

Who's Watching Dietary Supplement Advertising? Everybody!

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For several years now, dietary supplement advertising has been squarely on the radar of the FTC, state regulators, self-regulators, and last but not least, plaintiff's lawyers. A recent FTC settlement with the makers of the dietary supplement, Procera, highlights that point.

The FTC's investigation appears to have begun with a nudge from the self-regulatory body, the National Advertising Division (NAD). In 2009, the NAD reviewed the Procera marketing and recommended that the product makers discontinue performance and testimonial claims for boosting memory. In 2014, the NAD concluded that the Procera makers had not followed its recommendations, and it forwarded its case file to the FTC. The FTC, earlier this week, announced its settlement. That settlement, however, ties in state regulators from California who have also apparently been investigating the Procera marketing. Under the settlement, the Procera makers agreed to pay \$1 million to the FTC and \$400,000 to California. Injunctive relief that is part of the settlement requires, among other things, that the named parties possess well-designed clinical testing for any future claims that a "dietary supplement, food, or drug" will "improve or restore memory, mental clarity, focus, concentration, mood, or other cognitive or mental function" or "stop or reverse memory loss, or cognitive or mental decline."

By 2012, before the NAD referral to the FTC, the makers of Procera had settled at least one class action case. As part of that settlement, they established a fund to provide consumer refunds up to \$500,000.