

Ad Agency Liability: FTC Continues To Focus on Agency Role in Ad Campaigns

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Recent articles in [Forbes](#) and [National Law Review](#) highlight that the Federal Trade Commission continues to have advertising agencies in its sights when it comes to the role that agencies play in creating deceptive ads.

While the FTC's enforcement activity against businesses whose products or services are being advertised is frequent and well known, many are unaware that the FTC is also empowered to take action against advertising agencies who participate in deceptive ad campaigns on behalf of their clients. What's

more, advertising agencies can't claim ignorance about the contents of a campaign as a get out of jail free card. In particular, as included in the [FTC's online advertising guide for businesses](#) and as reflected by recent FTC enforcement activity, which we discuss below, agencies have an affirmative duty to independently check information used to substantiate advertising claims and cannot simply rely on an advertiser's assurances about the claims made.

At the forefront of the FTC's recent actions to hold ad agencies liable is a [2018 settlement](#) entered into by Minneapolis-based Marketing Architects with the FTC and the State of Maine, which included a \$2 million fine, the largest fine ever set against an ad agency. Marketing Architects specializes in creating direct response radio and TV ads, including radios ads with interactive voice response support inviting consumers to purchase products. Over the period January 2006 – February 2015, Marketing Architects developed these types of radios ads for a weight loss supplement company called Direct Alternatives, which advertised a number of purported weight loss products under the names AF Plus, Puranol, Final Trim and others.

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As laid out in the complaint filed by the FTC and the state of Maine, among the claims made in the radio ads were that “AF Plus is an amazing PROVEN breakthrough in weight loss” and that “th[e] product is proven and can cause dramatic weight loss.” A fictional company spokesperson also made statements such as “In six months of taking Puranol, I’ve already lost 30 pounds.” In reality, Marketing Architects did not have any substantiation for any of the claims made in the ads and did not find out from its client Direct Alternatives if any such substantiation even existed. Marketing Architects also engaged in other deceptive activity such as presenting the ads as objective news reports or public service announcements.

The unprecedented \$2 million dollar fine set as part of the FTC and the state of Maine’s settlement, was, at least in part, due to the fact that Marketing Architects had been the target of a prior FTC complaint for its ads for another client, and that it actually knew that its current advertising for Direct Alternatives’ AF Plus product was misleading and unsubstantiated. However, it’s worth noting that the FTC is able to impose liability on ad agencies in less extreme circumstances, including not only where an agency actually knew that an ad contains false or deceptive claims, but also where it should have known that an ad contains these types of claims.

The imposition of liability on ad agencies by the FTC and state attorney general offices shows the critical importance of ad agencies conducting an independent legal review of the advertising that they create for clients, and for making appropriate inquiry into a client’s ability to provide or develop appropriate substantiation for claims made about the performance or quality of the goods or services being advertised, as early as possible in the ad creation process.