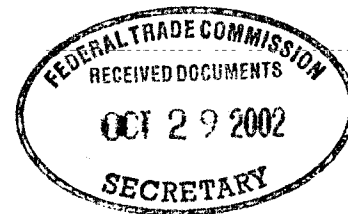


**BEFORE THE
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580**



In the Matter of)
)
Advertising of Weight-Loss Products) P024527
Workshop - Comment)
)

**COMMENTS OF THE
NEWSPAPER ASSOCIATION OF AMERICA**

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October 29, 2002

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I. INTRODUCTION

The Newspaper Association of America (“NAA”) hereby submits its comments in response to the Federal Trade Commission’s (“Commission” or “FTC”) *Notice Announcing Public Workshop* (“Notice”)¹ and the report, “Weight-Loss Advertising: An Analysis of Current Trends” (“Report”).² NAA is a non-profit organization representing more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily U.S. newspapers.

NAA supports the FTC’s initiative to address false and misleading advertising of weight-loss products, and offers these comments to assist the Commission in developing an effective response to such advertising. NAA appreciates the appropriate acknowledgment in the Report that newspaper publishers ultimately decide whether a newspaper will run an advertisement,³ and urges the FTC to continue to adhere carefully to that view. At the same time, NAA and its member newspapers recognize that the FTC has raised an important public health and consumer issue, and pledge to explore all ideas with the Commission on how best to address the problem.

The FTC has taken significant, positive steps through its active enforcement against false and misleading weight-loss advertising and its continuing efforts to educate consumers, as well as advertisers and media professionals. NAA has supported and will continue to support FTC

¹ Public Workshop: Advertising of Weight Loss Products, 67 Fed. Reg. 59289 (Sept. 20, 2002).

² Federal Trade Commission Staff Report, September 2002.

³ See Report at 32.

educational initiatives in this area. NAA already has alerted its 2,000 member newspapers to the availability of the Report, highlighting examples therein of questionable claims appearing in some newspaper publications. In addition, the November issue of our trade publication, *Presstime*, which reaches more than 140,000 professionals in the newspaper and related industries, features an article concerning false and misleading weight-loss ads. A more detailed article with information on the FTC Report and the availability of examples of false and misleading ads will appear in NAA publications directed at advertising and marketing professionals in the newspaper business.

While the newspaper industry commits itself to working with the FTC on this important issue, NAA believes that advertisers are ultimately responsible for the content of their advertising, and further, that the FTC and other government authorities are responsible for enforcing advertising laws. Historically, newspapers have not been liable for unlawful ads placed by third parties absent extraordinary circumstances, nor have they been required to investigate third-party claims, because such exposure would have a chilling effect on the freedom of the press and the public's interest in the free flow of information.⁴ NAA and its members believe that the current distribution of responsibility over advertising is good public policy and should not be upset.

It is important to acknowledge that public health professionals and government agencies like the FTC — not media companies — have the expertise to evaluate whether an advertising claim for a weight-loss product is sufficiently supported by scientific evidence. Thus, public health experts and the Commission are the best sources of consumer and professional education concerning fraudulent weight-loss products.

Newspapers are not equipped to take on the role of advertising enforcement experts. Inherent practical and legal constraints limit a newspaper's ability to pre-screen advertisements. For newspapers, the Report underestimates: (a) the sheer volume of ads published in a newspaper on any given day; (b) the short time frame in which newspapers generally receive, lay out and print advertisements; (c) the sizable fiscal and human resources implied in thoroughly screening advertisements; and (d) the potential legal liability newspapers would face if they hold themselves out as confirming third-party advertising claims. NAA hopes the Commission will

⁴ See Part II, B below.

recognize that it is a high hurdle for most media, including newspapers, effectively to “stop false ads before they are disseminated.”⁵

II. DECISIONS ABOUT EDITORIAL CONTENT PROPERLY LIE WITH NEWSPAPERS.

Newspapers are local businesses that play an economic and public service role in the local communities where they publish. Newspapers are responsive to the interests of their readers and routinely cover consumer issues of all types, including stories on the health risks associated with being overweight and on fraudulent weight-loss products. As businesses and also as members of local communities, newspapers are keenly interested in screening out material that may be harmful or offensive to their readers. Thus, many newspapers decline advertisements for products such as firearms or adult movies.

In these cases, newspapers can easily determine whether to reject an ad because the subject of the ad itself excludes it from publication. As discussed further below, however, vetting advertising claims, especially those merely implied or based on extrinsic evidence, requires a level of expertise and an evaluation process well beyond the capacity of existing newspaper operations.

As the Report acknowledges, decisions about a newspaper’s editorial content or advertising ultimately rest with publishers.⁶ Under current law, newspapers may not be constrained from printing advertisements based on the mere possibility that adverse consequences may result.⁷ Further, requiring publishers to prove the truthfulness of advertising claims prior to publication would amount to an unacceptable system of censorship.⁸ It is not necessary to deviate from these established principles, effectively requiring newspapers to filter out unlawful ads, in order to provide individuals a legal remedy.⁹ Consumers harmed by dangerous or ineffective weight-loss products have claims under a variety of legal regimes, and

⁵ Report at 30.

⁶ Report at 32.

⁷ See *New York Times v. United States*, 403 U.S. 713, 725-26 (1971) (Justice Brennan, concurring); see also *Near v. Minnesota*, 283 U.S. 697, 720 (1931) (The fact that the liberty of the press may be abused does not make the immunity of the press from prior restraint less necessary).

⁸ See *Near*, 283 U.S. at 721.

⁹ See *id.* at 720.

the FTC and its counterparts may challenge false or deceptive advertising practices on behalf of the public at large.

III. THE FTC, NOT NEWSPAPERS, MUST DETERMINE WHAT IS FALSE AND MISLEADING WEIGHT-LOSS ADVERTISING.

Newspapers lack the FTC's resources and expertise to identify unlawful weight-loss claims as well as a legal status that would allow newspapers actively to screen out fraudulent claims without risk of devastating liability. Consequently, the Commission and its private and public sector counterparts, not newspapers, should enforce advertising laws with respect to weight-loss claims.

A. Newspapers face significant and unique limitations on their practical ability to screen weight-loss advertisements.

The network broadcaster model for vetting advertisements, described by the Report as including advertising clearance standards, prior submission of ads and review of supporting evidence, is not a workable model for newspapers.¹⁰ Such a system would significantly burden newspapers because of the sheer volume of advertisements that newspapers publish, the tight deadlines associated with publishing daily newspapers, and the lack of capital and human resources to pre-screen all advertisements thoroughly and accurately.

Newspapers deal with many more advertisers than most other media, especially broadcast television networks. As a weekly or daily product, newspapers must "turn over" hundreds or thousands of advertisements on short deadlines. Moreover, some ads are "pre-printed" by third-party vendors and are not delivered to newspapers until presstime, effectively leaving no time for review. The burden of reviewing ads is thus compounded in the case of newspapers.

It would be neither efficient nor appropriate for the FTC to expect newspaper publishers to duplicate the legal review of advertising that is the responsibility of the advertiser. Newspaper publishing does not have a tradition of requiring advertisers to submit ads and substantiating evidence prior to publication. Many newspapers lack sufficient staff, let alone adequately trained staff, to review ads for their legality. Newspapers cannot easily pre-screen weight-loss

¹⁰ Report at 28.

ads for bogus claims because advertisements for weight-loss products are generally truthful.¹¹ Contrary to the Report's assertion that "questionable claims are not hard to identify,"¹² false and misleading weight-loss advertising may not be recognizable on its face. Even the most well-established weight-loss companies have been sanctioned by the FTC and other authorities for making deceptive or unsubstantiated claims,¹³ so newspapers cannot simplify screening efforts by focusing on lesser-known brand names. Self-regulatory "standards" would not necessarily equip newspaper staff in a review, as such guidance cannot be expected to cover the universe of weight-loss claims, clearly mark the dividing line between legitimate and illegitimate products, or anticipate how unscrupulous marketers will try to circumvent the rules. Further, even if newspapers could identify questionable claims, they lack the scientific and legal expertise to judge the "substantiation" materials that the Report suggests newspapers request of would-be advertisers.¹⁴

B. Newspapers face staggering liability risks if they are held responsible for false or deceptive weight-loss claims of third parties.

NAA and its members believe that current public policy appropriately places the responsibility for fraudulent advertising on advertisers and not newspapers.¹⁵ Immunizing newspapers from liability for publishing false advertisements serves the public interest by safeguarding the free flow of information and the dissemination of valuable public information that enables people to make informed choices.¹⁶ Many courts have acknowledged that if newspapers were generally liable for the ads they run, it could impose crushing liability.¹⁷

¹¹ See, e.g., Report at x (implying that 60% of the ads surveyed did not clearly include false content).

¹² Report at 32.

¹³ See, e.g., the FTC's 1997 consent decrees with Weight Watchers International, Inc. and Jenny Craig, Inc. regarding weight-loss claims; information available at: <http://www.ftc.gov/opa/1997/9709/ww-2.htm> and <http://www.ftc.gov/opa/1997/9711/jcraig-3.htm>.

¹⁴ Report at 32.

¹⁵ See generally, *Pittman v. Dow Jones & Co.*, 662 F. Supp. 921, 922 (E.D. La. 1987); *Goldstein v. Garlick*, 318 N.Y.S.2d 370, 374-376 (N.Y. Sup. Ct. 1971).

¹⁶ See *Pittman*, 662 F.Supp. at 922, 923.

¹⁷ See *Pittman*, 622 F.Supp. at 922; *Yuhus v. Mudge*, 322 A.2d 824, 825 (App. Div. 1974) (A broad legal duty upon nationally circulated newspapers to confirm third-party advertising claims "would not only be impractical and unrealistic, but would have a staggering adverse effect on the commercial world and our economic system"; and "[f]or the law to permit such exposure to those in the publishing business who in good faith accept paid

Further, to impose the burden of investigating the accuracy of every ad would be unreasonably onerous.¹⁸ Even though fraudulent ads may be lent credibility due to their publication in a “mainstream” newspaper, “the public policy of not subjecting newspapers to the chilling prospect of hordes of suits by disgruntled readers of inaccurate ads dominates.”¹⁹

Newspapers could face significant liability exposure should they screen weight-loss ads under publicly available criteria. Under an exception to the general rule above, newspapers may be responsible for a third party’s advertisement if the newspaper holds itself out as controlling the content of ads or guaranteeing the soundness of products advertised.²⁰ The plaintiff’s bar would inevitably seek to hold newspapers responsible for injuries resulting from a false or misleading weight-loss ad, arguing that by choosing to screen ads newspapers have a duty to take reasonable care and that individuals relied on newspapers’ screening when deciding to purchase advertised weight-loss products. Such outcomes are precisely what established public policies to limit the liability of newspapers and promote the free flow of information are designed to avoid.

IV. CONCLUSION

NAA appreciates this opportunity to express its commitment to work with the Commission toward an effective method for addressing fraudulent weight-loss claims. In addition, NAA will support FTC educational efforts by continuing to provide our member newspapers with information on false and misleading weight-loss claims. Our members strongly believe that the appropriate response to such claims must acknowledge newspapers’ control over the content of their publications and the principle that media should not be responsible for the

(Continued . . .)

advertisements for a myriad of products would open the doors ‘to a liability in any indeterminate amount for an indeterminate time to an indeterminate class’); *Goldstein*, 318 N.Y.S.2d at 376 (Requiring newspapers not to publish ads based on notice that they may be unlawful “would impose an intolerable burden upon newspapers and would, in the end, have a chilling effect upon them since they would have to refuse many items submitted because of possibility that publication would lead to liability”).

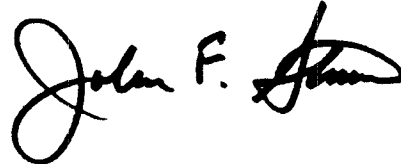
¹⁸ See, e.g., *Pittman*, 622 F.Supp. at 922; *Goldstein*, 318 N.Y.S.2d at 376.

¹⁹ *Pittman*, 622 F.Supp. at 923 (Further, there is no duty in tort for a newspaper publisher to investigate its advertisers for the correctness of the ads placed in the publication, even though a newspaper’s very stature lends credibility to the advertisements).

²⁰ See *Pittman*, 662 F.Supp at 922 (A newspaper has no duty to investigate the accuracy of advertisements it publishes unless the newspaper undertakes to guarantee the soundness of the products advertised); *Yuhas*, 322 A.2d at 825 (A newspaper has no legal duty to investigate advertising claims “unless it undertakes to guarantee, warrant or endorse the product”); *Hanberry v. Hearst*, 276 Cal. App. 2d 680 (Cal. Ct. App. 1969).

wrongdoing of unrelated third parties. Public health experts, the FTC and other government agencies, not newspapers, have the institutional capacity to identify and enforce against false and deceptive advertising of weight-loss products.

Respectfully submitted,



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