The Rundown On Reebok's False Ad Settlement

Law360, New York (October 12, 2011, 5:02 PM ET) -- On Sept. 28, 2011, the Federal Trade Commission announced that Reebok International Ltd. agreed to pay $25 million to settle a lawsuit alleging that Reebok's EasyTone shoes were advertised in a deceptive manner. According to the FTC's press release, the funds will be made available for consumer refunds either directly from the FTC or through a court-approved class action lawsuit.

The FTC's complaint alleges that Reebok's ads deceptively represented "that laboratory tests show that when compared to walking in a typical walking shoe, walking in EasyTone footwear will improve muscle tone and strength by 28 percent in the gluteus maximus, 11 percent in the hamstrings, and 11 percent in the calves." The ads were certainly attention-getting — one ad featured a woman in short shorts who, while giving a presentation about the shoes, had to repeatedly remind the cameraman not to focus his camera on her rear end, and another ad displayed the lower halves of slender, scantily clad women moving around and gyrating to music.

In a statement, Reebok declared that it fully stands behind its EasyTone technology. Reebok explained, "In order to avoid a protracted legal battle, Reebok has chosen to settle with the FTC. Settling does not mean we agreed with the FTC's allegations; we do not."

Reebok and the FTC entered into a stipulated final judgment and order for permanent injunction, which has not yet been approved by the court, entering judgment against Reebok in the amount of $25 million and enjoining Reebok from making any representations regarding the ability of its toning products to strengthen muscles unless it has first substantiated the representations through competent and reliable scientific evidence. The $25 million judgment will be paid into an escrow account and made available for refunds to consumers who bought certain Reebok toning shoes or apparel. Claims can be submitted online here.

While many details of the case were not made public, this high-profile settlement serves as a useful reminder for companies engaged in advertising. Claims can be literally true yet still be considered deceptive or misleading to consumers. The FTC takes the position that all claims, express and implied, must be substantiated at the time the claims are made, and an advertisement can even be deceptive by omission.

Advertisers should be particularly careful with respect to "establishment claims," which are claims that tests or studies prove a certain fact. Such claims can give rise to liability if the tests were not sufficiently reliable to conclude with reasonably certainty that they support the claim, or if the tests, even though reliable, did not support the proposition claimed.

False advertising can lead to lawsuits by competitors under the Lanham Act (15 U.S.C. § 1125(a)(1)(B)), class actions by consumers and enforcement actions by the FTC. The FTC is most likely to take action where the challenged advertising campaign is nationwide and is harming consumers (as opposed to competitors) in significant numbers. The FTC has been particularly aggressive where the challenged claims are related to health.

In a 2004 consent order, the FTC required KFC Corp. to refrain from making certain claims in its advertisements regarding the nutritional value and healthiness of its fried chicken in relation to a Burger King Whopper, unless such statements were substantiated with competent and reliable scientific evidence at the time the statements were made.

While the five FTC commissioners approved the order, two issued statements urging the commission to impose monetary sanctions in cases like this, noting, "KFC is fully aware of our nation's struggle with obesity, yet has cynically attempted to exploit a massive health problem through deceptive advertising. Companies should not be allowed to benefit monetarily from this kind of deception, especially where the health and safety of consumers are compromised."

Likewise, in 2008, the FTC successfully sued the makers of the then-popular Airborne effervescent tablet that was being marketed in advertisements as a cold prevention and treatment remedy that was particularly useful in crowded places such as airports and schools. The complaint noted that the sales for Airborne products were over $80 million from inception through mid-2005 and ballooned to over $300 million from mid-2005 through mid-2007.

In the stipulated settlement, Airborne agreed to pay a $30 million judgment, to be used for product refunds to consumers and was permanently enjoined from making further representations regarding the ability of its products to prevent colds or illness unless it first substantiates the representations through competent and reliable scientific evidence. Is this starting to sound familiar?

It is the very success of these kinds of advertising campaigns that can draw the attention of the FTC. In its complaint against Reebok, the FTC noted that toning shoe sales in the United States increased from $17 million in 2008 to approximately $145 million in 2009 and peaked in 2010 with sales close to $1 billion. If you are lucky enough to experience such commercial success as a result of your advertising efforts, be sure that you have the right documents in your files and can substantiate your advertising claims in the event that the FTC comes knocking at your door.

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