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FTC Brings Action Against PR Agency and Publisher For Misleading Online Endorsements and Deceptively Formatted Advertising

The Bottom Line

- The FTC is, once again, making it clear that all involved parties have a duty to comply with the FTC's rules regarding paid endorsements and native advertising practices — and that it is equally willing to take action against agencies and publishers when they violate these rules.
- Failing to comply with these FTC requirements could expose an agency, the associated publisher, and even their owners, officers and directors in their individual capacities, to significant liability.

The Federal Trade Commission (FTC) announced a settlement with a public relations agency and its chief executive officer, as well as a magazine publisher and its sole owner, alleging claims that they misrepresented paid endorsements as independent consumer opinions and commercial advertising as independent journalistic content.

The Complaints

According to the complaints, HealthPro Brands Inc. (HealthPro) hired Georgia-based public relations agency, Creaxion Corporation (Creaxion), to help launch and promote a new insect repellent during the 2016 Zika virus outbreak to consumers, media, retailers, and others.

The FTC claimed that Creaxion's CEO contacted the owner of Inside Publications, LLC of Georgia (Inside Publications) to broker a partnership between HealthPro and Inside Publications through which Inside Publications would distribute the repellent to athletes and others attending the 2016 Summer Olympics in Brazil, the epicenter of the Zika outbreak.

According to the FTC, HealthPro and Inside Publications also entered into a "Social and Digital Media Activation and Athlete Engagement" agreement providing that Inside Publications would be paid for various services, including publishing a feature article and "advertorial" promoting the repellent, and marketing the repellent on social media.

The FTC alleged that two Olympic gold medalists – Carly Patterson and Jake Dalton — posted endorsements for the repellent on social media without disclosing that they were paid several thousands of dollars for their endorsements. These endorsements were allegedly reposted by Inside Publications — once again without any disclosures. According to the FTC, Creaxion and its CEO also conducted an online consumer review program that reimbursed employees and their "friends" for purchasing the repellent and posting online reviews for the product (again, without instructing these individuals to disclose their relationship with HealthPro in their posts).

The FTC contended that the respondents drafted, reviewed, and monitored several paid social media posts and advertorials that lacked appropriate advertising disclosures, and that Inside Publications' magazine ran paid ads for the product that were disguised as independent, editorial features or other articles of interest to its readers.

The complaint alleged that these practices violated Section 5 of the FTC Act by: (1) falsely representing that endorsements reflected the independent opinions and experience of impartial users; (2) failing to disclose material connections between the endorsers and the marketer of the product, specifically that certain endorsers were paid or reimbursed by, or employees of, the public relations agency promoting the product; and (3) falsely representing that paid ads were the independent statements and opinions of impartial publications.

Notably, the FTC looked to the agency's and publisher's contracts, as well as their degree of responsibility for and involvement in the marketing materials, in determining which parties should be named in the action — and, in an unusual but telling move, did not name the advertiser, HealthPro, in its complaint.

The Proposed Settlements

The proposed settlements prohibit the respondents from making such misrepresentations going forward, and require that they disclose material connections with, and otherwise monitor, any endorsers they hire and refrain from deceptively formatted advertising practices.

In particular, the settlements prohibit the respondents from:

- misrepresenting the status of any endorser or reviewer of a product or service, including misrepresenting that the endorser or reviewer is an independent user or ordinary consumer;
- making any representation about any endorser of a product or service without clearly and conspicuously disclosing, in the endorsement, any unexpected material connection between the endorser and any respondent or anyone else affiliated with the product or service; and
- misrepresenting that paid commercial advertising is a statement of opinion from an independent or objective publisher or source.

The orders also require that the respondents take specific steps to ensure that endorsers they use comply with the endorsement provisions of the orders, including by affirmatively notifying endorsers of their responsibilities, creating a monitoring system to review their endorsements, and terminating endorsers who fail to comply.

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