



# astrachan gunst thomas

a professional corporation  
attorneys at law  
baltimore . washington, d.c.  
www.agtlawyers.com

## **FTC Issues Ad Guide**

**By: Jim Astrachan**

On Halloween, the Federal Trade Commission issued its most current pronouncement for keeping your ads legal: Frequently Asked Advertising Questions: A Guide for Small Business. I guess that the banks and automakers get the bailout; small businesses get the Guide, but I don't understand why the FTC intended that the Guide be limited to only small businesses inasmuch as the rules discussed pertain to businesses of every size.

The Guide is very useful, and perhaps the most important info it contains are the types of advertising claims that really attract the FTC's attention, such as:

Health and safety claims;

Sunscreen and cancer reduction;

Water filters and harmful chemicals;

Chainsaws, safety latches and injury reduction; and

Ads that consumers can't easily evaluate without assistance, such as –

    certain appliances reduce energy costs by 25%;

    certain gasolines decrease engine wear; and

    hairspray is safe for the ozone layer.

At the turn of the 19<sup>th</sup> Century, cereal magnate C.W. Post advertised that Grape Nuts cereal cured an inflamed appendix and fixed loose teeth, but today advertising must be truthful, non-deceptive and fair; if any material claims are made, the advertiser

must have substantiation of the claims in hand prior to running the ad. An ad is considered deceptive by the FTC if it contains a statement or omits information that is likely to mislead consumers, and is likely to influence that consumer's decision to buy the advertiser's product.

To evaluate an ad, the FTC steps into the shoes of the "reasonable consumer" and views the ad in the context of the impression made on that reasonable consumer. The FTC will also abstract from the ad all implied and express claims. An express claim is a literally stated claim, e.g. "more cars than any other rental car company." An implied claim is true as far as it goes, but needs more information to make it really correct because it may omit a pertinent fact, e.g. "more cars than any rental car company" (but the ad runs in in-flight magazines, and while it is true that the company has the most cars, it does not have the most cars available at airports although readers of the ads might believe this is the case).

The FTC next decides if the claim is material, that is, will it influence the consumer's buying decision. If there is a material claim made in the ad, express or implicit, and the ad strikes the FTC as to having a tendency to deceive consumers, the FTC will ask for claim substantiation. This means that the advertiser had a reasonable basis to make the claim. Uncle Willie's and Aunt Clare's effusive testimonials about the product's efficacy will not be considered adequate substantiation nor will the endorsements of other consumers. Substantiation requires that the advertiser possess some objective evidence to support the claim before the ad runs. Health claims must be supported by competent and reliable scientific evidence – tests, studies and the like. And these tests and studies must be conducted in a way acceptable to experts in those fields.

Some think the FTC selects deceptive advertisers for prosecution by spinning a wheel. With so many ads created and run every day the chances of winning the FTC's lottery are minute but some do get caught. How, then, does the FTC select its cases? First, it must have jurisdiction. Sometimes federal law provides that only another federal agency has jurisdiction to investigate industry claims, e.g. banks, airlines, insurance and others. FTC resources are not unlimited, so it attempts to focus on national advertisers, although it will refer local and regional deceptive advertisers to state authorities which can also be unpleasant. The FTC will look for a pattern of deception created by the ad. This means that many consumers must be affected, not just a smattering. Finally, the FTC will consider the amount of injury the ads can cause, whether to the wallet, health or safety.

If a hapless, advertiser ends up on the FTC's radar screen, and the FTC determines to go after the advertiser, it has available to it a plethora of remedial options. On the light but still unpleasant end, the FTC can obtain a cease and desist order. The recipient will have to withdraw its ads, have substantiation in hand for future ads – before they run – and report ad claim substantiation to the FTC from time

to time. Violation of a cease and desist can result in a daily fine of \$11,000. But that's only the tip of the iceberg considering what a deceptive ad can cost an advertiser. Civil fines can be imposed, and in some cases, an advertiser can be forced to cough up full or partial refunds to all its customers. Such was the recent case with a health food supplement advertiser who was ordered to pay more than \$13 million! And some years back, Listerine was required to run corrective ads when it claimed its mouthwash prevented colds. Advertisers who have been "bad" are required to make specific disclosures in future ads.

An advertising agency can be just as responsible for deceptive ads as its advertising client. The FTC advises that agencies have a duty to make an independent determination that the claims they create or pass on are accurate and correct. They simply can't turn a blind eye and rely on the advertiser's assurances. If an agency was responsible for the claim (remember the truck driving over Volvos some years back without crushing the roofs the ad agency ordered reinforced?), or if not responsible but knew or should have known the claim was false, that agency might be pinned to the FTC's bull's eye. Also, individuals on the client side can be held responsible.

The FTC's recently published Guide is not dissimilar to the prohibitions and remedies of the Lanham Act and the case law that has developed over the years that enables a competitor to sue for false advertising. But if I had my drothers, I would prefer not to be involved with the FTC, although there are some very nice people who work there.

---

*James B. Astrachan is the author of the 4 volume treatise, The Law of Advertising, published by Matthew Bender.*