FTC Asks (Too?) Much of Retailers

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The FTC recently announced that it sent warning letters to five "major retailers" selling athletic mouth guards on their websites. According to the FTC, the retailers' websites included concussion claims that may be deceptive. The FTC urged the recipients of the letters to ensure that all concussion claims appearing on their sites are backed by "competent and reliable scientific evidence." The FTC also warned the recipients that "retailers, as well as product manufacturers, can be liable for violating the FTC Act if they disseminate false or unsubstantiated claims."

The FTC, meanwhile, has provided little guidance on what constitutes competent and reliable scientific evidence for concussion claims for mouth guards or other similar devices. It has issued no guidance documents, and the single case that it has brought in the area led to a settlement. The resulting settlement order simply requires "competent and reliable scientific evidence" for any future concussion claims, without elaborating on what the appropriate evidence might look like. What exactly constitutes appropriate science is, however, apparently the subject of debate among experts. The single existing mouth guard case prompted experts in the fields of general dentistry and sports dentistry to submit comments to the FTC both opposing and supporting the settlement. In finalizing the order, the FTC said nothing substantive about the positive comments. Regarding the negative comments, it stated only that although the science shows that some mouth guards "can reduce the impact to the lower jaw," there is currently no science directly linking mouth guards and reductions in concussion risk. In a vacuum of any substantial guidance, retailers and manufacturers, alike, will be hard pressed to know what evidence is good enough.

In the recent warning letters, the FTC cited the 1970s case, *Porter v. Dietsch*, in support of the proposition that retailers may be held liable for violations of the FTC Act. In that case, the FTC found a retailer, Pay'n Save, liable for disseminating deceptive ads for a weight loss product. The FTC found that Pay'n was liable even though it had not participated in any way in the creation of the ads, which had been provided by the product manufacturer. The Seventh Circuit affirmed the FTC's findings on liability, but narrowed the resulting order against Pay'n Save. Rather than applying to any future advertising by Pay'n Save for any weight loss product, the narrowed order would apply only to future advertising for weight loss products made by the same manufacturer. The court pretty clearly had misgivings with treating a retailer just like an advertiser, even if both are subject to the FTC Act. It observed that "the extent of a party's culpability has an important bearing . . . on the nature of the relief that should be granted."