



July 2011

BUSINESS LITIGATION UPDATE

FTC Finds Keywords Are Part of Advertising Claims

Advertisers should take two significant messages from the recent FTC Complaint and Consent Agreement involving Nivea's My Silhouette! Redefining Gel-Cream ("My Silhouette") (*In the Matter of Beiersdorf, Inc.*, FTC File No. 092-3194 (June 29, 2011) (consent)):

- The FTC views advertising keywords as part of the advertisement itself and will consider the keywords in interpreting the express and implied claims in ads. This is the first time the FTC has taken this position.
- The FTC order will impose burdensome substantiation requirements and broad "fencing-in" relief.

The respondent, Beiersdorf, Inc., manufacturers My Silhouette, which it advertised online, on television and in other media. As part of its advertising, according to the complaint, Beiersdorf entered into an agreement with Google to:

[P]referentially identify a webpage marketing My Silhouette in response to consumer searches for information relating to body size. As a result, if a consumer entered the terms "stomach fat," "nivea slim silhouette" or "thin waist" into Google, a link to this My Silhouette webpage would appear as a sponsored result at the top of the search results...

A pithy statement touting the product would be displayed alongside the sponsored link. For example, a search for "nivea slim silhouette" would show the sponsored link to the My Silhouette webpage with the text: "Want to Slim Down? NIVEA My Silhouette Can Redefine the Appearance of the Body's Contours!" Similarly, a search for "stomach fat" would yield "Want a Toned Stomach? NIVEA My Silhouette Can Redefine The Appearance of Your Curves!" According to the FTC, the combination of the keywords purchased by Beiersdorf and the sponsored results "represented, expressly or by implication, that regular use of My Silhouette results in significant reductions in body size." The FTC charged that the representation was false or misleading, since using the product does not result in significant reductions in body size.

The FTC's position is both novel and aggressive. It has not previously tied keywords purchased by advertisers to the content of the ads. Further, the FTC appears to interpret the keywords in the context of the ad and in isolation to fit its interpretation of the ad. For example, the FTC asserts that the purchased keywords relate to the phrase "body size"; however, the phrase "nivea slim silhouette," which was mentioned in the FTC's complaint, does not on its own relate to body size. It only relates to body size when viewed alongside the question posed in the sponsored link: "Want



to Slim Down?” Other keywords such as “thin waist” relate to body size when viewed in isolation. However, it is debatable whether they relate to body size when viewed in context of the sponsored link, which includes the wording “Redefine *the Appearance* of ... Contours.”

To resolve the matter, Beiersdorf agreed to pay \$900,000. In addition, the company agreed that it would not represent that any “drug, dietary supplement or cosmetic” causes “weight or fat loss or a reduction in body size” unless it had two adequate and well controlled human clinical studies of the product or an equivalent product “conducted by different researchers independently of each other, that conform to acceptable designs and protocols and whose results when considered in light of the entire body of relevant and reliable evidence are sufficient to substantiate the representation as true.” Finally, Beiersdorf agreed to similarly burdensome substantiation requirements if it made representations about the health benefits of any drug, dietary supplement or cosmetic.

This matter illustrates the aggressive position the FTC will take in interpreting advertising claims, the burdensome substantiation it will require in consent agreements and the significant monetary sanctions it will impose. Advertisers may wish to seek legal counsel for guidance on how the FTC, other state and federal agencies and other potential plaintiffs might interpret advertising claims and assistance in evaluating the substantiation required to support those claims.

FOR MORE INFORMATION

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