

News

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FTC Focuses on Products Making Health Claims, Increases Cooperation with FDA

A number of recent cases brought by the Federal Trade Commission (FTC), under its authority to prohibit deceptive advertising to consumers, highlight that agency's new focus on products making health claims and demonstrate how the FTC has begun to work much more closely with the Food and Drug Administration (FDA). In 2009, FDA and FTC warned the public about fraudulent promotion of products claiming to diagnose, prevent, mitigate, treat or cure the H1N1 influenza virus, and issued their first-ever joint warning letter advising the owners of the offending websites that they must correct or remove them or face legal action. In September 2010, FTC and FDA issued a joint warning letter to a seller of what? Miami-based Telledant, challenging their advertising of these products as having therapeutic value for treating diseases in violation of FTC regulations.

FTC's interagency cooperation with FDA has gone further than just joint warning letters. In December 2010, FTC settled a case with the Dannon Company, relating to alleged deceptive advertising of Dannon's yogurt and dairy drink products. Dannon had made claims that its Activia yogurt and DanActive dairy drink products, which contain bacteria known as probiotics which are helpful for digestion, would relieve irregularity and help people avoid catching colds or the flu. In TV, internet and print ads as well as product packaging, Dannon had stated that there was scientific proof to back up these claims. The FTC charged that there was deception and the claims were unsubstantiated due to lack of clinical

proof. Under the settlement announced last month, the FTC, took the unusual step of prohibiting Dannon from claiming that any yogurt, dairy drink or probiotic food drink reduces the likelihood of getting a cold or the flu, unless the claim is approved by the FDA. The FTC noted that while companies do not usually need FDA approval of their health claims to comply with the FTC Act, in this case it would be beneficial to ensure Dannon's compliance.

Other recent settlements also evidence FTC's increased focus on products with health claims. In 2008, Airborne Health, Inc., makers of an effervescent tablet marketed as a cold prevention and treatment remedy, agreed to pay up to \$30 million to settle FTC charges that it did not have adequate evidence to support its advertising claims. In March 2010, FTC announced that Walgreens had agreed to pay nearly \$6 million to settle FTC charges that the company deceptively advertised "Wal-Born" – a line of dietary supplements similar to Airborne, claiming that the supplements could prevent colds, fight germs, and boost the immune system. In December 2010, FTC reached a settlement requiring major marketers of children's vitamins to stop making false and unproven claims that their supplements promote healthy brain and eye development in children. The companies agreed to pay \$2.1 million to provide refunds to consumers who purchased certain multivitamins in their Disney and Marvel Heroes line.

These cases certainly serve to underline the necessity of adequate scientific backup for health claims, but they also suggest that health claims may have become a big focus for the FTC and that the level of cooperation with FDA is steadily increasing. The Dannon case even raises the issue of whether companies may have to satisfy the FDA standards for claims in order to avoid issues with FTC deceptive practices. Given this higher level of scrutiny, companies with products making health claims should monitor such claims with great care and should be aware of new FTC cases relating to such claims. The above-noted cases also suggest that the increased level of interagency cooperation is not limited to dietary supplements with health claims; companies which manufacture or import other products under FDA jurisdiction, such as cosmetics, food and beverages and medical devices should also monitor new developments at the FTC relating to such products.

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