Your Product, Your Claims: Retailers Measure Their Responsibility

By Anthony Raissen

We all know the story: products on TV have historically made very strong claims and many end up being challenged. The days of infomercials making bold claims and using testimonials that overpromise and under deliver — as well as relying on questionable clinical support — are becoming a thing of the past.

Most newcomers to the world of direct response have been extremely naive to the Federal Trade Commission (FTC) and Food and Drug Administration (FDA) requirements for clinical studies and claims substantiation, while, at the same time, experienced DR marketers are often too overconfident in their own knowledge of these requirements to revisit the guidelines and/or listen to sound advice.

Now there is one more step for DR marketers to climb: retailers' requirements for anyone trying to make the transition from DR to retail. The law has become increasingly tougher for retailers that have historically relied on manufacturers' marketing and sales materials as substantiation for product claims.

Adding to this, it is not just product claims that are being scrutinized, but your warning labels and directions for use are also being targeted for accuracy and legal compliance in an effort to make sure that consumers are protected from any and all possible adverse conditions.

As in most cases, the legal system has adapted to "follow the dollar" to the deepest pockets, and when a product finds its way onto a retailer's shelf, we all know who has the deep pockets. This has resulted in retailers being forced to take a very serious look at claims and substantiations for any new items presented to it. The result of this scrutiny is that it can now take even longer for a product to go from DR to retail.

In some cases, retailers are prevented from bringing in a new item due to a previous problem that may have resulted in the retailer agreeing to a consent decree in order to avoid severe penalties and fines for carrying a specific product or ingredient.

One way that retailers have taken this even further on their own is to increase the minimum insurance requirement for vendors. Not too long ago, it was common for retailers to require a $2 million policy covering them for claims resulting from a bad product. But, nowadays, that coverage minimum has been raised to $5 million.

What does this mean for manufacturers? At the end of the day, a manufacturer knows that it has to follow a set of rules and guidelines when entering the market with a new product — and, for the most part, all do. What this additional scrutiny could do is to add an unnecessary and very burdensome layer to getting products to the market. The final decision whether a retailer brings in a new product or not could very well be left to the retailer's legal team, who, for fear of not receiving sufficient substantiation, could decide against approving a certain product.

Taking this even one step further, the courts are now holding manufacturers liable for consumer posts on websites and blogs, as this is now seen as a form of advertising. So what happens when a retailer sells your product on its online store and consumers post reviews or comments: you and the retailer could be liable for claims and testimonials of which you are not even aware.

I am all in favor of accountability for our actions, but I believe that placing the burden of substantiation on the retailer is taking things too far and creating an unnecessary barrier to the already tough challenges of getting new and innovative products onto retailer shelves.

Now more than ever, to protect yourself and you products, it is becoming imperative to have your claims, warning labels and directions for use examined by attorneys expert in FTC/FDA actions prior to submitting your products to retailers. ■

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