The FTC Issues Guides Concerning Endorsements and Testimonials

BY TOM DELLNER

On October 5th, a little less than one year after issuing proposed changes to its Guides Concerning the Use of Endorsements and Testimonials in Advertising, the FTC announced its final revisions—after months of diligent effort on the part of ERA's Government Affairs Team and many ERA members to ensure that the industry's voice was heard, most particularly with regard to the Guides' proposed elimination of the so-called "safe harbor" provision. The provision essentially permitted advertisers to use truthful testimonials from consumers who have had extraordinary or exceptional results from the use of a product, provided the advertiser clearly and conspicuously disclose "the limited applicability of the endorser's experience to what consumers may reasonably be expected to achieve." This lead to the ubiquitous "results not typical" or "your experience may vary" disclaimer.

Under the proposed Guides, the safe harbor was eliminated. Instead, a marketer using a truthful, yet extraordinary testimonial was to accompany the testimonial with a disclaimer disclosing what the generally expected results were—a proposal that had the industry not only questioning the feasibility and expense of obtaining this information, but wondering about the chilling effect it could have on a marketer's ability to make dramatic—yet truthful—claims to inspire consumers to make—in the case of the weight-loss industry—what might be difficult, life-changing decisions.

The reaction to the published Guides from those in the legal community has been somewhat mixed.

Ed Glynn, a partner with

The FTC's Guides: A Different Perspective

There is so much hysteria about this right now; it's way over the top. In some ways, it's like the media's overreaction to the swine flu. Just because you get the swine flu doesn't necessarily mean you're going to die, and just because some lawyer at the FTC can come along and allege that your ad's most exciting and inspirational testimonial actually is conveying that it is the "typical result"—this, all despite your big, fat, prominent disclaimer which clearly says *it is not typical*—doesn't mean the FTC is going to walk all over you in court.

Quite to the contrary.

I think what will happen here if the FTC pushes this too far is that a federal court judge is going to embarrass the FTC by requiring it to prove—with competent survey evidence—something it just won't be able to prove: that the ordinary consumer who sees your ad actually takes away from it that the generally expected result is going to be the result they heard about in your best and most exciting testimonial—considering the context of the entirety of your ad.

If your ad's overall net impression is reasonable to begin with—for example, showing a greater number of more modest results than extraordinary ones, and your ad disclaims typicality for the extraordinary ones in a very prominent way—I think it will be impossible in most cases for the FTC to get a survey result that shows that you've truly conveyed typicality. The surveys that the FTC used to justify its revisions to the Guidelines had huge flaws, and they were never subjected to the kind of cross-examination and "tire-kicking" that goes on in actual litigation.

The FTC is going to face a much higher evidentiary hurdle when it gets to court, and I think it knows that, which is why it buried a footnote in its Guidelines conceding, "The Commission cannot rule out the possibility that a strong disclaimer of typicality could be effective in the context of a particular advertisement."

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