

## CLIENT ALERT

### FTC Warns Retailers to Police Their Products' Deceptive Concussion Prevention Claims

September 18, 2014

As the storm of concussion-related litigation continues to churn, the Federal Trade Commission is once again wading into its turbulent waters. In August, the FTC sent warning letters to five undisclosed "major" retailers, expressing concerns that athletic mouthguards are being advertised deceptively on the retailers' web sites as helping to prevent concussions. These FTC letters represent the convergence of two trends at the Commission: (1) a recent focus on advertising claims of concussion prevention/protection; and (2) sustained efforts to hold retailers accountable for advertising claims concerning the products on their shelves.

#### Retailers in the Crosshairs

The FTC's letters mark the first time that the Commission has called *retailers* to account for allegedly deceptive concussion claims. They cite a 1977 FTC decision, *Porter & Dietsch, Inc.*, for the proposition that retailers "can be liable for violating the FTC Act by disseminating false or unsubstantiated claims." The FTC cited an example of a specific (and redacted) product, and recommended that the retailers review their web sites to ensure that they do not contain "concussion protection claims for which competent and reliable scientific evidence does not exist." The FTC stated its intent to revisit the retailers' web sites within 90 days, and implied that enforcement actions would be forthcoming if unsubstantiated claims were not removed.

FTC's concussion warning letters continue a trend of the Commission using the threat of enforcement against retailers essentially to turn them into deputized enforcers of false advertising rules. This practice places a substantial burden on retailers to demand substantiation of potentially questionable claims from product manufacturers.

#### Concussion Claims on the Brain at the FTC

In August 2012, the FTC reached a settlement with mouthguard manufacturer Brain-Pad, Inc., in which the company agreed to stop making certain claims that its products reduced the risk of concussions. The FTC followed this settlement with warning letters to 18 sports equipment manufacturers, "strongly recommend[ing]"

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that the companies review their marketing materials and product labels to ensure concussion prevention claims were substantiated by scientific evidence.

The FTC's actions followed a Senate Commerce Committee investigation into suspect concussion prevention claims by sports equipment manufacturers. More recently, in December 2013, the largest football helmet manufacturer, Riddell Inc., was served with a consumer class action alleging that the company falsely advertised that one of its helmet brands reduced players' risk of concussion.

Consumer lawsuits, like the action against Riddell, are spurred on by the high-profile class actions brought by amateur and professional athletes against the NCAA, NFL, NHL, FIFA and other leagues and governing organizations, alleging that these entities failed to protect athletes from the short- and long-term effects of concussions and other traumatic brain injuries. Completing the circle, the fears stirred by these lawsuits have prompted an increasing number of companies to develop products that purport to reduce the risk of concussions, and to make aggressive claims that are virtually certain to capture the FTC's attention.

#### **When Is A Concussion Prevention Claim Substantiated?**

The burden on retailers asserted by the August 2014 FTC letters is particularly problematic when advertising claims concern subjects where the science is in flux, which is the case with concussions and other traumatic brain injuries. Spurred by public awareness and a mushrooming litigation docket, the scientific study of concussions in sports continues to evolve rapidly. Nonetheless, it is noteworthy that the FTC has yet to issue specific guidance on concussion prevention claims. Retailers of sporting goods should therefore consider educating themselves in the fundamentals of concussion science in order to be alert to claims that sound too good to be true.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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