respond to Boucher's Privacy Bill

Several groups have filed written comments in response to Rep. Rick Boucher's (D-Va.) proposed privacy legislation, including a letter from the Interactive Advertising Bureau (IAB) stating that the bill would "fundamentally change online information and online advertising practices to the detriment of consumers."

Boucher released a draft of his privacy legislation last month, which included heightened disclosure requirements for privacy practices and new rules on targeted advertising. It also established a general rule of opt-out consent for companies that collect data about consumers, although opt-in consent would be required to collect "sensitive data," such as geographic location information, medical records, or sexual orientation. (For more details on the legislation, click [here](#))

Comments were due by June 4, and several trade groups and consumer organizations have weighed in.

The IAB, in a letter authored by vice president for public policy Mike Zaneis, objected to the legislation's opt-in consent requirement for ad networks to track consumers. "Requiring consumers to opt-in to transfers to third parties would drastically reduce the free flow of information that is the heart and soul of today's Internet offerings," the IAB wrote. The group also advocated for continuation of the current self-regulatory system, stating, "We believe that self-regulation, which is inherently more flexible and better-suited to govern a dynamic environment than legislation, is the best approach to help ensure that consumers receive transparency and choice online."

On the other end of the spectrum, the Center for Digital Democracy – joined by the Electronic Frontier Foundation, the World Privacy Forum, and other groups – also objected to the proposed legislation, seeking to expand the definition of "sensitive information" and utilize strict opt-in procedures. The groups contend that the bill should ban companies from keeping consumer information for more than 24 hours without opt-in consent, arguing

that the traditional notice-and-choice model doesn't work online.

Consumers Union, the publisher of *Consumer Reports*, criticized the bill for relying on the traditional system of notice and choice. It also objected to a provision in the legislation that would prohibit private suits against companies that violate the privacy standards. "The FTC does not have the resources to pursue all or even most privacy violations occurring on the Internet today," according to Consumers Union. "Giving individuals a private right of action against companies who violate the law will have a greater deterrent effect and give individuals some control over the way their personal information is used."

Voicing the concerns of the media, NetChoice, a coalition of media companies, including AOL, eBay, News Corp., and Yahoo!, suggested that the proposed legislation could interfere with the media's ability to report the news. For example, if a reporter interviewed participants at a religious rally, he or she would be required to provide any interviewees with a written privacy notice to even ask for a person's name, the group wrote, as "sensitive information" includes religious affiliation. A reporter "could not disclose anyone's name in a published story without first obtaining their express affirmative consent," the coalition wrote.

To read the draft of the proposed legislation, click [here](#).

To read the CDT's comments, click [here](#).

To read the comments from the CDD, EFF and other groups, click [here](#).

Why it matters: In addition to trade groups and consumer organizations, other lawmakers also weighed in on the draft legislation. Congressman Joe Barton (R-Tex.), a member of the House Energy and Commerce Committee, recently said that the bill does not go far enough, offering his help to Rep. Boucher to make the legislation more stringent.

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Virginia Passes New Law on Promotions

The governor of Virginia signed a new gambling bill into law that also regulates games, contests, and other promotions.

The law, which goes into effect July 1, was signed by Governor Bob McDonnell on May 21. Ostensibly a gambling bill, 18.2-325 also

regulates games, contests, and other promotions. Under the new law, for a game, contest, lottery, scheme, or promotional offering to be legal, the sponsoring company must make available a method of free entry to all participants who wish to enter the contest without purchase. Additionally, the contest must provide an equal opportunity to play and equal odds of winning for all participants (whether a participant entered with a valid purchase or through a free, alternative method of entry), and make various written disclosures, including the terms and conditions of entry and receiving a prize, the official contest rules, and the odds of obtaining a winning configuration or game piece, among others.

To read 18.2-325, click [here](#).

Why it matters: While the requirements are fairly typical and the required disclosures are standard, the new law demonstrates an increase in action by state governments in the realm of consumer protection.

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Senate Commerce Committee Approves Data-Pass Bill, Limit on Ad Volume

The Senate Committee on Commerce, Science, and Transportation approved two important pieces of legislation last week: Sen. Rockefeller's data-pass bill and another bill that would require the Federal Communications Commission to adopt a regulation limiting the volume of television ads.

The Chairman of the Committee, Jay Rockefeller (D-W. Va.), introduced Senate Bill 3386, the Restore Online Shoppers' Confidence Act, in May. The legislation addresses post-transaction marketing online and sets forth broad prohibitions and restrictions for all online post-transaction offers. Under the proposed bill, a post-transaction seller would be required to collect a consumer's full information rather than simply receiving it from the underlying seller, and consumers would have to take affirmative steps to demonstrate their agreement to the transaction. The legislation also addresses negative option sales offered online, with new disclosure, consent, and cancellation requirements.

For more details on Sen. Rockefeller's bill, click [here](#))

The second bill approved by the Committee, S.B. 2847, the

Commercial Advertisement Loudness Mitigation Act, would require the FCC to adopt a regulation within one year of enactment limiting the volume of television advertisements in accordance with recommended technical standards. The legislation was introduced by Sen. Sheldon Whitehouse (D-R.I.) with the support of Sen. Rockefeller. "Excessively loud television advertisements may seem like a small thing – but they are a big source of irritation for many television viewers. This bill will help put a stop to the annoying practice of featuring television advertisements that are many times louder than television programming," Sen. Rockefeller said in a statement. As passed, the bill includes a provision that would allow the FCC to grant broadcasters, cable operators, or other video programming providers waivers for up to a two-year period if they establish that the rules would impose "a financial hardship." A similar bill was passed by the House in December.

To read S.B. 3386, click [here](#).

To read S.B. 2847, click [here](#).

Why it matters: While both pieces of legislation would impact marketers, if passed as currently drafted, the Restore Online Shoppers' Confidence Act would have a profound effect on online marketers that engage in data-pass. As the bills continue to make their way through Congress, we will monitor developments and keep you posted.

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