

DISSENTING STATEMENT OF COMMISSIONER MAUREEN K. OHLHAUSEN
Federal Trade Commission v. Springtech 77,376, et al. ("Cedarcide Industries")
FTC Matter No. X120042
July 16, 2013

I strongly support the Commission's enforcement efforts against false and misleading advertisements and thus previously voted in this matter to challenge the defendants' claims about their bed bug and head lice infestation products. In the past, I have voted against these settlements, however, because I believe the requirement that defendants obtain Food and Drug Administration (FDA) preapproval prior to making head lice treatment claims is inconsistent with Commission precedent and that imposing such a high bar for this type of claims in general may ultimately prevent useful information from reaching consumers in the marketplace.

The Commission's two most recent decisions regarding deceptive health claims do not require FDA preapproval. Instead, in both cases, the Commission imposed our traditional standard of competent and reliable scientific evidence. Notably, in a case decided earlier this year, which involved claims regarding cancer and heart disease treatments, the Commission explicitly declined to adopt an FDA preapproval requirement and instead

There is also no reasonable basis to characterize the FDA preapproval provision as heightened fencing-in relief. Fencing-in remedies are designed to prevent future unlawful conduct through “provisions in a final Commission order that are broader in scope than the conduct that is declared unlawful.”¹⁰ Past decisions discussing the proper application of fencing-in remedies generally involve the extension of the scope of a final order beyond the specific product, parties, or type of conduct involved in the actual violation.¹¹ Requiring past violators to meet a higher burden of substantiation would not fence them in