Introduction

On November 19, 2002 the FTC conducted a public workshop on Deception in Weight-loss Advertising. A principle concern discussed during the workshop is the continued acceptance by media channels of weight-loss advertisements almost certainly false or deceptive. First Amendment concerns by the FTC result in no enforcement actions aimed at medial channels. Without enforcement pressure from the FTC, medial channels are not likely to adopt more responsible advertisement selection procedures. There is no constitutional impediment to more vigorous enforcement actions by the FTC, and such action must be forthcoming. Accordingly please accept these comments in furtherance of this important issue.

The FTC's Daunting Challenge

The difficulty in policing dietary-supplement advertising claims primarily is based on the diffuse nature of the industry. Effective industry-wide regulation is routinely thwarted because termination of one misleading advertisement campaign is quickly replaced with another. Logically, the Food and Drug Administration (FDA) should have authority to regulate this industry; however, Congress largely divested that authority in 1994 with the passage of the Dietary Supplements Health and Education Act (DSHEA). This legislation essentially removed a class of compounds called dietary supplements from the FDA's

pre-marketing approval process. After a supplement is marketed, if it later proves dangerous, the FDA retains authority to ban the product. Note, however, that it is far more difficult to withdraw a product from the market than to preclude one from being marketed in the first place.[1]

Since passage of the DSHEA, the FTC is the federal agency primarily responsible for regulating the marketing and sale of fraudulently or deceptively advertised weight-loss products. Unfortunately, inadequate funding limits the effectiveness of FTC enforcement efforts. According to Commissioner Sheila F. Anthony:

> Our law enforcement plate is very full as a result of the explosion in growth of the dietary supplement industry. Two factors have had a significant influence over this growth. The Internet has made it easier for snake oil salesmen to sell their products because it allows marketers, both large and small, to go global. In addition, many dietary supplement marketers believe that DSHEA provides a green light to make implied health and disease claims and avoid FDA review or approval. Consequently, the Commission has seen its workload expand in recent times in policing dietary supplement advertising. The Commission has brought over 60 law enforcement actions in the past 5 years challenging false or unsubstantiated claims about the efficacy and safety of a wide variety of dietary supplements, and we have many more in the pipeline.[2]

---

[1] Under applicable law, the FDA will fail to approve a new drug for sale unless the applicant proves its safety and efficacy. (21 CFR 314.125). The burden is on the applicant to demonstrate that the drug meets the legal requirements for sale. However, under the DSHEA, the proponent of a new dietary ingredient need only give notice to the FDA of the new product. Removal of the product from the market requires proof by the FDA that the product is unsafe or otherwise adulterated. Note that the burden of proof is on the FDA (21 CFR 301 et. seq.).

[2] Combating Deception in Dietary Supplement Advertising. Remarks By Commissioner Sheila F. Anthony Before The Food and Drug Law Institute 45th Annual Educational Conference Washington, DC April 16, 2002. http://www.ftc.gov/speeches/anthony/dssp2.htm#N_7_. Last visited 1/26/2003.

The FTC needs to make more efficient use of its scarce law-enforcement resources. Changing the focus of the commission's efforts may be one viable alternative.

Legality of Media Channel Enforcement Actions

For years, the FTC has relied upon media self-regulation to assist in keeping false and deceptive advertisements off the airwaves. The effort has been less than a stunning success. In the words of Herbert Rotfeld:

> At best, all self-regulation is a marketing tool In part, it is a minimal effort to convince various critics that governmental action is unnecessary. When self-regulation helps a firm sell its products to consumers, those efforts often amount to misplaced marketing, serve short-run sales need and not those of a greater consumer protection focus.[3]

Since advertising generates revenue, media channels will require strong economic incentives to change their behavior. The law can provide those incentives.[4] For a variety of reasons, some have argued that FTC regulation of advertisements at the media channel level is problematic;[5] however, careful review of case and statutory law compel a contrary conclusion. FTC regulation of advertising is achieved primarily through the Federal Trade Commission Act [6]and the Lanham Act.[7] The Federal Trade Commission

[3] Rotfeld, Herbert, J., *Adventures in Misplaced Marketing,* Westport Connecticut, (2001)
[4] Rotfeld, Herbet, J., "Power and Limitations of Medial Clearance Practices and Advertising Self-Regulation," *Journal of Public Policy & Marketing,* vol. 11(1) pp. 87-95 (1992)
[5] See, e.g., Reich, Robert, B., "Consumer Protection and the First Amendment: A Dilemma for the FTC?" *Minnesota Law Review*, Vol. 61 pp. 705-741 (1977)
[6] 15 U.S.C. § 45 et. Seq.

Act ("FTCA") prohibits "[u]nfair methods of competition… and unfair or deceptive acts or practices. It specifically empowers the Commission to "prevent persons, partnerships or corporations… from using unfair methods of competition… and unfair or deceptive trade acts or practices…." The FTCA further declares unlawful the act of any "person, partnership or corporation to disseminate, or cause to be disseminated, any false advertisement…[b]y any means, for the purpose of inducing, or which is likely to induce…the purchase in or having an effect upon commerce of food, drugs, devices, services, or cosmetics." The FTCA expressly makes the dissemination of false advertising an unfair or deceptive act or practice in violation of the law.

The reach of the FTCA undoubtedly extends not only to authors of false or deceptive advertisements, but also to media channels used to disseminate the offending advertisements. Initially no distinction is made for, nor exception provided to, the media for transmission of the advertisement. In fact, the Act specifically prohibits the dissemination of false or deceptive advertising. Thus, the act unambiguously applies to the authorship and publication of offending materials. That the Act applies to media channels as well as creators of offending advertisements is further buttressed by exclusion from criminal

[7] 15 U.S.C. § 1125.

liability of advertising media and agencies.[8] If the Act does not apply to advertising media, why is there a need to exclude the media from criminal liability? Additionally, the range of injunctive relief available is limited if the disseminating medium is a newspaper, magazine, periodical or other regularly published publication.[9] If the Act is not applicable to media channels, the inclusion of the limitation on injunctive relief is superfluous. This subsection, by limiting the availability of *a priori* injunctive relief against regular interval publications suggests that the full panoply of injunctive options is available against other media.

---

[8] The act provides that: "No publisher, radio-broadcast licensee, or agency or medium for the dissemination of advertising, except the manufacturer, packer, distributor, or seller of the commodity to which the false advertisement relates, shall be liable under this section by reason of the dissemination by him of any false advertisement, unless he has refused, on the request of the Commission, to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, seller, or advertising agency, residing in the United States, who caused him to disseminate such advertisement. No advertising agency shall be liable under this section by reason of the causing by it of the dissemination of any false advertisement, unless it has refused, on the request of the Commission, to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, or seller, residing in the United States, who caused it to cause the dissemination of such advertisement." 15 U.S.C. § 54(b)

[9] "Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals-- (1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and (2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement, the court shall exclude such issue from the operation of the restraining order or injunction."15 U.S.C. § 53(d)

Prosecution for false or deceptive advertising may also be predicated on the Lanham Act which prohibits"[a]ny person in a commercial advertisement or promotion [from] misrepresent[ing] the nature, characteristics, qualities, or geographic region of his or her or another person's goods, services or commercial activities." The Lanham Act immunizes innocent infringers from civil and criminal liability, leaving them subject only to injunctive remedies.[10] Thus, review of the statutory basis of FTC regulatory authority indicates that the Commission possesses sufficient statutory authority to regulate deceptive advertising in the weight-loss industry; however, serious resource deficiencies preclude adequate regulation of the industry.

First Amendment Considerations

Advertisements, to pass FTC regulatory scrutiny, must be neither untrue nor deceptive. Factual allegations must be

[10] "Where an infringer or violator is engaged solely in the business of printing the mark or violating matter for others and establishes that he or she was an innocent infringer or innocent violator, the owner of the right infringed or person bringing the action under section 43(a) [15 USCS § 1125(a)] shall be entitled as against such infringer or violator only to an injunction against future printing.

(B) Where the infringement or violation complained of is contained in or is part of paid advertising matter in a newspaper, magazine, or other similar periodical or in an electronic communication as defined in section 2510(12) of title 18, United States Code, the remedies of the owner of the right infringed or person bringing the action under section 43(a) [15 USCS § 1125(a)] as against the publisher or distributor of such newspaper, magazine, or other similar periodical or electronic communication shall be limited to an injunction against the presentation of such advertising matter in future issues of such newspapers, magazines, or other similar periodicals or in future transmissions of such electronic communications. The limitations of this subparagraph shall apply only to innocent infringers and innocent violators." 15 U.S.C §1114 The term "innocent" has been interpreted as adopting the *Sullivan* case knowledge standard

supported by substantial evidence, and to be non-deceptive, an advertisement must not contain a direct or indirect material misrepresentation or omission which, from the perspective of the consumer, is likely to mislead.[11] Given the difficulty in effectively regulating weight-loss advertisements at the producer level, regulation at the media channel level is clearly preferable. However, there has been some concern with the ability of the FTC and other governmental agencies to regulate commercial speech in the wake of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*. [12] Prior to the mid 1970's, governmental regulation of commercial speech was nearly unfettered. Prior to that time, popular consensus held that commercial speech was not protected by the First Amendment. In 1976 the Supreme Court expressly extended First Amendment protections to commercial speech by indicating that speech did not lose its protected nature by virtue of its commercial message. However, the Court did not and, to date, has not afforded commercial speech unfettered First Amendment protection.[13] No one seriously argues that weight-loss

[11] *See* FTC policy statement of deception, October 14, 1993. http.//www.ftc.gov/bcp/policy-stmt/ad-decept.htm. Last visited December 18, 2002

[12] 425 U.S. 748 (1976) Virginia State Board of Pharmacy granted First Amendment protection to purely commercial speech. Prior to this case it was generally though that commercial speech was not entitled to First Amendment protection.

[13] "In concluding that commercial speech enjoys First Amendment protections, we have not held that it is wholly undifferentiable from other forms. There are common sense differences between

advertisements are anything other than classic commercial speech.[14] That being the case, weight-loss advertisements are not entitled to the level of protection afforded other forms of speech. Given that these advertisements are protected commercial speech, what, if any, regulation may the government impose?

The legality of any governmental regulation or stature may be assessed using different levels of what has come to be known as "Scrutiny." Scrutiny is the level of analytical rigger the governmental regulation must withstand before obtaining constitutional clearance. The highest level of scrutiny, strict scrutiny, is reserved for governmental regulations of particularly sensitive subjects such as race and non-commercial speech. "When a law burdens core political speech, we apply 'exacting scrutiny' and we uphold the restriction only if it is narrowly tailored to serve an overwhelming state interest."[15] At the other end of the spectrum is the rational basis test. This test applies to general economic and social regulations not implicating core beliefs or involving suspect classifications. "[T]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute

---

[commercial speech] and other varieties" Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. at 772 n24.

[14] Commercial speech is most commonly defined as speech "which does no more than propose a commercial transaction." Pittsburgh Press co. v. Pittsburgh Commission on Human Relations 413 U.S. 376, 385 (1973).

[15] Mcintyre v. Ohio Election Commission 514 U.S. 334, 347 (1995)

is rationally related to a legitimate state interest."[16] The middle ground is occupied by intermediate scrutiny and is reserved for classification involving matters like gender and commercial speech. To pass intermediate scrutiny, a classification must be substantially related to a sufficiently important governmental interest.[17] As noted, in 1976 the Supreme Court granted commercial speech First Amendment protection. However, in doing so it failed to grant commercial speech full constitutional protection, drawing a clear line between commercial and other forms of more protected speech. This necessarily raised the question: How much protection does commercial speech have?

The constitutional protection afforded commercial speech is akin to intermediate scrutiny. In the case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,* the Supreme Court, for the first time, attempted to delineate the limits of governmental regulation of commercial speech.

> If the communication is neither misleading nor related to unlawful activity, [t]he state must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulation technique must be in proportion to that interest. The limitations on expression must be designed carefully to achieve the state's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.

[16] City of Cleburne, Texas v. Cleburne Living Center Inc., 473 U.S. 432, 440 (1985).
[17] *See. e.g.,* Mississippi University Women v. Hogar, 458 U.S. (1982)

Second if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive.[18]

The Court's test for validating governmental regulations of commercial speech appears remarkably similar to the intermediate scrutiny standard applied in traditional equal protection analysis. Note, however, that the government need only concern itself with the First Amendment when regulating speech that is truthful, accurate and related to legal activities.

Today, there is little credible legal support for the proposition that the government cannot regulate commercial advertising so long as the appropriate legal standards are satisfied. Moreover, governmental attacks on false or deceptive advertisements present scant reason for concern since such speech is beyond the purview of the First Amendment. As the Supreme Court has stated, "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it."[19] Obviously, the difficulty is in discerning protected commercial speech from unprotected deceptive or false speech. Any attack on media channels by the

[18]Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 564 (1980).
[19] Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 563 (1980)

FTC aimed only at false and deceptive advertisements raises significant First Amendment issues. Even though false and deceptive advertisements lack constitutional protection, to argue that a regulation prohibiting media channels from accepting false or deceptive weight-loss advertisements from producers of dietary supplements is *ipso facto* constitutional begs the question. Such a regulation would impermissibly shift the burden of determining the veracity of such advertisements to the channels with likely catastrophic constitutional consequences. [20] As the Supreme Court announced in *New York Times Co. v. Sullivan*, a defamed Public official may not recover "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[21] The *Sullivan* doctrine has come to stand for the proposition that a media channel may not be held liable in tort for an advertisement absent knowledge of its falsity. However, Sullivan does not reach that far. First, *Sullivan* involved political/social speech, not commercial speech. As noted, political and social commentary occupy a preferred position

[20] As a general rule, the media has no obligation to confirm or otherwise verify the accuracy of advertisements; however, there are exceptions to every rule. See infra notes 31-34 and accompanying text.
[21] New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

within the First Amendment framework not so occupied by commercial speech. The Supreme Court has never issued a blanket prohibition against imposing liability on the media absent intentional conduct. In fact, the Supreme Court has specifically said that absent public notoriety, "states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual.[22] The only constitutional limit placed on states' (or the federal government for that matter) ability to impose tort liability on media outlets is one of strict liability. Stated alternatively, absent speech involving matters of political or social importance, governments may impose tort liability on media for negligent or other wrongful conduct including the acceptance and publication of advertisements. Admittedly, both *Sullivan* and *Gretz* involved defamation actions; however, there appears to be no logical basis for discriminating between defamation and other forms of tortuous conduct. Accordingly, state and federal governments are constitutionally free to impose tort liability on media outlets for negligent conduct.

While it is certainly true that some courts have held that media owe no duty to the public to investigate the veracity of advertisements,[23] others courts have reached different results.

[22] See Gertz v. Robert Welch Inc. 418 U.S. 323, 347 (1974).
[23] See, e.g., Pittman v. Dow Jones & Co Inc. 662 F. Supp. 921 (E. D. La. (1987)

For example, in *Braun v. Soldier of Fortune Magazine*, the Eleventh Circuit of Appeals held that under Georgia law a publisher may be held liable if it fails to exercise reasonable prudence in determining if an advertisement "on its face" represents a "clearly identifiable unreasonable" risk to the public.[24] Note that there is no knowledge requirement; only that the advertisement alerts the publisher that it represent an unreasonable RISK to the public.

What appears to distinguish the *Braun* case from other cases declining to impose tort liability on media channels is the magazine's level of culpability. The magazine's failure to act with reasonable prudence proved fatal to its First Amendment defense.

FTC Media Channel Strategy

The FTC and the FDA have amassed a substantial volume of information pertaining to false and deceptive weight-loss advertising. In reviewing countless weight-loss advertisements, certain types of claims are most certainly false or deceptive. Based on the FTC's experience and the FDA's review and analysis of available scientific data, certain types of claims appear beyond the realm of reasonable possibility.[25] The FTC appears able to make determinations of the likely falsity or deception

[24] Braun v. Soldier of Fortune Magazine, Inc., 968 F. 2d 1110, 1118 (11th Cir. 1992)

[25] For a list of some questionable products go to: http://www.cfsan.fda.gov/~dms/qa-nut4.html

of advertisements solely from review of its contents.[26] Their track record of litigation and enforcement success suggests that the assertion is well supported.

As noted, both the FTCA and the Lanham Act apply to media channels. To date, however, the FTC has been somewhat reticent to include media channels in enforcement actions. This must change. The FTC must embark upon a plan of action which precipitates responsible advertising decision by media. The following may prove useful in developing such a plan. Any plan should include actions designed to create monetary and other disincentives for media to accept inappropriate weight-loss advertising. The FTC and the FDA have amassed sufficient expertise and there exists sufficient scientific evidence to accurately identify false or deceptive advertisement at a glance. Pursuant to the FTC's regulatory authority, a proposed "Guide" concerning use of claims in weight-loss advertising should be adopted in accordance with applicable procedures contained in the Administrative Procedures Act. The Guide should essentially indicate that certain weight-loss claims are *prima fascia* false or deceptive and that any media channel (except

[26] For example, the Executive Summary to the Weight-loss Advertising: An Analysis of Current Tends (*supra* note 1) reports that 40% of the advertisements almost certainly contain false statements. This document is a staff report of the FTC and is available at http://www.ftc.gov/bcp/reports/weightloss.pdf. Last visited 1-24-2003.

ISP's [27]) accepting an advertisement containing a suspect claim may be subject to enforcement action. Any media channel prosecuted more than one time would likely lose the ability to credible claim ignorance of the false or deceptive nature of the advertisement. Keep in mind that any purchaser of a weight-loss product marketed through false or deceptive means is an injured party. While injured consumers may not bring private enforcement actins under the FTCA,[28] such action are available in many states which permit private enforcement actions.[29] While certainly some state courts would decline to impose liability, it is highly likely that some states would. As with the *Braun* case, where the level of culpability[30] of the media exceeds negligence, the imposition of liability is likely appropriate.[31]

Finally, it should be noted that the mere publication of this or any similar strategy for persuading media channels to act more responsibly is likely to have a significant deterrent effect. The lack of any significant pressure by the FTC on media

---

[27] Since federal law prohibits imposing liability on internet service providers,(*see* 47 U.S.C. § 230 (c)) arguments for regulating web advertising are beyond the scope of this paper.
[28] St. Martin v KFC Corp., 935 F. Supp. 898 (W.D. Ken. 1996)
[29] See, e.g., ." Ky.Rev.Stat.Ann. § 446.070 (Baldwin 1993). "A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."
[30] The term "culpability" refers to the level of inappropriate conduct of the media and ranges form strict liability evidencing not fault to intentional conduct. Gradations in the middle include negligence, gross negligence and recklessness. The *Braun* case suggests that conduct which is either grossly negligent or reckless warrants imposition of liability.
[31] Remember, there is not constitutional impediment to the imposition of liability on media channels so long as the subject conduct is at least negligent.

channels to change their behavior has been a significant contributing factor to the continuation and proliferation of illegal weight-loss advertising. Owners of media channels in the first instance are business people. Unless litigation cost and potential liability exposure exceed advertising revenue, change is not forthcoming.

CONCLUSION

Unscrupulous producers of weight-loss products continue to market their products using false and deceptive advertising. Passage of the DSHEA in 1994 hampered FDA regulation of dietary supplements and the limited budget of the FTC makes regulation of the industry at the producer level problematic. To date, the FTC has been reluctant to bring enforcement actions against media channels; however such actions may be necessary to effectively regulate the industry. The FTC possesses sufficient statutory authority to regulate false or deceptive advertising carried by media. Such regulation should be narrowly tailored to further important governmental goals thus passing constitutional muster. Additionally, repeated enforcement actions by the FTC would foster state civil litigation creating a powerful disincentive to carry risky advertisements. Creating disincentives to accept questionable advertising does not present vexing ethical and moral issues; for it is the mission

of the FTC to protect the public from useless, fraudulent and even dangerous products.