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Hair Product Fails to Meet Federal Trade Commission Act Standard for Effectiveness

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Hair product fails to meet Federal Trade Commission Act standard for effectiveness

by Julianne Moody

In ***Federal Trade Comm'n. v. Pantron I Corp.***, 33 F.3d 1088 (9th Cir. 1994), the United States Court of Appeals for the Ninth Circuit held that representing a hair loss product as "effective" when its efficacy was due solely to a placebo effect constituted false advertising in violation of the Federal Trade Commission Act ("FTCA"). It also held that dissatisfied consumers were entitled to restitution for injuries resulting from such false advertising as monetary equitable relief could be awarded for violations of the Act. Finally, the court declined to disturb the district court's finding that, under the FTCA, the hair loss product was a drug as consumers could reasonably believe that the product would affect the structure or function of the body.

Seller claims product promotes hair growth

The Pantron I Corporation ("Pantron"), owned by Hal Z. Lederman, marketed a shampoo and conditioner called "The Helsinki Formula" ("Formula"). Pantron advertised that this product arrested hair loss while stimulating regrowth in baldness sufferers. As part of these advertisements, Pantron stated that scientific studies supported their claims about the product's efficacy. Consumers were offered a full refund if there was any dissatisfaction with the product.

Pantron's advertisements came to the attention of a number of regulatory agencies, including the United States Postal Service and the Food and Drug Administration. On November 18, 1988, the Federal Trade Commission ("FTC") filed suit against Pantron seeking a permanent injunction and monetary equitable relief. In its complaint, the FTC alleged that Pantron's claims regarding the efficacy of the Formula violated the FTCA as they constituted false and deceptive advertising. Specifically, the FTC contended that the Formula was ineffective in treating hair loss in the absence of acceptable scientific proof demonstrating its successful treatment of the condition.

At trial, the FTC introduced evidence to prove that the Formula did not effectively treat hair loss associated with male pattern baldness. Three expert witnesses testified that Pantron's studies concluding that its product was effective failed to satisfy generally accepted scientific standards in the United States. Other studies, which did satisfy inquiry standards, demonstrated that the Formula's key ingredients were ineffective in reducing hair loss or promoting hair growth. Testimony from these experts suggested that the Formula had no effectiveness in arresting hair loss or promoting regrowth beyond its placebo effect.

Pantron countered these claims with evidence from users who were satisfied with the product. Survey data demonstrated that Formula users reported successful results, ranging from 30% for those who had used the product for less than two months to 70% for those who had used the product for six months or more. Additionally, Pantron introduced several studies of its own that concluded that the product was effective for treating hair loss.

On September 24, 1991, the district court first determined that while Pantron had made the claims of efficacy alleged, the FTC had failed to prove that the Formula was entirely ineffective. The court found that the evidence suggested that the Formula may work for some people some of the time. It concluded therefore that the FTC had failed to prove that Pantron's advertising contained a false claim as to its efficacy. However, the court did find that the FTC had demonstrated that Pantron's claims regarding scientific proof of the product's efficacy were false. Accordingly, it enjoined Pantron from making representations that the product's efficacy had been demonstrated through scientific study. However, the injunction permitted Pantron to state that the product had been subjected to European medical investigations if accompanied with a disclosure stating that such work did not conform to the standards for scientific medical studies in this country. Moreover, the

order allowed Pantron to state that the Formula was effective to some extent for some people. This statement, however, had to be qualified by an additional disclosure stating that the product more likely arrested hair loss rather than promoted regrowth and that the efficacy claim was not supported by studies meeting the rigor of the scientific community in the United States. Additionally, the district court, in its order, concluded that the Formula was a drug as defined by the FTCA. Finally, the court awarded no monetary equitable relief because the FTC had failed to establish that Pantron had caused actual deception and injury or that Lederman knew or should have known that the advertising was fraudulent.

The FTC appealed the district court's decision. Specifically, it challenged the narrowness of the district court's injunction and the denial of any monetary equitable relief. Pantron cross-appealed from the court's ruling that the Formula was a drug under the FTCA.

Material representations likely to mislead consumers constitute false advertising

On appeal, the United States Court of Appeals for the Ninth Circuit first examined the language of the FTCA. It noted that the FTCA defines a false advertisement as "an advertisement, other than labeling, which is misleading." An advertisement is misleading or deceptive if it involves a material representation, omission, or practice that is likely to mislead the reasonable consumer. In the case at hand, there was no dispute that Pantron claimed that the Formula was effective against hair loss and that such claims were material. The only disputed issue was whether these misrepresentations would likely mislead a reasonable consumer.

The court observed that while there were a number of ways to determine whether a representation, omission, or practice would mislead a reasonable consumer within the meaning of the FTCA, the government here premised its argument on the falsity theory. Under the falsity theory, the government must prove that the advertisement's express or implied message was false.

Looking at the evidence, the court of appeals found that the overwhelming weight of proof at the trial clearly indicated that any efficacy demonstrated by the Formula was due to the product's placebo effect. It therefore held that the district court had erred in concluding that Pantron's representations about the Formula were not false advertising. Specifically, it stated that the district court had misapprehended the law when it required the FTC to prove that the hair loss product was "wholly ineffective" in order to prevail under the falsity theory. Because the court concluded that a claim of product effectiveness is false if the evidence developed under accepted standards of scientific research demonstrated that the product had only a placebo effect, it held that Pantron's material misrepresentations regarding the Formula's efficacy would likely mislead the consumer and constituted false advertizing under the FTCA.

In light of this ruling, the court of appeals instructed the district court to revise its injunction and prohibit Pantron from making any statement regarding the Formula's efficacy for some people. Furthermore, the circuit court ruled that the injunction must be further modified to indicate that any statement detailing the European studies must be qualified by the following disclosures: (1) the United States scientific testing standards are stricter than those in Europe; (2) studies using American standards have researched the Formula; and (3) these studies unanimously have concluded that the Formula is ineffective.

Pantron ordered to pay consumers restitution

Turning to the issue of monetary equitable relief, the appellate court observed that restitution serves as an adequate remedy when the advertiser has substantially benefitted from his illegal conduct, even if individual damages were minimal. The FTCA grants federal courts broad authority to issue restitution, in addition to injunctions, for violations of the Act.

On review, the court of appeals held, as a matter of law, that the district court's reasoning for denying monetary equitable relief had been flawed. First, the appellate court stated that it was immaterial whether the consumer injuries were only economic in nature. Second, the amount of the injury suffered by each individual consumer was irrelevant in assessing whether restitution was an appropriate remedy. Rather, the district court should have looked to the aggregate consumer injury as that reflected the total damage caused by the seller's conduct. Finally, the court of appeals stated that the promise of a full refund was an insufficient reason to deny restitution. The court

therefore concluded that consumer restitution was proper. Restitution would eliminate the profits Pantron had obtained through its false advertising and address the economic injury experienced by the dissatisfied consumers.

The court of appeals also found Lederman, Pantron's president and sole owner, was personally liable for the monetary award as he had been aware of the false advertising. The court held that Lederman acted with "reckless indifference to the truth or falsity"of the representations made about the Formula. It reasoned that Lederman knew or should have known about the misrepresentations as several government agencies had notified him regarding that issue. Additionally, there was overwhelming evidence that no scientific study supported the product's efficacy claim.

The Formula is a drug

The court then turned to the issue of Pantron's cross-appeal of the district's court's characterization of the Formula as a drug. It noted that the FTCA defines drugs as "articles (other than food) intended to affect the structure or function of the body of man or other animals." The circuit court noted that Pantron, in its advertisements, claimed that the Formula would cause hair growth where no hair currently existed. A reasonable consumer could construe that as a claim promising to affect the structure of the scalp, rather than a temporary and superficial change in appearance. The circuit court concluded that the district court had not erred in determining that the Formula was a drug.

The circuit court remanded the case back to the district court for modification of the injunctive order limiting the scope of Pantron's advertisements for the Formula. Additionally, the district court was instructed to order Pantron and Lederman to pay monetary equitable relief for injuries caused by their false advertising of the Formula.

Credit card payments due on Sunday must be received by Sunday

by Jennifer L. Fitzgerald

In ***Larned v. First Chicago Corp.***, 636 N.E.2d 1004 (Ill.App.Ct. 1994), the court held that a credit card agreement between the issuer and the card holder could validly exclude the Illinois Bank Holiday Act. The issuer could impose finance charges against a holder whose payment was due on Sunday, but received on Monday. Furthermore, the court held that a credit card agreement was not an unenforceable adhesion contract.

Class Action Suit Against First Chicago For Finance Charges Incurred

On October 24, 1990, William J. Larned ("Larned") filed a class action lawsuit on behalf of all holders of credit cards issued by the defendants, First Chicago Corporation ("First Chicago") and its wholly owned subsidiary FCC National Bank ("First Card"). Plaintiff alleged that: (1) the defendants' practice of assessing finance charges for payments due on Sunday, but received on Monday was contrary to the Illinois Bank Holiday Act ("Holiday Act") 205 ILCS 630/17 (West 1992); (2) the choice of law provision in the contract was unenforceable; and (3) the agreement was a contract of adhesion.

The Illinois Holiday Act provides that where indebtedness is due on Sunday, the debtor has until the following Monday to pay the debt without accruing finance charges. However, defendants claimed that they, as a national bank, could not be prohibited from collecting payments