

# **Advertising and Unfair Competition: Federal and State Enforcement**

## **Remarks by Commissioner Pamela Jones Harbour**

### **American Law-Institute-American Bar Association (ALI-ABA) Course of Study on Product Distribution and Marketing**

**New Orleans, Louisiana  
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#### **I. INTRODUCTION**

Good morning. I am delighted to be here today to speak with you about some recent activities at the Federal Trade Commission (“Commission”). Before I begin, I will make the usual disclaimer: the views I express here are my own, and are not necessarily those of the Commission or any other individual Commissioner.

During the past year, the Commission has been extremely busy fulfilling its long-standing mandate to protect consumers against fraud, deception, and unfair practices in the marketplace. Today, I will speak about just a few of those activities, including the following:

- recent Commission cases alleging the use of a deceptive format where infomercials have been styled to fool consumers by looking like independent talk shows, rather than commercials;
- Commission staff’s issuance of “Red Flag” media guidance to assist broadcasters and publishers in spotting false weight loss ads, so they can avoid running such ads;

- the Commission's continuing interest in ensuring that expert endorsers are, indeed, experts in their field, and that they rely on competent scientific evidence when they endorse claims made for products; and
- the Commission's use of strong and appropriate remedies.

## **II. DECEPTIVE FORMAT**

Ads are required to be truthful and non-misleading. An advertisement is deceptive if it contains a material misrepresentation or omission that is likely to mislead consumers, acting reasonably under the circumstances, to their detriment. One way that ads can be deceptive is through their format. If your client produces an infomercial to sell a product, the client should consider whether consumers will know they are watching a commercial, or whether the program will attempt to deceive consumers into thinking they are watching an unbiased informational program or independent talk show. If the program format represents an attempt to deceive consumers, the program should be changed.

The Commission recently brought two actions that included deceptive format claims: *Window Rock Enterprises*<sup>1</sup> and *Direct Marketing Concepts*.<sup>2</sup> In both cases, the companies also made allegedly deceptive claims about the advertised products themselves.

The Commission alleged that Window Rock Enterprises infomercials used a deceptive format. The Commission also challenged allegedly deceptive claims that “CortiSlim” and “CortiStress” can, respectively, cause weight loss and prevent or reduce the risk of serious health conditions. Advertising for CortiSlim alleged that controlling cortisol – a, naturally-occurring hormone – would cause anyone to lose as much as four to ten pounds per week over multiple weeks. Advertising for CortiStress alleged that controlling cortisol would reduce the risk of (or even prevent) cancer, diabetes, Alzheimer’s disease, and cardiovascular disease.

The Commission also alleged that infomercials by Direct Marketing Concepts used a deceptive format and relied on allegedly deceptive claims to sell their product, “Supreme Greens.” Direct Marketing claimed that Supreme Greens could cure a variety of serious diseases, such as cancer and diabetes. They also claimed that the product could cause significant weight loss of up to four pounds per week and up to eighty pounds per month.

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<sup>1</sup> FTC v. Window Rock Enterprises, Inc., et al., No. CV04-8190 DSF (JTLx) (C.D. Cal.) (complaint and stipulated interim agreement and order filed Sept. 30, 2004); available at <http://www.ftc.gov/os/caselist/windowrock/windowrock.htm>; FTC News Release, *FTC Targets Products Claiming to Affect the Stress Hormone Cortisol* (Oct. 5, 2004), available at <http://www.ftc.gov/opa/2004/10/windowrock.htm>.

<sup>2</sup> FTC v. Direct Marketing Concepts, Inc., No. 04-CV-11136-GAO (D. Mass.) (complaint filed June 3, 2004; preliminary injunction granted June 23, 2004), available at <http://www.ftc.gov/os/caselist/0233138/0233138.htm>; FTC News Release, *Marketers of “Supreme Greens” and “Coral Calcium Daily” Come under Fire from the FTC* (June 3, 2004), available at <http://www.ftc.gov/opa/2004/06/dma.htm>; FTC News Release, *FTC Obtains Preliminary Injunction Against Marketers of Bogus Cancer-Cure “Supreme Greens”* (July 1, 2004), available at <http://www.ftc.gov/opa/2004/07/dmc.htm>.

What was deceptive about the format of these programs? Let's look at them.

- Both infomercials use a talk show format with a “host” and a “guest.” Greg Cynaumon is the “host” of a show called “Breakthroughs” and Donald Barrett appears as “host” of “Today’s Health” on “ITV.”
- In the CortiSlim commercial, Cynaumon and a female co-host are seated on a couch, with Dr. Shawn Talbott as their guest.
- In the Supreme Greens commercial, Barrett and “Dr.” Alex Guerrero are seated at a desk – like a desk on a news program – with a city skyline in the background. The “ITV” logo is shown throughout the infomercial.
- The guest is introduced as an independent doctor. No financial ties to the host are mentioned. However, Talbott and Cynaumon were part of a joint venture to create, manufacture, and market CortiSlim and CortiStress.
- The shows are presented as “controversial” or “newsworthy.”
- The shows discuss at length general issues related to the product, without mentioning the product being promoted. For example, Talbott speaks about his alleged scientific breakthroughs concerning cortisol and CortiSlim or CortiStress. Similarly, Guerrero speaks about his alleged scientific breakthroughs with regard to acid in the body. Throughout the Supreme Greens infomercial, the bottom of the screen states, “Are all health problems caused by an acidic body?”
- The “guest” is asked to respond to “viewers” questions, including “general health questions.”
- Each show suggests that it is distinct from the product sellers. For example, the host presents the toll-free number shown on the screen as a number to call for

“more information,” rather than as a number to call to place an order. Viewers also are told to mention the name of the show, which has arranged for them to get a “substantial price discount.” When the toll-free number is shown, no disclaimer is presented to indicate that the “Breakthroughs” or “Today’s Health” programs are actually paid advertisements for CortiSlim, CortiStress, or Supreme Greens.

- “Paid advertisement” disclosures appear only briefly, at the very beginning and end of the programs.

In June 2004, the district court in the *Supreme Greens* case entered a preliminary injunction prohibiting the defendants from making the challenged disease-cure claims, and also prohibiting the dissemination of any advertisement that misrepresents itself as something other than a paid advertisement.<sup>3</sup> For any advertisements longer than fifteen minutes in length, the order mandates that a disclosure be presented immediately before each showing of ordering instructions for a product or service. The disclosure must read: “THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR [THE PRODUCT, PROGRAM, OR SERVICE].”<sup>4</sup>

The presence or absence of a particular element in an infomercial is not a determining factor in whether a given program has a deceptive format. The net impression of the program matters most. However, each of these factors may contribute to the overall creation of a deceptive format. Thus, if your clients market products through infomercials (of any length), each client should ask himself: “Am I adequately conveying to consumers that this program is a paid advertisement, not an independent program?”

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<sup>3</sup> *Direct Marketing Concepts*, preliminary injunction at 17-18.

<sup>4</sup> *Id.* at 18-19.

### III. “RED FLAG” MEDIA GUIDANCE

Beyond the elements that may constitute a deceptive format, the cases I just discussed highlight a substantive issue as well. What about the claims that CortiSlim or Supreme Greens alone – without exercise or dieting – could cause sustained weight loss of four or more pounds per week, over multiple weeks? If you are thinking that such claims *must* be false, you are correct.

In December 2003, the Commission issued a report on deception in weight loss advertising.<sup>5</sup> In conjunction with that report, Commission staff issued a guide titled, “Red Flag: A Reference Guide for Media on Bogus Weight Loss Claim Detection.”<sup>6</sup> The guide lists particular weight loss claims that broadcasters and publishers can easily spot as being patently false, and thus should screen out before they are ever disseminated. False claims promise that a product:

- causes weight loss of two or more pounds a week, for a month or more, without dieting or exercise;
- causes substantial weight loss, no matter what or how much the consumer eats;
- causes permanent weight loss (even when the consumer stops using the product);

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<sup>5</sup> Federal Trade Commission Staff Report, *Deception in Weight-Loss Advertising Workshop: Seizing Opportunities and Building Partnerships to Stop Weight-Loss Fraud* (Dec. 2003), available at <http://www.ftc.gov/os/2003/12/031209weightlossrpt.pdf>.

<sup>6</sup> Available at <http://www.ftc.gov/bcp/online/pubs/buspubs/redflag.pdf>; see also FTC News Release, *FTC Releases Guidance to Media on False Weight-Loss Claims* (Dec. 9, 2003), available at <http://www.ftc.gov/opa/2003/12/weightlossrpt.htm>; see generally FTC Web Site, *Red Flag: Bogus Weight Loss Claims*, at <http://www.ftc.gov/bcp/online/edcams/redflag/index.html>.

- blocks the absorption of fat or calories to enable consumers to lose substantial weight;
- safely enables consumers to lose more than three pounds per week for more than four weeks;
- causes substantial weight loss for all users; or
- causes substantial weight loss by wearing it on the body or rubbing it on the skin.

As a follow-up to that report, in November 2004 the FTC filed six law enforcement actions against companies and individuals running national advertisements that made false weight-loss claims targeted by the FTC's "Red Flag" education campaign.<sup>7</sup> At the same time, the Maine Attorney General's Office also filed a weight loss enforcement action in Maine state court against a diet patch seller from that state.<sup>8</sup> We called this sweep "Operation Big Fat Lie." The written materials I submitted for this conference highlight a number of other joint enforcement sweeps conducted by the Commission and state Attorneys General.<sup>9</sup>

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<sup>7</sup> FTC News Release, *FTC Launches "Big Fat Lie" Initiative Targeting Bogus Weight-loss Claims* (Nov. 9, 2004), available at <http://www.ftc.gov/opa/2004/11/bigfatliesweep.htm> (includes links to individual cases).

<sup>8</sup> State of Maine News Release, *AG Rowe, Federal Authorities Work To Expose "The Big Fat Lie"* (Nov. 9, 2004), available at [http://www.maine.gov/ag/press\\_release\\_pop\\_up.php?press\\_id=236](http://www.maine.gov/ag/press_release_pop_up.php?press_id=236).

<sup>9</sup> See, e.g., FTC News Release, *Criminal and Civil Enforcement Agencies Launch Major Assault Against Promoters of Business Opportunity and Work-at-Home Schemes* (Feb. 22, 2005), available at <http://www.ftc.gov/opa/2005/02/bizoppflop.htm>; FTC News Release, *Law Enforcement Posse Tackles Internet Scammers, Deceptive Spammers* (May 15, 2003), available at <http://www.ftc.gov/opa/2003/05/swnetforce.htm>; FTC News Release, *Internet Auction Fraud Targeted by Law Enforcers* (April 30, 2003), available at <http://www.ftc.gov/opa/2003/04/bidderbeware.htm>; FTC News Release, *Federal, State, and Local Law Enforcers Tackle Deceptive Spam and Internet Scams* (Nov 13, 2002), available at <http://www.ftc.gov/opa/2002/11/netforce.htm>; FTC News Release, *State, Federal Law Enforcers Launch Sting on Business Opportunity, Work-at-Home Scams* (June 20, 2002), available at

The complaints in each of the “Operation Big Fat Lie” cases allege that defendants used at least one of the seven bogus weight-loss claims described above. For example, one case targeted a product called “Himalayan Diet Breakthrough,” which was a dietary supplement allegedly containing Nepalese Mineral Pitch, a paste-like material supposedly from the Himalayas. Ads claimed that the Himalayan Diet Breakthrough caused users to lose substantial weight without diet or exercise, including as much as thirty-seven pounds in eight weeks, by simply taking a pill.<sup>10</sup> In November 2004, the district court in that case entered a stipulated preliminary injunction against the defendants.<sup>11</sup>

The “Operation Big Fat Lie” complaints and press release identify many of the publications that ran these false ads, including *Cosmopolitan*, *USA Weekend*, and the *San Francisco Chronicle*, as well as Spanish-language publications such as *TeleRevista Magazine*.

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<http://www.ftc.gov/opa/2002/06/bizopswe.htm>; FTC News Release, *FTC, States Help Consumers “Ditch the Pitch” of Unscrupulous Telemarketers and Cold-Call Sellers* (Oct. 18, 2001), available at <http://www.ftc.gov/opa/2001/10/ditch.htm>; FTC News Release, *Law Enforcers Target “Top 10” Online Scams* (Oct. 31, 2000), available at <http://www.ftc.gov/opa/2000/10/topten.htm>; FTC News Release, *FTC Acts to Protect Consumers Whose “Travel Unraveled”* (Aug. 23, 2000), available at <http://www.ftc.gov/opa/2000/08/travelunravel.htm>; FTC News Release, *FTC Helps Consumers Avoid The “Trip Trap”* (Aug. 3, 1999), available at <http://www.ftc.gov/opa/1999/08/triptrap.htm>; FTC News Release, *“Operation Cure.all” Targets Internet Health Fraud* (June 24, 1999), available at <http://www.ftc.gov/opa/1999/06/opcureall.htm>; FTC News Release, *FTC Announces “Operation Vend Up Broke”* (Sept. 3, 1998), available at <http://www.ftc.gov/opa/1998/09/vendup2.htm>.

<sup>10</sup> FTC v. AVS Mktg. et al., Civ. No. 04C-6915 (N.D. Ill.) (complaint filed Oct. 27, 2004), available at <http://www.ftc.gov/os/caselist/0423042/041109cmp0423042.pdf>; see generally <http://www.ftc.gov/os/caselist/0423042/0423042.htm>.

<sup>11</sup> AVS Mktg. (stipulated order for preliminary injunction with asset freeze and other equitable relief entered Nov. 19, 2004), available at <http://www.ftc.gov/os/caselist/0423042/041119gpreliminjunc0423042.pdf>.



We hope that these publications and others will act responsibly in the future, by rejecting claims that are patently false.

If your clients are considering advertising and marketing programs for weight loss products, or if you represent media sources that might consider running such ads, I urge you to consult the “Red Flag” media guide, which is available on the Commission’s website. The guide provides an easy first step for the media to determine which weight loss claims are outrightly false. However, you also should be aware that *any* weight loss claims made in ads must be substantiated *before* the ad airs. Any of your clients who market a weight loss product or any dietary supplement also should consult the Commission publication, “Dietary Supplements: An Advertising Guide for Industry,”<sup>12</sup> as well as the Food and Drug Administration’s regulations on “Statements Made for Dietary Supplements Concerning the Effect of the Product on the Structure or Function of the Body.”<sup>13</sup>

#### **IV. EXPERT ENDORSERS**

Next, I would like to turn to the topic of expert endorsers. Ads touting particular benefits for a consumer’s health may use doctors or scientists to convey those claims. Consumers rely

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<sup>12</sup> BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION, DIETARY SUPPLEMENTS: AN ADVERTISING GUIDE FOR INDUSTRY (rev. Apr. 2001), *available at* <http://www.ftc.gov/bcp/online/pubs/buspubs/dietsupp.htm> (hyperlinked version) *or* <http://www.ftc.gov/bcp/online/pubs/buspubs/dietsupp.pdf> (printable version).

<sup>13</sup> 21 C.F.R. § 101.93(f)-(g) (2005); *see also* FDA Talk Paper, *FDA Finalizes Rules for Claims on Dietary Supplements* (Jan. 5, 2000), *available at* <http://vm.cfsan.fda.gov/~lrd/tpdsclm.html>; Regulations on Statements Made for Dietary Supplements Concerning the Effect of the Product on the Structure or Function of the Body; Final Rule, 65 Fed. Reg. 999 (Jan. 6, 2000), *available at* <http://www.cfsan.fda.gov/~lrd/fr000106.html>.

heavily on the opinions of doctors and scientists, and therefore place additional emphasis on any statements they make.

Prior to making any product claims, an expert endorser must possess at least the level of substantiation that experts in the field would agree is reasonable. For health or safety claims, the Commission typically has required a relatively high level of substantiation, usually “competent and reliable scientific evidence.”<sup>14</sup> Such evidence is typically defined as “tests, analyses, research, studies, or other evidence based upon the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.”<sup>15</sup>

The Commission recently has focused on doctors who make claims that are not properly substantiated. For example, my colleague, Commissioner Leary, recently stated in an American Medical Association publication<sup>16</sup> that the Commission is intensifying its focus on physician endorsers because “there is a heightened public concern about specific health care issues” and because the high level of esteem that doctors hold in the United States lends added credibility to a product when a physician endorses it. Commissioner Leary stated that deceptive commercials that use physician endorsements “taint the whole profession.” I wholeheartedly agree. In fact, I think that any doctor who becomes a defendant in a deceptive advertising case

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<sup>14</sup> See, e.g., *Brake Guard Products, Inc.*, 125 F.T.C. 138 (1998), available at <http://www.ftc.gov/os/1998/01/brakeguaop.pdf>; *Automotive Breakthrough Sciences, Inc., et al.*, 126 F.T.C. 229 (1998), available at <http://www.ftc.gov/os/1998/09/d09275opi.htm>; see also FTC DIETARY SUPPLEMENTS ADVERTISING GUIDE, *supra* note 12.

<sup>15</sup> *Brake Guard*, *supra* note 14; *Automotive Breakthrough Sciences*, *supra* note 14; FTC DIETARY SUPPLEMENTS ADVERTISING GUIDE, *supra* note 12.

<sup>16</sup> Tanya Albert, *Doctors who tout iffy “cures” will face critical eye of FTC*, 47 AM. MED. NEWS (Sept. 27, 2004), available at <http://www.ama-assn.org/amednews/2004/09/27/gvsa0927.htm>.

should be referred to his or her state medical board, so that the board can determine whether the doctor is violating any of the board's own ethical requirements.

## V. REMEDIES

The Commission recently has focused on obtaining strong and appropriate remedies. Last September, the Commission entered a final consent order to Kentucky Fried Chicken Corporation ("KFC") after certain ads aired.<sup>17</sup> The Commission's complaint challenged allegedly deceptive claims about the relative nutritional value and healthfulness of KFC's fried chicken as compared to a Burger King Whopper, as well as the chicken's compatibility with popular weight-loss programs.

While I applauded staff for bringing a national advertising case and for the strong injunctive relief they obtained, I issued a separate statement in the *KFC* case.<sup>18</sup> In my view, companies should not be permitted to reap monetary benefits from their deceptive practices, especially where the health and safety of consumers are compromised. My statement encouraged the Commission to find ways to seek monetary relief in any similar cases that may arise in the future.

In addition to permanent injunctive relief stopping the deceptive conduct at issue, it is imperative that the Commission examine what types of remedies are appropriate in national advertising cases— especially when a company appears to have exploited a national health crisis,

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<sup>17</sup> FTC News Release, *KFC's Claims That Fried Chicken Is a Way to "Eat Better" Don't Fly* (June 3, 2004), available at <http://www.ftc.gov/opa/2004/06/kfccorp.htm>; see generally In the Matter of KFC Corp., FTC. Dkt. No. C-4118 (decision and order issued Sept. 9, 2004), available at <http://www.ftc.gov/os/caselist/0423033/0423033.htm>.

<sup>18</sup> *KFC Corp.*, Statement of Commissioner Pamela Jones Harbour, available at <http://www.ftc.gov/os/caselist/0423033/040917statementharbour0423033.pdf>.

such as obesity. Consumers place great trust in national advertisers. When that trust is broken by false, deceptive, or misleading statements, the advertiser may need to repair that trust – perhaps by ensuring that corrected information is provided to the consumer, or through redress for any harm the consumer actually may have suffered as a result of the deceptive ads.

## **VI. CONCLUSION**

Thank you for your time today. And remember: if you see an ad for something that looks “too good to be true” – it probably is.