

BY GREG SATER

## ERSP Sets High Standard for Body-Shaping Claims

CHANNEL CROSSING: LEGAL

As January is upon us and consumers carry out their new year's resolutions by purchasing fitness equipment, let's look back at some of the ERSP decisions from 2011 that examined products, programs or "systems" that promised body shaping, muscle toning or other physical fitness benefits.

ERSP is the Electronic Retailing Self-Regulation Program. Under ERSP, advertising claims may be challenged and, while one has the right to refuse to take part in an ERSP proceeding or to refuse to comply with the recommendations made by ERSP, such a refusal will lead to one's case being referred to the FTC.

Below are the high points (or, as the case may be, the low points) of a couple relevant decisions by ERSP from 2011 that provide a very good framework for understanding how ERSP approaches body-shaping claims.

### Ab Rocket Twister

As part of its campaign, the marketer of the Ab Rocket Twister, an abdominal exercise machine, used testimonials that discussed weight loss or inch loss, including "I lost 30 pounds and 5 inches off my waist in 6 weeks." ERSP said that was not OK absent a disclosure of the results that consumers could generally expect to achieve. The marketer agreed to disclose that information in the future and to base its disclosure on the results of a user group of 17 people who followed the complete Ab Rocket "System," which included a meal plan and a cardio workout. The group followed the plan for three to four months and experienced an average loss of 18 pounds and 4.5 inches off the waist. (ERSP did not comment on the scientific adequacy of the user group study in terms of it being robust enough to support such a disclosure.)

The marketer also advertised the Ab Rocket "System" without disclosures that, in ERSP's view, communicated clearly enough the fact that the depicted weight loss and inch loss were based on one's adherence to the entire system, including the meal plan. ERSP said that was not OK, especially given references in the advertising that seemed to focus on use of the equipment alone.

ERSP said the marketer's claim that "Now anyone can go from flab to fab; it's never been easier" also was not OK. Consumers could interpret that as a statement of superiority over other abdominal exercise equipment despite a lack of comparative testing.

However, ERSP said that the marketer's claim, "Five minutes a day for the hottest looking abs you've ever

had," was OK because it was not measurable and constituted mere puffery.

### The Belly Burner


ERSP also reviewed The Belly Burner, which is a heated belt that is worn around one's midsection to increase caloric expenditure. The product also came with a meal plan and an exercise DVD.

The marketer in this case used testimonials that discussed weight loss and size loss, such as "I've lost over 25 pounds" and "I went from a size 38 to a size 32." These had two disclaimers. One said, "Results may vary." The other said, "Results may vary. With the Belly Burner, you can expect to lose at least 1-2 pounds per week. Weight loss is influenced by diet, exercise and caloric intake." ERSP didn't like either of these disclaimers, holding them to be inadequate because they appeared on screen for less than 2 seconds in white print on a gray background and, more importantly, because the marketer did not have data supporting the statement that 1-2 pounds per week could be expected from the product.

The marketer also made claims such as "Get rid of belly fat," "Shed away unwanted inches," "Burn fat faster while walking, biking, jogging – any form of exercise," and "Heat vision photography shows how the belly burner raises your body's core temperature supercharging the calorie burning process." ERSP found these claims to be unsupported by testing done by the marketer, which included calorimetry and thermographic images of the heated areas.

ERSP asked the marketer to modify its ads to clearly and conspicuously disclose that the advertised results are not based only on using the Belly Burner, but they also require adherence to the meal plan and the exercise DVD.

Do you see the common thread? In 2011, when it came to body shaping products, ERSP wanted to see solid science not only supporting claims, but also supporting the use of testimonials. It wanted to see the diet and cardiovascular exercise components of "systems" more prominently discussed; and it held any kind of establishment claim to a very high standard of proof.

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