

rayon is processed with a toxic chemical that releases hazardous air pollutants and that eliminates any natural antimicrobial properties of the bamboo plant, and the textiles are easily biodegradable after customary disposal. The four companies have entered settlement agreements with the Commission that prohibit such deceptive claims.

But the bamboo problem extended far beyond these four companies. Just a few weeks ago, the FTC announced that it had sent Warning Letters to 78 companies nationwide that were

⁴ See Press release, FTC Announces Actions Against Kmart, Tender, and Dyna-E Alleging Deceptive 'Biodegradable' Claims (June 9, 2009), available at <http://www.ftc.gov/opa/2009/06/kmart.shtm>.

“miracle” devices advertised to dramatically increase gas mileage in ordinary cars. Last year, we filed a case alleging that Dutchman Enterprises falsely advertised in major magazines that its Hydro-Assist Fuel Cell could boost automobile gas mileage by at least 50% and “turn any vehicle into a hybrid.”⁵ In the second matter, a contempt action, the same defendant was charged with falsely advertising that its “NanoDetonator” would allow ordinary passenger cars to harness the power of nuclear fusion, thereby eliminating the need for gasoline.⁶ In both cases, the Commission charged that the claims for the devices violate basic scientific principles. Through litigation, the Commission is seeking to halt unsubstantiated gas savings claims and reimburse consumers who have purchased the devices. I will talk about media screening in a few minutes, but I’d like to note my particular concern here that the ads for the Hydro-Assist Fuel Cell made it into publications such as *Newsweek* and *Popular Science*, which arguably lends credibility to the fantastic claims made about the device.

Endorsement Guides

⁵ See Press release, FTC Sues Promoter of Fuel Efficiency Device (Feb. 2, 2009), available at <http://www.ftc.gov/opa/2009/02/dutchman.shtml>. Preliminary Injunction was entered June 8, 2009.

⁶ *FTC v. Five Star Auto Club, Inc. et al.*, No. 99-CV-1693 (S.D.N.Y. Feb. 23, 2009) (order converting temporary restraining order to preliminary injunction).

endorsers⁷. In November 2008, for the first time since their adoption about 30 years ago, the Commission announced several proposed revisions to the Guides and invited public comment. The Commission gave careful consideration to the comments received and announced in October 2009 that it had approved final revisions to the Guides.

The basic principles underlying the Guides remain unchanged. Endorsements should not contain express or implied representations that would be deceptive or could not be substantiated if made directly by the advertiser. Endorsements themselves are not competent and reliable scientific evidence. Experts must have the qualifications they are purported to have, and material connections between endorsers and sellers should be disclosed if they might affect the weight or credibility of the endorsement.

But the Guides were first formulated in a world quite different from the one in which advertisers and marketers now promote their goods and services. The specific applications and examples appearing in the original Guides do not contemplate the advent of program-length infomercials, Internet advertising, word-of-mouth or viral marketing, and consumer blogs. In 1980, the advertiser always disseminated the advertisement. With advertiser-promoted consumer blogging, the advertiser is not always disseminating the endorsement, although it certainly orchestrates and expects to profit from the message.

Typicality

Let me first talk about typicality claims. The Commission's enforcement history with false or deceptive advertising using consumer endorsements, as well as its own research on consumer perception of such ads, has made it increasingly clear that in one key aspect –

⁷ Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255.

disclaimers of typicality – the Guides were not working as intended to prevent deception. Such disclaimers simply are not effective. Consumers interpret the results depicted in testimonials to be representative of what consumers can expect to achieve, even where testimonials are accompanied by the statement, “Results not typical.” The Commission’s consumer research found that even where testimonials were accompanied by the strong statement, “These testimonials are based on the experiences of a few people and you are not likely to have similar results,” consumers still believed that the results in the testimonials were representative of what would generally be achieved.

The misuse of testimonials and endorsements has been particularly prevalent in the promotion of weight-loss products, as described in the FTC staff’s 2002 report *Weight-Loss Advertising: An Analysis of Current Trends*.⁸ A review of 300 weight-loss ads revealed that two-thirds used consumer testimonials, and those testimonials rarely described realistic achievements, instead proclaiming extraordinary weight loss results that, in all likelihood, are not achievable. Disclosures regarding atypicality of the advertised results – when they appeared – often were buried in a fine-print footnote or video superscript flashed too quickly to be read. The typical disclaimers, such as “results may not be typical” or “results may vary,” did not adequately inform consumers that the reported weight losses were, at best, outliers or extreme cases.

Clearly, it was time for a change. The revised Guides no longer contain the so-called “safe harbor” for disclaimers of typicality, so it is no longer a shield from liability to simply use the “results not typical” language with testimonials. The revised Guides do not bar the use of

⁸ The Report is available <http://www.ftc.gov/bcp/reports/weightloss.pdf>.

atypical or best-case testimonials. But where the net impression from an ad is that the experiences of the testimonialists are representative of what consumers can generally expect to achieve, that is, that they are “typical” results, the advertiser should clearly and conspicuously disclose the generally expected result in the depicted circumstances. The Commission’s consumer research has found that this is the most effective way to counter the otherwise common consumer perception that testimonials portray typical results. We expect that advertisers who have competent and reliable scientific evidence to support a health claim also have reliable information as to what results consumers can generally expect with their products.

While this change in the Guides has garnered quite a bit of attention, the most fundamental principle underlying FTC advertising law remains the same. Advertisers who use testimonials are held to the exact same standard as those who do not. All advertisers are responsible for ensuring that their ads are truthful and not misleading.

We understand that it will require some adjustment for the industry to adopt the new guidelines regarding the use of testimonials. While we will allow a reasonable period of time for people to come into compliance, we want you to know that this change to the Guides is important and we intend to aggressively enforce the revised requirements for testimonials.

Social Media Marketing

Another change to the Guides that has attracted attention is the inclusion of several new examples that highlight the Guides’ applicability to new media and user-generated content, such as blogs and “word-of-mouth” marketing. The need for disclosure of material connections between endorsers and advertisers has always been embodied in the Guides. These new examples simply apply this principle to modern forms of marketing.

Today, when consumers seek out information about products and services they are

interested in buying, they often turn to the internet. Consumers are often interested in seeing what other consumers have to say about particular products and companies, and blogs are an increasingly common place to find product reviews. Some bloggers have become very influential and have an enormous number of followers. In addition, because many blogs relate to very personal aspects of people's lives – such as “mom bloggers” who write about the intimate details of raising children – many readers place more weight on bloggers' product reviews than they do on conventional advertising. To some extent, many readers trust the information and opinions posted on certain blogs in the same way they would rely upon advice from close friends. Although some of these bloggers are using the internet to share their personal viewpoints with the world, others have turned their websites into commercial ventures, where they promote an advertiser's products in exchange for free products, payments, or other significant perks. Consumers are entitled to know whether the product review they are reading on a blog is really the objective, personal opinion of an disinterested user, or an endorsement from a person who has essentially become part of the advertiser's marketing campaign. This is not to say that there is anything wrong with a marketer using bloggers to promote their products or paying them for this service. But a blogger who receives payments or other compensation – such as free products – to review products or services is an endorser and should disclose his or her material connection with the seller. This is no different from the requirement for endorsers in print, radio, or television advertisements, who must also disclose such connections when they would not be expected by consumers.

In addition, keep in mind that advertisers are potentially liable for statements made by paid bloggers. As with more traditional forms of media, you cannot simply hire someone to disseminate your advertising message and then walk away and expect to be insulated from

liability for the message you are paying to disseminate.

We have been asked about enforcement in light of the breadth of social media marketing. Historically, we have focused our enforcement actions on deceptive acts and practices that are the most clearly egregious or the conduct that is likely to cause the greatest consumer injury. I do not expect that our priorities will change under the revised Guides. Accordingly, I expect that our enforcement focus will remain on the conduct of advertisers rather than on individual endorsers.

National Advertising

National advertising is, once again, a high priority in the work of the Bureau of Consumer Protection. Last April, for example, Kellogg Company – the world’s leading cereal producer – agreed to settle FTC charges that its advertising falsely claimed a breakfast of Frosted Mini-Wheats was “clinically shown to improve kids’ attentiveness by nearly 20%.”⁹ Health claims are becoming more prevalent in food advertising – as I’m sure this audience is well aware – and the FTC is therefore giving it increased scrutiny. The Kellogg case provides a lesson to advertisers on the importance of careful and accurate portrayal of research findings when they are transformed into advertising claims.

Last year, the Commission settled charges that Airborne Health, Inc. disseminated false and unsubstantiated claims that Airborne effervescent tablets prevent or treat colds, protect against exposure to germs in crowded environments, and offer a clinically proven cold remedy.¹⁰

⁹ See Press release, Kellogg Settles FTC Charges That Ads for Frosted Mini-Wheats Were False (Apr. 20, 2009), available at <http://www.ftc.gov/opa/2009/04/kellogg.shtm>.

¹⁰ See Press release, Makers of Airborne Settle FTC Charges of Deceptive Advertising; Agreement Brings Total Settlement Funds to \$30 Million (Aug. 14, 2008), available at www.ftc.gov/opa/2008/08/airborne.shtm.

often done without consumers' knowledge. Also, once consumers share their information online, they completely lose control of it. They cannot recall it, erase it, prevent it from being shared or sold, see who has access to it, or know what measures, if any, are being taken to keep it secure.

There is concern that privacy protections in place today may not be adequate to deal with the privacy challenges that we are likely to see going forward. The formulation and implementation of privacy protections that will work in the future will require the input, expertise, and cooperation of consumers, businesses, and government. As part of this process, the Commission is hosting a series of day-long public roundtable discussions to explore the privacy challenges posed by 21st-century technology and business practices – including social networking, cloud computing, online behavioral advertising, mobile marketing, and the collection and use of information by retailers, data brokers, and others. These discussions are considering the risks and benefits of information collection, consumer expectations regarding the use of their information, and the adequacy of existing legal and self-regulatory regimes to address privacy interests. We are learning more about innovative approaches to providing effective notice and choice, both online and offline. We also hope to hear from those who have done actual consumer testing. Participants have included academics, privacy and technology experts, consumer advocates, industry members and associations, legislators, and international representatives. The roundtables have been open to the public, and the final one will be held on March 17, 2010, at the FTC Conference Center in Washington, DC. You can get details on our website. We hope to see many of you there.

Behaviorial Advertising

An aspect of online commerce with privacy implications which has increasingly

occupied our attention is behavioral advertising. This topic is particularly challenging, not only because marketing practices implicating privacy are constantly evolving, but also because we don't necessarily have the same well-defined expectations for online privacy as we do with physical privacy. Everyone knows that consumers don't want people peeping in their windows, looking through their bank statements, nosing around their medical charts, or following them around stores while they shop, writing down a list of everything they look at. Yet when consumers go online to get information or make a purchase, they potentially expose this sort of information to a host of companies that track consumer behavior online.

Companies track consumers' online activities in order to deliver advertising tailored to the consumers' interests. For instance, a consumer who lives in New York City and searches online for information on the New Orleans Jazz Fest might be served ads for airfare sales to New Orleans, New Orleans hotels, or jazz concerts in the New York area. Often, the companies involved in behavioral advertising are "network advertisers" who select and deliver advertisements to multiple websites participating in their networks. They commonly track consumer behavior by placing a file called a "cookie" on a consumer's computer which tracks which web pages have been visited, what content was viewed, what queries were typed into search engines, and whether the user has clicked on particular ads. In many cases, the information collected through the use of cookies is not personally identifiable in the traditional sense of including a consumer's name and address, but is instead identified with a particular computer or IP address. However, in some cases one could aggregate and analyze this and other collected data in order to identify a specific person.

Behavioral advertising offers potential benefits for consumers. Online advertising in general may help support free internet content that many consumers value, and the targeted

nature of behavioral advertising makes online advertising more efficient and attractive to advertisers. The practice may also potentially reduce unwanted advertising and increase the amount of advertising that a particular consumer finds relevant and useful. The Commission makes an effort not to stifle innovation and to allow responsible business practices to develop and flourish. However, behavioral advertising also raises serious privacy concerns. These include the invisibility of the practice to consumers, the lack of effective disclosures about the practice, the potential to develop and store detailed profiles about consumers, and the risk that the data collected for behavioral advertising – including sensitive data regarding health, finance, or children – could fall into the wrong hands or be used for unanticipated purposes.¹³

One year ago, the Commission staff issued a revised behavioral advertising self-regulatory principles to encourage the industry to provide more comprehensive and accessible protections to consumers. We did this after holding a workshop on the issue and reviewing comments from industry members, privacy advocates, and other stakeholders.

We encourage industry members and other stakeholders to develop specific standards to address this issue. We hope that self-regulation will suffice to bring order to this practice, but we caution that much more work needs to be done to stop problematic practices in this area. We are keeping a close watch here, because failure to tighten industry standards may invite legislation from Congress or further regulation or stepped up enforcement efforts from the Commission.

Media Screening

In 2003, former FTC Chairman Tim Muris talked to this audience about the FTC's Red

¹³ See generally *Sears Holdings Management Corp.*, FTC Dkt. No. C-4264 (final consent order approved Sept. 9, 2009).

Flags project, a project that was designed to ~~the~~ advertising of patently false weight loss claims. We enlisted the media as an ally in our campaign because, as ridiculous as many weight loss claims sound, mainstream magazines, newspapers, and cable television stations have run these advertisements without challenge. The same year, we published a media reference guide entitled *Red Flag Bogus Weight Loss Claims* that describes seven deceptive or false claims in weight loss ads. Our goal was to give the media an easy and efficient way to screen and reject advertisements that make the “Red Flag” claims. In 2005, former FTC Chair Deborah Platt Majoras returned to speak to this audience and discussed a 2004 Commission report that showed some progress in that we found substantially fewer ads with Red Flag claims. Nonetheless, we’ve continued to bring cases against advertisers of bogus weight-loss products, and in the last few years, we have also considered enforcement action against companies that published free-standing insert advertisements making false weight-loss claims. Those companies decided to adopt internal guidelines and screening procedures, and they committed not to publish advertisements containing “Red Flag” claims identified in the Commission

In their discussions with this audience in 2005 and 2003, both former Chairs emphasized the important role of the media in ad screening, not just for weight-loss claims, and I am here to reiterate this message. Despite the Commission’s efforts to date, it appears that the flow of patently deceptive advertisements in major publications has continued unabated. Indeed, the floodgates may be open wider than ever. I have been growing increasingly concerned with the number of facially dubious advertisements appearing in widely circulated magazines and newspapers, such as the Hydro-Assist Fuel Cell ads I mentioned earlier. Let me give you two more relatively recent examples, both full-page ads that appeared in major newspapers and were styled to look like actual news content. One touted a weight-loss pill that supposedly “delivers 5

times more weight loss” and is clinically proven to do so for most or all consumers. The other ad hawked free armored safes that consumers should consider using to store their cash, playing on fears of bank failure. The safes may be free, but the point of the ad was to sell consumers a “hoard of valuable coins” to go into the safe, to be paid in an unspecified number of installments for an unspecified sum of money. The ads ran in some newspapers even after at least two state attorneys general reached public agreements with the seller to stop running similar ads.

My message to you, therefore, is simply this: Publishers can and should do more to screen proposed advertisements for obvious signs of fraud. We want to enlist your help in stopping obvious frauds. I am well aware of the challenging policy issues surrounding enforcement actions against media outlets. That is not our goal. And I am not suggesting that publishers have a duty to “fact check” the advertisements they run. I am, nevertheless, hopeful that publishers will do more to prevent their publications from being used as vehicles to perpetrate obviously fraudulent schemes on subscribers and readers.

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The Commission tries to stay on the leading edge of technological and industry developments to make sure that our enforcement efforts remain effective and relevant. I look forward to working with you as our regulatory and enforcement programs continue to evolve. The seismic technological changes of the last twenty years have given consumers an unprecedented volume of information about the goods and services available in the marketplace as well as a myriad of methods and platforms for accessing and purchasing them. These revolutionary changes make consumer protection in the 21st century an exciting, if daunting, task. In addition to battling long-standing deceptive practices, the FTC has adapted with the

times, and we continue to do so. The initiatives I have outlined today are some of the ways in which the agency is responding to the changing marketplace and its consumer protection challenges. Our goals in these and all of our consumer protection efforts is to prevent the use of deceptive and misleading marketing techniques that keep consumers from making informed purchasing decisions and to protect consumers from unfair practices in the marketplace. These efforts benefit both consumers and businesses that play by the rules. I would like to thank you again for inviting me to speak today and ~~work~~ forward to working with you as our regulatory and enforcement programs evolve to meet new consumer protection challenges.