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DECEPTIVE ADVERTISING

Washington State Court of Appeals upholds application of FTC guidelines in evaluating alleged deceptive claims for 5-Hour ENERGY® under Washington's Consumer Protection Act

Under federal law, the Federal Trade Commission oversees advertising of OTC products and nutritional products subject to the Dietary Supplements and Health Education Act (DSHEA). For the FTC to show that an advertising claim is deceptive under FTCA §5, according to the opinion in the instant case, it "must establish that the advertisement (1) conveys a representation through either express or implied claims; (2) that the representation is likely to mislead consumers; and (*3) that the misleading representation is material." It is not necessary to prove either consumer reliance on the claim(s) or that consumers were injured. In evaluating whether the claim(s) are misleading, the FTC can prove either actual falsity or that the advertiser lacked a reasonable basis for asserting that the representation was true. The FTC has indicated that to have a "reasonable basis" for asserting a claim, the manufacturer "must have some reasonable substantiation for the representation *prior* to advertising it." This is known as FTC's "prior substantiation" doctrine.

Washington State has adopted statutes prohibiting unfair business practices, including the state's Consumer Protection Act (Chapter 19.86 RCW). According to the Court's recitation, the CPA was adopted in 1961 and was generally modelled after §5 of the FTCA. The act is to be construed broadly to achieve its aims of protecting consumers, and "in construing this act, the courts [should] be guided by the final decisions of the federal courts and final orders of the federal trade commission," citing RCW 19.86.920.

Actions under the CPA may be filed by individuals or by the Attorney General, and in this case the AG's office instituted the action in the Superior Court, alleging that Living Essentials, LLC, violated the CPA by making deceptive advertising claims concerning its products, 5-Hour ENERGY® (5HE) and its decaffeinated version.

First, the defendant widely advertised that 5-Hour Energy was "superior to coffee," the "superior-to-coffee" claim. Living Essentials proclaimed that "the key vitamins and nutrients [in 5-Hour ENERGY®] work synergistically with caffeine to make the biochemical or physiological effects last longer than caffeine alone." Second, Living Essentials claimed that the decaf version of 5HE provided energy, alertness, and focus "for hours," the "Decaf" claim. Finally, the company implied that 73% of physicians would recommend 5HE (the "ask your doctor" claim). A national TV ad campaign stated, "We asked over 3,000 doctors to review 5-hour Energy®, and what they said is amazing. Over 73% who reviewed 5-Hour Energy® said they would recommend

a low calorie energy supplement to their healthy patients who use energy supplements. 73% 5-hour Energy has 4 calories and is used over nine million times a week. Is 5-hour Energy right for you? Ask your doctor. We already asked 3,000." It appears from the opinion that while 3,000 physicians may have been surveyed, only a few hundred responded, of which 73% agreed somewhat ambiguously recommended a "low calorie energy supplement."

Following an 11-day bench trial, testimony of "20 expert and lay witnesses, and admission of approximately 500 exhibits, the trial court issued a 57-page decision including detailed findings of fact and conclusions of law. Following FTC guidance, the trial court concluded that Living Essentials Superior to Coffee, Decaf, and Ask Your Doctor claims were deceptive and violated the CPA." The trial court imposed civil penalties under the CPA of $2,183,747, and awarded attorney fees and costs to the state.

On appeal, Living Essentials raised several assignments of error, but principally it argued that the trial court relied on the FTC's "prior substantiation doctrine" because that doctrine has not been adopted in Washington, cannot be judicially adopted, and is inconsistent with CPA jurisprudence. It also argued that the fines imposed by the trial court were excessive and arbitrary.

The Court disagreed with the appellant "that the trial court erred by adopting the prior substantiation doctrine – effectively creating a new per se unfair trade practice." It agreed that the Washington Supreme Court has precluded state courts from determining whether a trade practice is a per se violation of the statute unless the Legislature has done so. However, it disagreed that the trial court's adoption of the doctrine was a judicial adoption of a new per se unfair trade practice. Prior CPA jurisprudence has clarified "that a decision does not risk creating a new per se unfair trade practice when, on the facts of the case, the alleged violators' conduct actually constituted deception."

The Court noted that the trial court did not rely solely on the prior substantiation doctrine to examine Living Essentials' pre-claim studies, but also on post-claim studies and expert trial testimony to determine, *inter alia*, that "there was insufficient scientific evidence to support Living Essentials' express claims that people who drink 5-hour ENERGY® will experience hours of energy, alertness, and focus because the vitamins and nutrients extend the effects of caffeine." The trial court entered similar findings for the other challenged claims.

Living Essentials also raised constitutional challenges to CPA's restrictions on advertising asserting protection for commercial free speech. Applying the *Central Hudson* tests to this case, the Court found that the challenged advertising failed the first prong: whether the speech concerns lawful activity and is not misleading. It rejected Living Essentials' argument that its advertising is mere puffery.

Finally, after discussing the CPA's statutory civil penalty scheme, the Court found that the trial court did not abuse its discretion in assessing a $100 penalty for each violation arising from the deceptive advertisements and $4.29 per decaf bottle sold in Washington whose labeling was deceptive. The resulting calculation was $1,971,600 for the Ask Your Doctor claim, $10,647 for decaf packaging, and $201,500 for the Superior to Coffee claim. It also confirmed that trial court's award of $1,888,866.71 in attorney fees and $209,125.92 in costs, which the trial court found appropriate given the "lengthy and complex nature of the litigation." The Court noted that the trial court reduced the state's claimed attorney fee by more than $40,000 to "reflect time spent on unsuccessful motions or other duplicative time." It affirmed that trial court in all respects. [State of Washington v. Living Essentials, LLC et al., No. 76463-2-I, Wash. App. Div. 1, March 18, 2019]