

Washington Court of Appeals Upholds Multi-Million Dollar Fine for 5-Hour Energy Advertising Claims

Thursday, April 4, 2019

On March 18, 2019, the Washington Court of Appeals [upheld](#) a trial court's decision that three advertising campaigns for 5-Hour Energy® made by Living Essentials, LLP and Innovative Ventures, LLP (collectively, Living Essentials) violated the Washington Consumer Protection Act (CPA) by making deceptive advertising claims.

Living Essentials makes and markets the energy drink 5-Hour Energy®. The three advertising claims at issue involve claims about the efficacy of the drink. Living Essentials claimed or implied that: (1) 5-Hour Energy® was "Superior to Coffee" (Superior to Coffee claim); (2) decaf 5-Hour Energy® was effective "for hours" (Decaf claim); and (3) 73 percent of doctors would recommend 5-Hour Energy® (Ask Your Doctor claim). The trial court found all three advertising claims in violation of the CPA. It also assessed a civil penalty against Living Essentials of \$2,183,747 and awarded the State \$1,886,866.71 in attorney fees and \$209,125.92 in costs. The court of appeals affirmed.

Living Essentials argued on appeal that the trial court (1) erred by adopting the Federal Trade Commission's (FTC) prior substantiation doctrine; (2) that the prior substantiation doctrine violates article I, section 5 of the Washington State Constitution and the First Amendment to the United States Constitution; (3) that Living Essentials' claims were mere puffery which did not require substantiation; (4) the trial court applied the wrong standard for necessary substantiation; and (5) the trial court erred in concluding that Living Essentials' Ask Your Doctor claim was deceptive. Living Essentials also challenged the trial court's penalty and award of attorney fees.

With reference to Living Essential's first two arguments surrounding the prior substantiation doctrine, the court of appeals was unconvinced. The issue of prior substantiation is an important one to understand for those in the product advertising space, so we take the opportunity here to provide further context. Section 5 of the Federal Trade Commission Act (FTCA) declares "**unfair or deceptive acts or practices** in or affecting commerce" to be unlawful (15 USC § 45(a)(1)). The [FTC Policy Statement Regarding Advertising Substantiation](#) affirms that advertisers "must have a reasonable basis for advertising claims before they are disseminated." The reasonable basis doctrine requires that firms have substantiation prior to disseminating a claim. Where an advertiser does not have the adequate substantiation for a claim, it necessarily lacks any reasonable basis for the unsubstantiated claim and it accordingly is deceptive.

Living Essentials argued that the trial court erred by relying on the FTC's prior substantiation doctrine, effectively creating a new *per se* unfair trade practice. The court of appeals disagreed, finding that the trial court, although was appropriately guided by the FTC's prior substantiation doctrine, had specifically declined to rely only on prior substantiation and did not adopt it as a *per se* violation of the CPA. As for Living Essential's argument that the application of the prior substantiation doctrine was contrary to article I, section 5 of the Washington Constitution and the First Amendment to the United States Constitution, the court of appeals were equally unconvinced.

Living Essential's third appeal argument was that substantiation was not necessary because the Superior to Coffee and Decaf Claims were "mere puffery" and therefore not actionable under the CPA. [The FTC Policy Statement on Deception](#) states that the FTC "generally will not bring advertising cases based on subjective

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claims... [or] cases involving obviously exaggerated or puffing representations, i.e., those that the ordinary consumers do not take seriously.” The court of appeals found that because the advertised claims about 5-Hour Energy® were factual representations capable of being tested, they were not mere puffery.

The court of appeals did agree with Living Essential’s argument that the trial court erred in applying the FTC substantiation standard for claims that “relate to consumer health.” The FTC [defines](#) a health claim as a “representation about the relationship between a nutrient and a disease or health-related condition.” When an advertisement alleges that a product has a relationship to a disease or health-related condition, FTC requires substantiation with “competent and reliable scientific evidence.” The court of appeals acknowledged that although 5-Hour Energy® is a dietary supplement, the advertising claims were not health claims. Dietary supplements can make structure/function claims, which are distinct from health claims, that describe the role of a nutrient or dietary ingredient intended to affect the normal structure or function of the human body. Such claims are not subject to a high standard of substantiation, but do need a reasonable basis to be made. Since the claims for 5-Hour Energy® were not health claims, the court of appeals agreed with Living Essentials that the applicable standard was not competent and reliable scientific evidence.

Nevertheless, the court of appeals found, based on their independent review of the record and evidence, that reversal was not warranted. The court of appeals agreed with the trial court that there was insufficient substantiation as no person with science training had evaluated the claims. The court pointedly stated, **“asking an advertising director who lacks any scientific or medical training to conduct internet research is [not] adequate substantiation.”**

Finally, Living Essentials argued that the trial court erred in determining that its Ask Your Doctor claim was deceptive. To note, the trial court found that, although the words in the Ask Your Doctor advertisement were literally true, the net impression was deceptive. The net impression was that 73 percent of doctors had specifically recommended 5-Hour Energy® as a health and safe dietary supplement. The trial court found that the surveys Living Essentials used were specifically designed to elicit certain responses from the doctors and that the statistics were presented in a way that would lead a reasonable viewer to believe that 73 percent of 3,000 surveyed would recommend the product, when in fact it was 73 percent of 503 doctors. The court of appeals states, based on the FTC Policy Statement on Deception, that the key question for the trial court was what the reasonable consumer would have taken away from the advertisement. The court of appeals agreed with the trial court’s conclusion that the reasonable consumer would have been misled by the Ask Your Doctor Claim.

The court of appeals upheld the trial court’s assessment of a hefty \$2,183,747 civil penalty against Living Essentials and award to the State of \$1,886,866.71 in attorney fees and \$209,125.92 in costs. Product advertisers should pay special attention to the lessons this case illustrates by ensuring adequate prior substantiation of claims in advertisements, especially if those claims are about diseases or health-related conditions. Advertisers should not only review explicit claims, but consider any implied claims that the advertisement may make or the net impression of a claim. Spending the time to adequately substantiate claims prior to advertising may make all the difference, especially when the alternative may be facing millions of dollars in penalties and fees.

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