

Advertising: The Rules of the Road  
and  
Practical Advice on Avoiding the  
Bumps (and Potholes) Along the Way  
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## FTC Authority Over Advertising

- ◆ Section 5 of the Federal Trade Commission Act prohibits false or deceptive advertising claims
- ◆ Enforced by the Federal Trade Commission
  - ◆ Traditional advertising
  - ◆ Internet/website
    - ◆ Country-specific; market segmentation

## Other Players

- Attorney General/NAAG
- National Advertising Division (NAD)
- Lanham Act
- “Public interest” groups

3

## Elements of a Deceptive Ad

- A statement or omission
- Likely to mislead
- To the consumer’s detriment

## Claims: General Principles

- FTC enjoys broad discretion in determining claims conveyed by an ad
- “Net impression” determines claims; express and implied
- Advertiser responsible for all interpretations reasonably conveyed
- No detailed regulations - - FTC signals “policies” through enforcement actions and Commissioner speeches

5

## Statement or Omission

- Critical threshold inquiry: Does the advertisement convey a claim?
- Evaluate from viewpoint of consumer “acting reasonably under the circumstances”
- FTC has broad discretion to interpret meaning
  - ◆ “Office Poll” approach
  - ◆ Will examine “extrinsic evidence” (copy tests)



# NET IMPRESSION

\*A 1994 Contemporary Pediatrics Recommendation Study found that 88% of pediatricians who recommend baby food recommend Gerber.

Gerber.

\*A 1994 CONTEMPORARY PEDIATRICS RECOMMENDATION STUDY FOUND THAT 88% OF PEDIATRICIANS WHO RECOMMEND BABY FOOD RECOMMEND GERBER.

  
9 Gerber

## Deception by Omission

- Advertisements can be deceptive for what they fail to say or communicate.
- Not all omissions are deceptive, even where providing the information would be useful to consumers
- Absence of information is deceptive if it causes the advertisement to convey an inaccurate impression about a material information

## Disclosures

- Disclosures must be clear and prominent (ad specific exercise)
  - ◆ What factors bear on prominence?
- A false or misleading claim cannot be “cured“
- FTC generally disfavors disclosures.
- Stouffer’s Lean Cuisine 1 gram sodium

11

## BE CAREFUL WITH DISCLOSURES

Palm Powered handhelds can do just about anything, anytime. Drop an email, fax a lunch order, check inventory. That’s taking the Internet with you. Simply amazing.



<sup>12</sup>  
Palm

## BE CAREFUL WITH DISCLOSURES

© 2000 Palm, Inc. All rights reserved.  
Palm, Simply Palm, Palm Powered,  
and the Palm logo are trademarks of  
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Application software and add-ons  
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Applications may not be available on  
all Palm handhelds.



[Palm](#)

As the FTC would say . . .

“CLEAR AND CONSPICUOUS”



**NO MOUSEPRINT**

15

## Statement or Omission: “Puffery”

- Defined: non-objective statements for which support would not be expected
  - ◆ Includes subjective representations; expressions of opinion
  - ◆ “Tastes great,” “Soothing and refreshing”
- Contrast – objective claim that tout attribute of product material to purchasing decision

## “Likely to mislead”

- Reasonable consumer standard/subjective
- FTC’s “Office poll: approach
- Significance of consumer perception data (or lack thereof?)
- Humorous executions do not immunize ad from challenge

## “Consumer detriment”

- FTC presumes consumer injury when objective claim lacks adequate substantiation; no need to prove actual injury
- Greater likelihood of finding injury if consumer cannot independently evaluate validity of claim

## Ad Substantiation Policy

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Advertisers and advertising agencies must have a “reasonable basis” for advertising claims before they are disseminated.

19

### A Reasonable Basis requires:

1. The level of substantiation expressly or impliedly claimed in the ad; or
2. Nature of claim dictates the corresponding level of proof required.

“Establishment claims” – tests prove, 4 out of 5 agree

General benefit/usefulness claims require a reasonable basis

## Developing Support: Tips and Common Pitfalls

- Information in the press or anecdotal evidence does not support an advertiser's reasonable basis.
- Individual experiences/testimonials are not a substitute for substantiation.
- Sound scientific principles appropriate in a given area are key
- Match the claim to the data; study design often yields insight into qualifications that must appear in the ad.

21

## WHO MAY BE HELD LIABLE FOR DECEPTIVE CLAIMS?

- **Company selling the product**
- **Ad agency**
- **Individual corporate officers**
- **Endorsers**
- **Infomercial companies, shopping channels, catalogs**
- **Others with a role in the promotion**

22

## How FTC Determines Enforcement Priorities

- Health and safety
- Ability of consumer to independently evaluate the truthfulness of a claim
- National advertising and pattern of deception - - policymaking on basis of case-by-case enforcement
- Clear consumer injury

23

## FTC Enforcement

- “Consent Order” most common means for resolving compliance action
  - ◆ “Pick your poison” (consent order – Draft Complaint)
  - ◆ Litigation and right to appeal FTC decision
- “Consent Order” most common means for resolving compliance
- The “chilling effect” of consent orders; \$11,000 per violation

## Other FTC Enforcement Tools

- Injunction – order firm to stop advertising
- Corrective advertising
- Consumer redress
- FTC trend toward implementing broad array of “creative” solutions

## FTC Enforcement Examples

- Slim America - - “blast up to 49 pounds in 29 days,” \$8.3M (representing company’s total sales). Individuals also had to post \$5M performance bond before engaging in weight loss business.
- Rexall Sundown - - “Cellasene” cellulite product, \$12M in consumer redress.
- Numerous others

## Role of States

- Almost all states have state laws that resemble the FFDCA and the FTC Act.
- States may independently challenged firm
- National Association Association of Attorney General
  - ◆ Love of all things in front of camera
  - ◆ Perfected the Multi-state AG Task Force
- States quick to act when they perceived Feds have dropped the ball

## Applebee's/Market Segmentation

- “Applebee's House Sirloin. America's #1 Sirloin Steak”
- Qualifier: “Among casual dining bar and grill restaurants”

## A Few Words on the NAD: Self-Help

- National Advertising Division is voluntary, self-regulatory body that focuses solely on substantiation.
- Overview of process (4 to 6 months)
- Advantages: timely, informal, inexpensive vs. litigation, high rate of voluntary compliance, a forum to address competitive issues that are of no regulatory concern
- Disadvantages: No immediate relief or damages, competitor can opt out of process, must invest some resources