

Strike 2: FTC Loses Again in its Case Against Steve Garvey

INTRODUCTION

In an important ruling on the liability of celebrity spokespersons under the Federal Trade Commission Act (“FTCA”), the Ninth Circuit Court of Appeals has affirmed the finding that former professional baseball player Steve Garvey is not liable for statements he made while appearing in two infomercials for Enforma Natural Products weight loss supplements.

BACKGROUND

Garvey appeared in two infomercials for “Exercise in a Bottle” and “Fat Trapper,” which together constitute the “Enforma System.” In 2000, the FTC sued Enforma and its president for claims made in the infomercials. That case settled for \$10 million. The FTC sued Garvey separately. The evidence showed that Garvey had no role in developing claims for the products (he simply read the scripts), and that he and his wife had lost weight using the products. Nevertheless, the FTC argued that Garvey was liable under sections 5(a) and 12 of the FTCA either as a “direct participant” in the making of deceptive advertising claims or under the principles of “endorser” liability.

“DIRECT PARTICIPANT” LIABILITY

The Court found that in order to hold Garvey liable under the FTCA, the FTC must show that he “participated directly” or “had the ability to control” the acts in question, and the FTC must also show that: (1) he had actual knowledge

of the material misrepresentations; (2) was recklessly indifferent to the truth or falsity of a misrepresentation; or (3) had an awareness of a high probability of fraud along with an intentional avoidance of the truth. The district court had found that Garvey had no actual knowledge of any material misrepresentations in the infomercials, and the FTC did not dispute that. Instead, the FTC argued that Garvey was required – but failed – to “ascertain the existence of substantiation for the claims” that he made. The district court found that Garvey was aware of the following “substantiation” for the advertising claims:

1. Garvey himself used the system and lost eight pounds during a three- or four-week period;
2. Garvey’s wife lost approximately twenty-seven pounds between filming of the first infomercial and the date the program was broadcast;
3. Garvey received and reviewed two booklets containing substantiation materials for “Fat Trapper” and “Exercise in a Bottle” produced by Enforma;
4. Garvey met and spoke with several individuals who had experienced “positive results” prior to the second infomercial filming; and
5. Garvey learned of a pyruvate study published in the American Journal of Clinical Nutrition.

Despite the FTC’s arguments about the deficiencies in this “substantiation,” the

Court of Appeals affirmed the district court's decision and found that "the substantiation he had was sufficient – at least for someone in Garvey's position – to avoid participant liability."

"ENDORSER" LIABILITY

The FTC also tried to rely on its "Guides Concerning Use of Endorsements and Testimonials in Advertising" ("Testimonial Guides"). The Testimonial Guides provide that endorsements and testimonials (1) must reflect the honest opinions, findings, beliefs or experiences of the endorser; and (2) must not contain any representations which would be deceptive, or could not be substantiated if made directly by the advertiser.

The district court had held that Garvey's statements in the infomercials did not provide an "endorsement" as defined by the Testimonial Guides. Specifically, the district court held that the FTC failed to present any facts establishing that consumers were likely to believe that Garvey's statements reflected the opinions of a party other than the advertiser's. The Court of Appeals affirmed that decision.

The Testimonial Guides are generally thought of as being guides for advertisers, and not as an independent basis for holding an endorser personally liable. Because the Court of Appeals simply affirmed the lower court's decision that Garvey did not provide an endorsement, it did not have to decide whether the Testimonial Guides provide an independent basis for endorser liability. The Court called on Congress and the FTC to clarify this area of law.

WHAT DOES THIS MEAN?

This decision is good news for celebrity spokespeople who are not actively involved in developing advertising claims. It does not, however, affect the potential liability of advertisers and others who develop the claims made by the spokespeople. Finally, more guidance on endorsements may be on the way as the Court called upon Congress and the FTC to clarify the rules that apply to endorsers. The FTC is expected to issue revised guides shortly.

FOR MORE INFORMATION

Kelley Drye Collier Shannon's Advertising and Marketing practice group is on the forefront of developing marketing and advertising industry guidelines and regulations. For more information about this issue of Advertising Law Alert or to learn more about how Kelley Drye Collier Shannon can help you increase the effectiveness of your advertising and marketing, please contact one of our team members at (202) 342-8400 or via email:

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