

## ADVERTISING & MARKETING BULLETIN

April 2008

### TOO GOOD TO BE TRUE? HEALTH CLAIMS IN ADVERTISING

Businesses that advertise using their products reduce the risk of cancer must tread carefully this year. By launching “Project False Hope” to combat misleading advertising of cancer products online, the Fair Business Practices Branch of the Competition Bureau (the “Bureau”) has identified this issue as an area of focus in 2008. As a result, now is a good time to examine your company’s marketing practices to ensure that they do not violate the deceptive marketing provisions of the federal *Competition Act* (the “Act”).

#### *Deceptive Marketing Practices in General*

The Act contains provisions which allow the Bureau to police the marketing practices of businesses to ensure they are not deceptive. In particular, there is a prohibition against promoting a product by making a representation to the public that is false or misleading. As well, there is a requirement that any claim made about a product or service must be properly substantiated.

The negative consequences to businesses found to have engaged in deceptive marketing practices are substantial. One significant consequence is negative publicity. The reputation of a business suffers further when that business has to post an apology on its website or advertise that apology in Canada’s national newspapers in order to settle the Bureau’s investigation into their marketing practices.

In addition to the negative publicity that comes from a Bureau investigation, violations of the Act’s deceptive marketing provisions can result in criminal charges or administrative monetary penalties of up to \$100,000 for a first offence and \$200,000 for a second offence. If a business chooses to negotiate a settlement with the Bureau, then this amount could increase to a seven-figure sum as the recent history of such settlements attest.

#### *TEAM Enforcement*

The deceptive marketing provisions of the Act apply to all businesses, but the Bureau has identified cancer claims as an area of particular concern.

The Bureau uses an approach it calls the Targeted Enforcement Approach to Markets (*TEAM*), as part of its efforts to curb deceptive marketing practices. Under *TEAM*, the Bureau gathers market intelligence from a variety of sources including public complaints, stakeholder consultations, media monitoring, literature reviews and academic partnerships. The Bureau analyzes this intelligence to identify and assess the current issues in the marketplace in terms of the risks to consumers and the state of competition in the market. This allows the Bureau to focus its resources on those issues that pose the greatest overall risk at any given time. Further, these risk assessments are continually updated as the market evolves. For example, last year using *TEAM*, the Bureau focused on products that made weight loss claims and also on clothing that claimed to protect the wearer from harmful UV rays.

The response from the Bureau to a given issue will include a blend of enforcement, education and outreach. This approach will therefore be both remedial and proactive, allowing for the prevention of some problems from ever reaching the marketplace, while properly reprimanding businesses that do not comply with the Act. Further, the Bureau will use certain performance measures as goals which will assist it in deciding when to move to a new issue.

#### *Health and Cancer-Fighting Claims*

Cancer is Canada’s leading cause of death. The Bureau has gathered intelligence from its web surveillance operations indicating that 80% of online consumers look for health information online. It is no surprise that fraudulent cancer claims

are a priority when the Bureau's intelligence also shows that 44% of these online consumers will likely encounter a website selling a cancer-fighting related product or service and 75% of cancer-fighting product consumers will not conduct any due diligence on the company from which they make a purchase. Furthermore, Bureau intelligence suggests that over 50% of people say that the information they find online will impact the care that they seek for themselves or someone else.

The Bureau is responding to this intelligence with a dedicated team to conduct both online and offline enforcement, consumer education and outreach, and to develop and strengthen strategic partnerships which raise awareness of deceptive marketing conduct. The Bureau is also mindful of the fact that, with such a sensitive issue, they have to accomplish this goal without removing hope for the millions of Canadians who want to see cancer eradicated.

In addition to the deceptive marketing prohibition in the Act, the federal Food and Drugs Act ("FDA") prohibits the advertisement of any food, drug, cosmetic or medical device to the general public as a "treatment, preventative or cure" for a number of diseases, including cancer. Contravening the FDA prohibition carries the risk of fines and imprisonment. Companies that advertise products that fall outside making a "treatment, preventative or cure" claim, but cannot substantiate the health claim, may still encounter a Bureau investigation even if the FDA prohibition has not been violated. Businesses that market a food product as one that reduces the risk of cancer must also comply with the prescribed wording in the FDA Regulations as explained in the Canadian Food Inspection Agency's 2003 Guide to Food Labelling and Advertising.

While the Bureau has identified fraudulent cancer claims as one area of special concern this year, this does not mean your businesses marketing practices are immune from Bureau scrutiny if your business is not in an area of Bureau focus. Therefore, all businesses should have a system for reviewing marketing practices to ensure they are not deceptive. This preventive measure could save your company from costly legal proceedings and substantial negative publicity.

*By Jonathan Hood, Les Chaiet and Andrew Warman*

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*The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.*

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## **ABOUT OUR ADVERTISING & MARKETING GROUP**

The landscape of laws, regulations and codes governing advertising and marketing is complex and multi-jurisdictional. Our Advertising and Marketing Group has the knowledge and experience to help businesses comply with these legal requirements, without weakening the marketing effectiveness and creative brilliance of our clients' ideas. Our advertising and marketing clients operate in a wide range of business sectors, including automotive, food and beverages, consumer credit and other financial services, cosmetics, consumer goods, drugs, education, gaming, media and entertainment, electronics, publishing, medical devices, retail, textiles and telecommunications.

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