FTC Goes After a Consumer-Endorser for the First Time

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When deciding whether to buy a product or service, how often do you check out product reviews or testimonials and how often does that research impact your purchasing decision?

The FTC seems to consider consumer reviews and testimonials as pretty persuasive – most notably in the context of online write-ups. In 2009, the Commission revised guidelines on testimonials and endorsements to address the importance of these reviews and especially the growing prevalence of online reviews. Significant in the revisions was that the FTC highlighted the possibility of endorser liability for false or unsubstantiated claims. (FTC regulations typically are directed at advertisers as opposed to those who give product endorsements or testimonials.)

Less than two years later, the FTC has filed a complaint against a consumer-endorser. The Commission, along with the Colorado Attorney General, filed an action in U.S. District Court in Colorado against Marsha Kellogg for her alleged false or misleading representations in support of an infomercial program, "Winning in the Cash Flow Business." According to the complaint, Kellogg falsely claimed that she earned an artificially high amount of money through the infomercial program – some $50,000 more than what she actually earned.

The action was incorporated in a suit filed against the CEO/founder of that infomercial enterprise, Russell Dalbey, and related defendants. However, Kellogg already agreed to an order settling the FTC's charges – an order that generally prohibits her from making several types of misrepresentations in the future.

Significantly, this is the FTC's first order against a consumer on charges of misrepresentations in a product/service testimonial. As it foretold in the 2009 guidelines, the FTC has now broken ground by going after a new type of defendant. Now, seemingly little guys, i.e. the random individual who is paid for a testimonial on a product or service, may find themselves in hot water for making inflated endorsements.

Should the FTC persist in going after this new breed of defendant, it is likely to focus on the web-related aspects of its revised 2009 guidelines: bloggers and other "word-of-mouth" marketers. The FTC noted that these types of endorsers are subject to the long-standing principle "that 'material connections' between advertisers and endorsers – connections that consumers would not expect – must be disclosed." The FTC likely means to address blogs and other online write-ups that feign objectivity when in reality they are somehow connected to the product they are reviewing.

While this is merely speculation, more information may come to light as the FTC works on new online advertising guidelines (something the Commission recently announced and something we will be monitoring). In the interim, what a world of exposure this could lead to if the FTC is persistent! How many Amazon consumer reviews could be deemed deceptive because they are actually written by sellers or a seller's employees? It may be time for advertisers to start curbing employee online enthusiasm.

FTC Beat is authored by the Ifrah Law Firm, a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

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