Is Marriage a "Material Connection"? The FTC Challenges an "Independent" Expert Based on Marital Status

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Medical endorsements can be powerful selling tools for health care products. But if a medical professional has a connection to the company marketing the products that would be material to consumers in evaluating the credibility of the endorsement, the connection must be disclosed in advertising and promotion. A company that ran afoul of this requirement in an unusual way was the subject of an FTC enforcement action announced earlier this month. The FTC filed a Complaint and subsequently arrived at a Stipulated Final Judgment and Order concerning the marketing of a liquid supplement product under the brand name "Supple" for the relief of joint pain caused by arthritis and fibromyalgia. While most of the claims in the action focused on the lack of substantiation for representations made about the efficacy of the products in treating pain and repairing cartilage and joints, the FTC also took issue with the independence of the doctor who endorsed the product in various advertising media.

The defendants named in the action were Supple, LLC (the company marketer), Peter Apatow (Supple's founder and CEO) and Dr. Monita Poudyal, who was married to Apatow while serving as a medical endorser of the liquid supplements. By the time the Complaint was filed, however, Dr. Poudyal was identified as the "ex-wife" of defendant Apatow. What went wrong, at least with respect to the advertising and promotion of the Supple products? Lots.

In addition to making many unsubstantiated therapeutic health claims, the company presented Dr. Poudyal in an infomercial and in online advertising as an apparently

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independent medical endorser of the Supple liquid supplement products. In the infomercial, Dr. Poudyal acted as the medical expert and show-host, with Apatow as the guest. Dr. Poudyal's university training and board certification were prominently mentioned, but her marriage to Apatow, not so much. The existence of the relationship appeared only in what the FTC characterized as "teeny-tiny mouseprint" run simultaneously with a much larger on-screen message about how the Supple product could end joint and arthritis pain. To boot, the "disclosure" was only on screen for 7 second of the 30 minute infomercial. And within this teeny-tiny mouseprint, dense facts about Dr. Poudyal's medical credentials came first before indicating that Dr. Poudyal "had recently joined Mr. Apatow in matrimony, and is now assisting Supple, LLC with research and public education." Other ads made no mention that Dr. Poudyal was Mr. Apatow's wife.

The FTC complaint charged Supple LLC, Apatow and Dr. Poudyal with making many deceptive claims about the product's ability to treat pain, repair cartilage and restore mobility. In addition, the Complaint contained two different claims regarding the medical endorsement issue: (1) representing, expressly or by implication, that Dr. Poudyal is an independent, impartial medical expert; and (2) failure to disclose or to disclose adequately that Dr. Poudyal was married to Supple's founder and CEO at the time of making endorsements of the Supple product in the infomercial and on the website.

According to the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising, the rules are clear: "when there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed." The Guides themselves provide many helpful examples to help advertisers determine what is and is not a material connection that should be disclosed. If Apatow and Poudyal has referenced the guides before advertising Supple, they might have realized that the failure to prominently disclose their marriage was a bad idea.

In particular, Example 4 in Section 255.5 of the FTC's regulatory guide tells the story of a physician who was endorsing an anti-snoring product. The Guides conclude that consumers would expect the physician to be reasonably compensated for his appearance in the ad and thus a disclosure of this type of arrangement is not necessary. However, according to the guide, consumers are unlikely to expect that the physician receives a percentage of gross product sales or that he owns part of the company, and either of these facts would likely materially affect the credibility of the endorsement. As a result, the advertising example described by the FTC staff should clearly and conspicuously disclose the connection between the company and the physician.

The happy couple could have also consulted one of the many other FTC publications on how to make clear and conspicuous disclosures. For example, for video ads (including infomercials), the FTC staff recommends that disclosures should be: (1) in clear and unambiguous language; (2) in a font and color that's easy to read; (3) in a shade that stands out against the background and (4) on the screen long enough to be noticed, read, and understood.

The settlement announced by the FTC included a $150 million judgment, most of which has been suspended due to the financial condition of Supple and Apatow, as well as injunctive relief requiring scientific evidence, including human clinical studies, to support the varied efficacy claims made for the liquid supplement. The order also prohibits the company from making deceptive representations that medical endorsers are independent and objective when in fact those endorsers have a close personal or financial stake in company’s product sales. Interestingly, Poudyal was not on the hook for any of the financial judgment (consistent with the FTC's position that the advertiser is primarily responsible for any acts of false advertising), but she and the other defendants are all subject to the portion of the order permanently restricting them from advertising any products through the use of an endorser unless they disclose all material connections "Clearly and Conspicuously, and in Close Proximity to the representation."