Federal Trade Commission

The Federal Trade Commission's Consumer Protection Priorities

Remarks By

The Honorable Deborah K. Owen
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The views expressed are those of the Commissioner, and do not necessarily reflect those of the Federal Trade Commission or the other Commissioners.

I appreciate the opportunity to be here today to talk about two of the most interesting and challenging issues currently facing the Federal Trade Commission -- environmental claims, and health claims for foods. I will begin with an update on our progress in addressing environmental claims, and then offer some thoughts on several of the many issues currently pending in the health claims area. Please keep in mind that my remarks are solely my own and do not necessarily represent the views of the Commission or of any other Commissioner.

Environmental Claims

The FTC is proceeding on three fronts to deal with the varied and complicated issues that arise in the environmental claims context. In our primary theater of operations, we are currently engaged in more than twenty major investigations relating to various environmental claims, such as "degradable," "recyclable," and "environmentally friendly." So far, two consent agreements have been announced, both relating to ozone safety claims.

In April, the Commission issued a complaint and consent agreement with a company known as Zipatone, regarding claims that its spray cement products contained only "ecologically safe" propellants. The complaint charged that, in making these statements, the company represented that its product contained no ingredients that would endanger the environment, and that use of the spray cement would not have a detrimental effect on the

earth's ecology. In fact, the complaint alleged, the product itself contained an ozone-depleting chemical, which will cause environmental damage. Based on virtually identical allegations, the Commission, just a few weeks ago, issued for public comment a complaint and consent agreement concerning Jerome Russell Cosmetics. In its promotional materials and on cans of Halloween-type glitter hair spray and other cosmetics, Jerome Russell had made statements such as "ozone safe" and "ozone friendly," as well as stating, "no fluorocarbons." The complaint alleged again that, in fact, the advertised products contained an ozone-depleting chemical.

While these two cases are the most recent in the environmental claims area, they are not the first. That distinction dates back to 1973, when the Commission charged a milk container maker with false claims about the biodegradability of its milk cartons.[1] I also expect that these cases will not be the last enforcement actions in this area, and I am hopeful that we will have more to announce in the near future.

Meanwhile, on the second front, our consideration of various petitions to issue environmental guidelines is gearing up as we prepare for two days of hearings just a month away, on July 17 and 18. As you may know, the petition of your Association and its co-petitioners, which made recommendations for specific

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[1] Ex-Cell-O Corp., 82 F.T.C. 36 (1973).

guidelines, was recently printed in the Federal Register, along with two others. We are expecting wide participation, and will try to accommodate as many different speakers as possible in order to ensure that we hear a full panoply of views. Written comments will also be important in our deliberations, whether or not an oral presentation is made.

I have an open mind about environmental guidelines and am looking forward to what will likely be a most productive debate. At the same time, I realize that we have much to learn before we can determine whether guidelines at this time are the most effective means to deal with this dynamic and rapidly changing area. I am especially interested in receiving empirical data, such as consumer surveys, concerning consumer interpretation of environmental claims. In the Federal Register notice soliciting public comments, the Commission poses ten comprehensive questions on which it would like to receive comments and data. I have brought with me a number of copies of the press release listing these questions.

On our third and final front, we are participating in a joint task force with the Environmental Protection Agency and the U.S. Office of Consumer Affairs. The task force will help ensure that our actions are complementary, and will explore efficient responses within our respective authorities. It is my understanding that staff from each of the participating agencies

have recently developed a final workplan outlining the goals the task force hopes to accomplish, and a proposed schedule.

Health Claims for Foods

While some of the issues surrounding environmental claims are more or less a recent phenomenon, the Commission has had considerably more experience in the area of health claims for foods. Nevertheless, as is the case with environmental claims, our knowledge of the relationship between diet and health is constantly evolving. As you know, health claims for foods are subject to the jurisdiction of several agencies. According to our Memorandum of Understanding with the Food and Drug Administration, the FTC has primary responsibility for food advertising, and the FDA takes primary responsibility for food labeling, except for meat and poultry labeling, which is within the province of the U.S. Department of Agriculture. These agencies operate under different enabling statutes and are entrusted by Congress with different missions; but when enforcing laws that affect health claims for foods, we all share the same goal of protecting consumers from misleading or deceptive claims.

In accomplishing this goal, I believe it is important to keep in mind that advertising and labeling play significant roles in communicating information to consumers. A landmark study by the Commission's Bureau of Economics found that advertising and labeling claims for ready-to-eat cereals increased consumer

awareness of the potential nutritional benefits of fiber in the diet.[2] In fact, they found that for some segments of the population, advertising and labeling claims did a better job of communicating beneficial information than did other information sources, such as public service campaigns by government and private groups.

I have been startled to hear that this exemplary study has been mischaracterized as having been limited to one ad campaign that was created in consultation with the National Cancer Institute. While that campaign was the first, in 1984, to draw the connection between fiber and reduction of the risk of colon cancer, the staff's cereal marketing study was far more comprehensive than just this one campaign. It looked at changes in cereal consumption during a period when several of the major cereal producers were using a variety of advertising approaches to spread the information that fiber consumption might reduce the risk of colon cancer. I cannot emphasize this point enough because I believe that this study, as well as others which provide hard empirical data on how consumers and markets interact, are critical components in the health claims debate.

Because our roles in the health claims field are so interrelated, the FTC has always maintained a close working

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[2]Ippolito, P. and Mathios, A., Health Claims in Advertising and Labeling: A Study of the Cereal Market, Bureau of Economics Staff Report, Federal Trade Commission, August 1989.

relationship with the FDA. Our staff constantly consults with FDA scientists concerning the evidence available to support claims made in advertising. There are numerous examples in which the FTC has accorded substantial weight to even tentative or interim FDA scientific determinations. For example, in Thompson Medical,[3] one of the Commission's most significant advertising cases, the FTC relied in part on FDA's interim determination that insufficient evidence existed to classify the product in question as safe and effective. In Removatron,[4] the Commission gave substantial weight to an FDA panel's conclusion that the device the company had marketed for permanent hair removal was not proven effective. In a recent example, the Commission challenged claims made by Sterling Drug for two separate analgesic ingredients that were the subject of FDA review procedures. In that matter, Sterling agreed to pay a civil penalty of $375,000 to settle the charges.[5]

These cases illustrate the extremely high value that the FTC places on ensuring consistency with FDA's substantive or scientific determinations. Moreover, they illustrate that the FTC can also move against allegedly unsubstantiated claims on a

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[3]Thompson Medical Co., 104 F.T.C. 648 (1984), aff'd, 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987).

[4]Removatron International Corp., 111 F.T.C. 206 (1988), aff'd, 884 F.2d 1489 (1st Cir. 1989).

[5]United States v. Sterling Drug, Inc., No. CA90-1352 (D.D.C. June 21, 1990).

case-by-case basis even where the FDA has not completed its own regulatory process.

While the FTC and the FDA work very closely together to ensure as much consistency as possible, both agencies have recognized that advertising and labeling, though complementary, are different in certain respects. As FDA Commissioner David Kessler has observed, the differences between advertising and labeling may sometimes warrant different approaches.[6] The FTC staff also has explained, in comments on various FDA proposals, that health claims on food labels may raise different issues than advertising claims.[7]

There are several significant differences between labeling and advertising. In advertisements, pictures truly can be worth a thousand words, and the order and positioning of information can be critical to the messages that consumers receive. While these factors are present in the labeling context to a degree, they are much less of an issue because consumers have more time to closely examine the entire label.

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[6]See, Kessler, The Federal Regulation of Food Labeling, 321 THE NEW ENGLAND JOURNAL OF MEDICINE 717, 723 (1989); Address by David A. Kessler, M.D., 20th Anniversary Conference of the Center for Science in the Public Interest, p. 5 (June 6, 1991).

[7]Comments of the Bureaus of Consumer Protection and Economics of the Federal Trade Commission, Submitted to the Food and Drug Administration Department of Health and Human Services in Response to a Request for Comments on its Proposal to Amend the Rules Governing Food Labeling; Health Messages and Label Statements; Reproposed Rule (May 18, 1990).

Another factor concerns the cost differences involved between disseminating advertisements and creating labels. It would be virtually impossible to communicate coherently, in a 15- or 30-second television ad, all of the information that could be placed on a fixed label, or in a package insert. Small print may be incomprehensible on a TV ad, but is more readable, and more likely to be read, on a label.

A third significant factor concerns the frame of reference that consumers use to interpret ads and labels. Obviously, as consumers, we generally do not expect advertisements to contain the same degree of information as labels. Based on our experience, we know labels will contain more detailed nutritional information. Conversely, we don't necessarily expect advertising to have as much detail, so long as any omissions are not material and therefore deceptive.

Advertising can accomplish what labeling can't -- it can make a consumer stop and pay attention in a busy world, where many things compete for the consumer's attention. And, the fact that advertising and labeling serve some different functions in communicating information does not mean that false claims or deceptive half-truths should be tolerated in either medium; but it does mean that all of the same information need not appear in <u>both</u> media for consumers to be given accurate and beneficial information. Labels and advertisements can complement, and need

not necessarily mimic, each other. Likewise, law enforcement approaches to dealing with misleading claims in the two media must be consistent, but not necessarily identical. Towards that end, the FTC is committed to maintaining a close working relationship with the FDA, as we have in the past, to ensure that our actions to prevent deception in the area of food health claims, as in all areas, are consistent and not contradictory.

Within our own sphere of influence, the Commission has been extremely active in the health claims area. Let me give you a thumbnail sketch of some of our most recent cases, all of which involved sensitive questions of how to interpret implied claims in advertisements.

Kraft

In January of this year, the Commission issued its opinion in the matter of Kraft, Inc. The case involved advertisements stating that Kraft Singles cheese slices were made from five ounces of milk, and specifically mentioning the nutritional benefits of calcium. After full adjudication, the Commission found that Kraft had misrepresented that each Singles slice contains the same amount of calcium as five ounces of milk. The Commission also found that, in one set of advertisements, Kraft had misrepresented that Kraft Singles contain more calcium than most imitation slices.

Campbell Soup

The Commission recently issued for public comment a proposed consent agreement with Campbell Soup. The complaint charged that Campbell had represented that most of Campbell's soups are low in fat and cholesterol and, as part of a diet low in fat and cholesterol, may help reduce the risk of some forms of heart disease. The complaint further alleged that Campbell's failure to disclose that its soups are high in sodium was deceptive, given that diets high in sodium may increase the risk of heart disease. Under the proposed consent order, Campbell must disclose the sodium content of its soups in any advertisement making a connection between heart disease and a soup that contains more than 500 milligrams of sodium per eight-ounce serving. The proposed order would also require Campbell to have a reasonable basis for any representation about a connection between its soups and a reduction in the risk of heart disease.

Mazola

One final case that may epitomize the current debate over health claims in food advertising concerned the Commission's allegations against CPC International, the makers of Mazola corn oils and margarines. In that case, the Commission alleged that each of two advertisements contained an implied claim about the ability of Mazola products to reduce cholesterol. One ad depicted a piece of raw chicken and a piece of fried chicken, along with the headline, "Add Mazola, reduce cholesterol." The

second ad portrayed a grandfatherly-type figure, outfitted with racquetball gear, and the headline: "Mazola does what? They said it could turn back my cholesterol. I didn't believe it til my level dropped 17%."

When the complaint and the consent agreement regarding these ads were issued for public comment, the Commission received a number of comments from various nutrition and health experts who opposed the Commission action and suggested that it could discourage non-deceptive messages to the detriment of consumers. I was impressed by this virtual outcry from the scientific community. For example, a Professor of Nutrition Emeritus from Harvard Medical School wrote that he was concerned that the consent order "might prevent advertisers from saying that consumption of a polyunsaturated fat, like corn oil, can lower serum cholesterol levels."[8] He further commented that, while the total diet must be modified:

> The consumer must be able to identify those foods which contribute to the desired diet. Most of this information comes from food advertising. It will be a great mistake if the limitations on advertising are so severe that the consumer cannot make appropriate food selections.

Because of the lack of empirical evidence regarding the "chicken" ad, I determined that, although it was possible that some consumers might infer a deceptive message, this fact was too uncertain. For example, it was not clear that consumers

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[8]Comment of D. M. Hegsted, July 24, 1990.

would interpret the ad to mean that they could reduce cholesterol by adding fried chicken to their diet, rather than by substituting corn oil for highly saturated fats, or other possible truthful interpretations. In the case of the "grandfather" ad, I found a higher quantum of both intrinsic and extrinsic evidence, in the form of scholarly articles relating to consumer perception and ad interpretation. Thus, I was able to conclude that the ad was potentially misleading.

In the wake of the Commission's decisions in these cases, it has been interesting to hear comments from various pundits who have attempted to characterize the current "philosophy" of the agency, and my own views. For example, it has been suggested that the Commission has regressed back to an era when it simply determined for itself whether ads contained implied claims. Curiously, it has also been asserted that the Commission is suffering a "philosophical hangover" from the Reagan administration. These opposite conclusions about the Commission may be due to the "eye of the beholder" phenomenon; and frankly, when we hear vastly divergent criticisms like these coming from groups on opposite sides of the spectrum, it's probably safe to say that we must be doing something right. Maybe we have been successful in achieving that elusive balance in our enforcement policies that has escaped the Commission during turbulent times in the past.

Nevertheless, I do find some of these misconceptions disconcerting. For instance, suggestions have been made that Kraft is a harbinger of future days when the Commission will not require any extensive evidence in support of an implied claim interpretation. By contrast, it has also been asked if I would require extensive evidence, like consumer surveys, on even the most obviously misleading claims.

For those who may not have found enough guidance from my statements in the Mazola matter and from the Kraft opinion, which I authored, let me try to set the record straight once and for all. In Kraft, a unanimous Commission found that deceptive claims could be found in three out of four instances based solely on our analysis of all the factors within the four corners of the challenged advertisements. The Commission also considered the probative extrinsic evidence in the record and found that the weight of that evidence supported its conclusions. In a fourth instance, the Commission found that, in the absence of probative extrinsic data, the Commission could not conclude with confidence that the allegedly deceptive claim was present. These conclusions were consistent with the Commission's 1983 Deception Statement[9] and its 1984 decision in Thompson Medical,[10] one of the pivotal Commission cases discussing evidentiary standards for

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[9]Commission Policy Statement on Deception, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174 (1984).

[10]104 F.T.C. 648, aff'd 791 F.2d 189 (D.C. Cir. 1986), cert. denied, 107 S.Ct. 1289 (1987).

determining ad meaning. My decision in the Mazola matter was based on the same principles as they were applied to different facts.

Let me conclude with some generalizations about ad interpretation. First, the Commission should not hesitate to decide that a misleading claim is conveyed based on its own analysis of an advertisement in cases where the claim is express or otherwise clearly present. On the other hand, if there is some doubt that consumers would not be deceived, and especially in cases where the message may be beneficial, I will insist on sufficient extrinsic evidence, possibly including reliable empirical data in the form of consumer surveys, before determining to challenge the advertisement. I believe that this approach embodies a basic principle of responsible government -- making decisions based on evidence (evidence which may in some cases be within the four corners of an advertisement), and not based on the personal conjectures of the decisionmaker. These are the principles that have guided my work as a Commissioner and will continue to be the foundation of my consideration of issues in the areas of environmental and health claims.