Advertising Law

September 30, 2011

SPECIAL FOCUS: FTC and Reebok Enter Into $25 Million Stipulated Order Over Toning Shoes

On September 28, 2011, the Federal Trade Commission's Bureau of Consumer Protection announced that Reebok International Ltd., the manufacturer of athletic footwear and apparel, entered into a $25 million stipulated judgment and Order regarding allegations that it violated the FTC Act by making false and unsubstantiated claims for its fitness toning athletic shoes. According to the FTC's Complaint in the case, Reebok had made unsupported advertising claims that its toning shoes would provide extra toning and strength to leg and buttock muscles by increasing the effect of a regular exercise routine. The Complaint further alleges that the advertising made quantified claims of health benefits, such as that the shoes had been proven through research to lead to a 28% better workout for the buttocks, and 11% better workout for calves compared to regular walking shoes.

The FTC's Order requires Reebok to pay $25 million into a fund for consumer redress, which will be administered either directly by the FTC or through a court-approved settlement of class action litigation against Reebok, which is currently pending. In addition to the monetary penalty, the Order prohibits Reebok from making advertising claims regarding health, fitness or muscle building that are specifically quantified unless it has competent and reliable scientific evidence, which is specifically defined in the Order to mean well-controlled, blinded human clinical trials of at least six weeks in duration. The Order also includes standard general requirements regarding claims substantiation for other general health and fitness claims.

The FTC's Order reflects what has been an increasing trend in FTC enforcement actions in a number of key respects:

- First, the Order demonstrates that the FTC will pursue traditional brand name companies and is increasingly seeking, and obtaining, significant monetary relief for a wide range of claims.
- Secondly, the Order reflects the FTC's increasing demand for consumer restitution in cases involving exaggerated or unsubstantiated advertising claims. The FTC can only obtain penalties in cases where there is an alleged violation of a trade regulation rule or prior consent order. However, this administration is increasingly demanding substantial payments in the form of consumer restitution even in cases involving only exaggerated or unsubstantiated claims. This growing trend accounts for the sizable amounts that the FTC is obtaining in monetary relief.
- Finally, the Order reflects the FTC's continued shift from a more flexible "competent and reliable scientific evidence" standard for substantiating health and safety claims to a more specific clinical testing requirement. Historically, the FTC has simply required in its

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Consent Orders that advertisers have "competent and reliable scientific evidence" which was defined broadly to mean tests, studies, analysis and other evidence that experts in the field might deem sufficient. Last June, the FTC issued a series of three orders in rapid succession against Dannon, Nestlé and Iovate which specifically required that the advertisers have two double blind clinical studies to support certain health and benefit claims. The Reebok Order does not require two clinical studies, but does require that certain specified fitness claims be supported by a single blinded clinical study of at least six weeks in length. The FTC has been shifting to these specific Order provisions in order to make enforcement of these Consent Orders easier in the future. By dictating the precise type of support that will be required to substantiate certain claims, there is less room for a defendant to argue that anything less than clinical support is adequate.

In response to the Order, Reebok issued the following press statement: "In order to avoid a protracted legal battle, Reebok has chosen to settle with the FTC. Settling does not mean we agreed with the FTC's allegations; we do not."

To read the FTC's Complaint, click here.

To read the FTC's Order, click here.

Why it matters: The Reebok action demonstrates the FTC's increasingly aggressive posture with regard to its enforcement actions. This Order sends yet another strong message to marketers that quantified health and fitness claims must be supported by empirical clinical evidence, and that failure to properly substantiate these claims can result in significant monetary exposure.

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