Endorsement Liability: Putting Your Good Name at Risk

Endorsements designed to sell products are most effective when the endorser is a celebrity or an expert. If such endorsements contain misrepresentations, the endorser risks personal liability. For products related to health and safety, endorsements are subject to evaluation by reliable independent sources. In a number of high-profile cases, the Federal Trade Commission determined that endorsers must have a reasonable basis for their representations. (Aesthetic Surg J 2001;21:373-374.)

What do Dr. Harvey Glass, Gordon Cooper, Pat Boone, Lloyd Bridges, and George Hamilton have in common? They were all successfully sued for providing endorsements for products or services that harmed consumers.

“Endorsement liability” results from engaging in a deceptive trade practice that creates unfair competition as a result of fraud or negligent misrepresentation. Action may be taken by the Federal Trade Commission (FTC) or by individual consumers under the state unfair business practices acts (the FTC act does not provide consumers with a private right of action).

The FTC definition of an “endorser,” generally used by courts, states, “An ‘endorsement’ means any advertising message...consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser.”

A consumer may rely on the endorser’s opinion only if such reliance is reasonable. Consequently, there is no endorsement if the speaker is unidentified and unknown and speaks not on the basis of his or her own opinion but on behalf of the sponsor as a spokesperson. Likewise, it is not an endorsement if unknown actors perform a script, for example, 2 women discussing laundry detergents. The endorser’s professional reputation as a celebrity or expert is therefore relevant in determining whether the consumer’s reliance is justified.

Endorsements are designed to sell products, and the most effective endorsements come from entities or persons with strong credibility. For instance, Lloyd Bridges and George Hamilton encouraged consumers to invest in Diamond Mortgage Company through A. J. Obie & Associates. The pitch was that “Obie” would invest in deeds of trust arranged by “Diamond” with high-risk borrowers, thereby guaranteeing high profits for investors. George Hamilton’s endorsement was, “Hundreds of millions of dollars. That’s how much Diamond has arranged in new first mortgages during the many years I’ve been talking to Midwest homeowners. For many years now, I’ve been telling homeowners how Diamond can help them to a better life. Do call the Midwest’s number-1 mortgage broker, because Diamond wants to be your friend.”

When it was revealed in criminal and bankruptcy proceedings that tens of millions of dollars of investments had been diverted to Obie and Diamond owners, investors sued the actors under Illinois’ Consumer Fraud and Deceptive Practices Act for making such endorsements when they either knew or should have known that both businesses were in financial distress. Both the FTC and bankruptcy court denied summary judgment to the actors, finding that endorsers not only have a duty to investigate their sponsor, but that even innocent misrepresentations are actionable under the Illinois Act.

Of course, to find liability, there must be a misrepresentation. Johnny Unitas, of the former Baltimore Colts, merely introduced his “friends at First Fidelity” and invited the public to call First Fidelity for more information. Because he did not make any statements that a reasonable consumer would construe as a representation,
despite his celebrity status, he was deemed to be just a spokesperson with no personal liability when the mortgage/investment broker went out of business.\textsuperscript{8}

To avoid personal liability, endorsers must have a reasonable basis for any representations they make. Pat Boone was president and principal owner of Cooga Mooga, a business that marketed health-related products, including Acne-Statin. Through magazine, newspaper, and television advertising, Mr. Boone claimed not only that Acne-Statin was a cure for acne (it was not), but that his daughters had used this product successfully (when they had not). In addition, he falsely demonstrated Acne-Statin’s effectiveness with photographs of staphylococci and other facial bacteria that are unrelated to the bacteria that cause acne.\textsuperscript{9}

In the cease and desist consent order, the FTC stated that Pat Boone must possess information “independently evaluated by reliable sources...in order to provide a basis for an endorsement.”\textsuperscript{10} They also ordered him to pay restitution to his customers.

However, different rules apply to products or services unrelated to health or safety. In cases in which the evaluation of such products or services requires no professional expertise but may be properly evaluated by a layperson, the endorser’s personal experience is sufficient.\textsuperscript{11}

Experts who choose to endorse products are held to the same standards as other endorsers, and they also must have a reasonable basis for their representations. Harvey Glass, MD, a New Jersey dermatologist, promoted Acne Lotion 22 and Acne Masque in national magazines and newspapers, claiming that the products had been scientifically and clinically proven to be effective in curing acne and destroying the bacteria that cause it. Dr. Glass consented to cease and desist his endorsements until he possessed a “reasonable basis for such representations,” which the FTC defined as “competent and reliable scientific or medical evidence” consisting of “at least 2 double-blind clinical studies” conducted by “dermatologists who are recognized as specialists in acne and its treatment.”\textsuperscript{12}

Not surprisingly, liability will also be incurred if the endorser’s field of expertise does not match the subject of the endorsement, as happened with a psychiatrist who endorsed The Rotation Diet\textsuperscript{13} and a former National Aeronautics and Space Administration astronaut, Gordon Cooper, who endorsed the Turbo-Dyne Energy Chamber, an after-market automobile product alleged to deliver an additional 7 miles per gallon.\textsuperscript{14} In Cooper’s case, the FTC determined that not only were there no competent scientific tests confirming such claims, but Gordon Cooper’s experience as an astronaut did not qualify him as an expert in the field of automobile engineering.

Unknown and unidentified spokespersons who merely express the sponsor’s opinion have no personal liability. Endorsers, on the other hand, express their own opinions. Personal liability follows if those opinions contain misrepresentations, even if they are innocent, which a consumer reasonably relies on. Whether a consumer’s reliance is reasonable depends on the endorser’s credibility, which is highest for celebrities and experts. Finally, the endorser may escape liability only by having a reasonable basis for any opinions expressed in the endorsement.

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**References**

2. 16 CFR §255.0 (6) (June 27, 2001).
3. 16 CFR §255.0 example 3 (June 27, 2001).
4. 16 CFR §255.0 example 2 (June 27, 2001).

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