

Justin Prochnow ([00:00](#)):

Hello and welcome to Legal Food Talk. I'm your host, Justin Prochnow, a shareholder in the Denver office of the international law firm, Greenberg Traurig. This is a podcast brought to you by our food, beverage, and agribusiness practice to give you some insights and knowledge about the world of food, beverage, and agribusiness.

Justin Prochnow ([00:36](#)):

Today, we are going to talk about endorsements and testimonials. I'm going solo today to bring you some of our expertise on this subject. Endorsements and testimonials are an interesting advertising vehicle because they're one of the most persuasive forms of advertising. For that reason, they also are one of the more scrutinized forms of advertising by both the Food and Drug Administration and the Federal Trade Commission, so it's really important that if companies are using endorsements and testimonials in their advertising, that they understand what the criteria is that both the FDA and the FTC use when evaluating those types of claims.

Justin Prochnow ([01:26](#)):

Really, those are the two agencies that are going to be evaluating the use of endorsements and testimonials in your labeling or advertising, so we'll talk briefly from the FDA perspective, because for the most part, it's going to be the FTC that is really concerned about the use of endorsements and testimonials, but the FDA has been increasing their focus and concentration on the use of endorsements, testimonials, and I would say moreso lately, customer reviews that are posted on websites, social media outlets, or other online e-tailer websites.

Justin Prochnow ([02:09](#)):

Probably the most important thing to keep in mind when a company is using endorsements and testimonials in their labeling or advertising is that the use of endorsements or testimonials essentially makes those endorsements or testimonials adopted statements of the company. I often review companies, websites, social media pages, and other platforms for content to make sure they're in compliance and I often hear from the companies that, "Well, we're not saying that, it's just the honest opinion of our customers." Well, the reality is when you use an endorsement, a testimonial, a customer review in your labeling or advertising, it becomes a statement of the company, so you can't get around it by saying, "Well, we're not really saying that, that's just what our customer is saying."

Justin Prochnow ([03:08](#)):

The reality is once you use it in your labeling or advertising, you as a company are saying it now as well, so you have to be very careful about the content in those endorsements, testimonials, and reviews. Basically, you have to view it from this standpoint: A company may not use any endorsement, testimonial, or review that says anything that the company would not be allowed to specifically say itself, so if I'm selling a non-drug product, a food, it's a beverage, a dietary supplement, a cosmetic, I'm not allowed, as we've talked about on other episodes of this podcast, I'm not allowed to sell a product to diagnose, treat, cure, or prevent any disease. Since that is the case for any company selling products, it's also the case for any customer reviews, testimonials, or endorsements that a company might use in marketing its products. You may not use a customer review or an endorsement that suggests that a company's product will also help diagnose, treat, cure, or prevent a disease.

Justin Prochnow ([04:23](#)):

For example, let's say we have Justin's immune support product and my claims are consistent with those claims that we talked about in episode one of this podcast, that it will help maintain a healthy immune system. But then in my customer reviews that I've posted on my website, I post a review from a woman in Tulsa, Oklahoma who says she tries Justin's Immune Support and now she never gets colds or flu anymore. I have now made my product a drug product because I have used an endorsement or testimonial that suggests that my product will help with colds and flu. Even though I'm not saying it myself, once I use that endorsement or testimonial in my product labeling or advertising, I am now adopting that statement as a statement of the company.

Justin Prochnow ([05:21](#)):

Rule number one when you are evaluating whether you can use any endorsements, testimonials, customer reviews in your product labeling or advertising is you cannot use any reviews that make nonpermissible claims for the types of products that you are selling.

Justin Prochnow ([05:38](#)):

Rule number two is that because those now become adopted claims of the company, you must have substantiation for each of those claims made in those reviews in the same way that you would need substantiation for those claims if made yourself, so even if they're permissible claims, let's go back to Justin's Immune Support, a very popular product, and the next review doesn't say that it will treat colds and flu, but it says, "It really helps with my immune system, keeps me healthy, but the other great thing was I lost 20 pounds taking that product."

Justin Prochnow ([06:18](#)):

If I use that endorsement or testimonial in my labeling, I not only must have evidence that it will help support a healthy immune system, which I likely do because those were claims I was making for my product, anyway, I also must have evidence that this product will help someone lose 20 pounds, which I don't likely have, or I would be making those claims myself. In addition to not using customer reviews that make disease claims, a company also should not be using customer reviews that make claims outside the scope of what have already been vetted for that product, because at the end of the day, the FTC or the FDA can ask me for the substantiation to support those endorsements or testimonials, and I must be able to provide it.

Justin Prochnow ([07:13](#)):

Those are really the two main points that the FDA looks at when evaluating endorsements, testimonials, customer reviews. It is an increased area of focus from the FDA. The FDA in recent warning letters and enforcement actions has taken a, I will say, heightened interest in customer review pages and other pages suggesting comments from customers. The FDA has also sent recent warning letters regarding actions by a company on social media that the FDA has basically said suggests that a company is endorsing the comments of those customers, so things like liking a posting on Facebook or retweeting a comment that has been tweeted can be viewed by the FDA as evidence that the company is endorsing those statements.

Justin Prochnow ([08:17](#)):

Again, we take the example of, let's say the woman from Tulsa posted on my company's website that she loves Justin's Immune Support because she takes it and no longer gets colds and flu, and I like that

comment, or I retweeted if it was posted on a Twitter feed, the FDA can also look to that as evidence that I am really endorsing those statements.

Justin Prochnow ([08:43](#)):

Now, in my opinion, it's unlikely the FDA would initiate action based solely on those types of actions, but they have certainly identified it in warning letters as additional evidence of how a company is really intending to sell the product, so it is important for a company to review customer review pages if they are on your website to ensure that proper claims are being made. It's unlikely that the FDA or the FTC would take action against the company if someone posted something, let's say on Thursday afternoon, you're not going to get a call from the FDA on Friday morning. But if those reviews have been around for a lengthy period of time, and the company has done nothing to remove or revise those reviews, it is a possibility that the FDA or the FTC could take action based on those customer reviews.

Justin Prochnow ([09:51](#)):

One of the questions we often get is, "I understand what you're saying about our website, but what about some other e-tailer's site where we have no control over those reviews?" The answer would be: You're not going to be held accountable for reviews posted on sites that you can't modify those reviews, but if you aggregate those reviews onto your website, then you do become responsible, so it really goes to who is responsible, who has the control over those reviews. If it's the company, then you're going to need to adjust those to make sure they're in compliance.

Justin Prochnow ([10:30](#)):

From an FDA standpoint, it's really the content of those reviews: Are you able to substantiate the content of those reviews and is the content of those reviews, consistent with the parameters for how you can sell that product? From the FTC side of things, they're looking at it a little bit differently. We've talked about the FTC before. They're charged with enforcing Section Five of the Federal Trade Commission Act, and basically, their goal is to prevent deceptive and unfair acts or practices, so when they evaluate advertising, they review all advertising under the criteria of it having to be truthful, not misleading, and adequately substantiated.

Justin Prochnow ([11:19](#)):

Now, when we talk about endorsements and testimonials, the FTC really first issued some guidance concerning the use of endorsements and testimonials in 1980, and then had big revisions to those endorsements and guidelines in 2009. More recently, they updated those guides to address, of course, social media issues, which has become probably one of the bigger areas where the FTC has taken action in this area. When the FTC is evaluating endorsements and testimonials, again, they're really looking to make sure that the statements are truthful and not misleading, so one of the first things that's important to evaluate when you're using endorsements and testimonials is that they are considered to be reflective of what a typical person can expect from using a product.

Justin Prochnow ([12:23](#)):

This comes up most often in the context of weight-loss products. We did a previous episode on weight-loss claims with my colleague, Michael Goodman. If you're interested in weight-loss claims, you should check out that episode. But when we talk about weight-loss endorsements and testimonials, those tend to be some of the most influential types of endorsements and testimonials.

Justin Prochnow ([12:47](#)):

Again, when a consumer is making an endorsement or testimonial, those testimonials are viewed as what a typical person can expect from using the product. Especially in the case of weight loss, if you have a testimonial from someone who says, "I took this product and I lost 50 pounds taking the product," unless a typical person can expect to lose 50 pounds, that is not going to be considered a permissible type of endorsement without making disclosures to what a typical person can expect. Essentially, if a testimonial is not reflective of what a typical person can expect, then the company should be disclosing what a typical person can expect. This is why in the case of weight-loss products, you really need to have your own clinical trial conducted on the product to establish what a typical person can expect from using your product. If you haven't done that, then you really shouldn't be using endorsements or testimonials that describe specific amounts of weight loss.

Justin Prochnow ([14:05](#)):

There's one exception to this general rule and that is if you describe the specific circumstances in which someone lost their weight or experienced their benefits to establish what those specific circumstances were, then you can potentially use a testimonial that might not be indicative of what a typical person can expect.

Justin Prochnow ([14:32](#)):

For example, if you have someone that says, "I lost 50 pounds taking Justin's Weight Away dietary supplement. In conjunction with that, I went for a walk twice a day. I ate salad for lunch, I only ate protein shakes in the afternoon, and I took the product twice a day," then it would be more clear about the specific circumstances in which you consume that product.

Justin Prochnow ([15:03](#)):

Really, for the most part, this is why we generally recommend that when companies have weight-loss products, that they offer them in conjunction with a healthy diet and exercise program, because again, unless you have done a specific clinical trial to evaluate what a typical person can expect when using the product, it is likely that your endorsement or testimonial is not going to be viewed as reflective of what atypical person can expect.

Justin Prochnow ([15:35](#)):

Endorsements and testimonials can come in a number of different ways. Of course, we have written statements, but commonly, especially again, in the weight-loss area, but also in the bodybuilding/muscle-building area, before-and-after pictures can be endorsements in and of themselves. Typically, they're accompanied by statements about how much weight was lost or how much muscle was put on, but it should be known and truthfully should be known that the FTC is likely to put more scrutiny on before and after pictures because of the influence that they have with potential consumers.

Justin Prochnow ([16:22](#)):

Once we get past the content of those testimonials, there's another really important part of testimonials and endorsements that I want to make sure companies are aware of. This has been a big focus from the Federal Trade Commission in the last couple of years. That is the issue of material connections. You are

required to disclose any material connections that there are between an endorser of the product and the seller of the product that would not be reasonably expected by an audience.

Justin Prochnow ([16:57](#)):

Material connections are any connections that might materially affect the weight or credibility of an endorsement. They can be of a personal nature; the person making the endorsement is the husband, wife, partner, father, mother, sibling, offspring of the owner of the company. It can be a financial interest, they're getting paid for their endorsement, or of a business nature, they have an investment in the company, they have a principal position in the company. Any of those types of material connections are required to be disclosed.

Justin Prochnow ([17:42](#)):

It doesn't mean just because there is a personal connection, a financial connection, a business connection that an endorsement or testimonial is not true. Certainly, just because the person has a connection, it doesn't mean what they're saying is not totally truthful, but the FTC believes that those types of material connections are important for a consumer to at least know of when deciding to evaluate how much credibility they want to give to that endorsement.

Justin Prochnow ([18:16](#)):

Again, for example, you have an advertisement featuring the testimonial of a man touting large amounts of weight loss he achieved by using a particular product. Putting aside the issues that we have about needing to substantiate those claims, it's also true that the man is a part-owner of the company. While that testimonial may very well be true, that connection of that person being a part-owner of the company needs to be made clear in conjunction with that endorsement or testimonial to ensure that people can evaluate that and give it the proper credibility that they want to.

Justin Prochnow ([18:59](#)):

That can be done in a number of different ways. It can be just below the name of the person where it says "co-owner." It can be where he says something. Some of you might remember way back when, there was a hair loss product, Sy Sperling. I think it was Hair Club for Men, where he said, "I'm not only an owner, I'm a customer," that's basically a material connection disclosure. He's disclosing that he is the owner of the company. Again, it doesn't mean what he's saying isn't true, but it does mean that he needs to make that connection.

Justin Prochnow ([19:41](#)):

What makes it somewhat interesting these days is the use of social media platforms for making endorsements and testimonials and some of the lines that are blurred. It used to be the case that it was pretty obvious that you knew someone was endorsing the product. When you have Michael Jordan on TV touting Gatorade, or any one of a number of celebrities on TV doing ads, there's no requirement to disclose a material connection. You know that that is an advertisement. Where it becomes a little bit trickier is when a celebrity does it more organically. Let's say they're on a talk show and they start talking about this experience they had and how this product really helped them. If they're an owner of that company, they really should be disclosing that when they're talking about it to make it clear what the issue is.

Justin Prochnow ([20:42](#)):

There was a case a couple of years ago involving 50 Cent. He tweeted out that there were these great new headphones that he really liked and there was a huge spike in the sales of those headphones because 50 Cent had endorsed them. Not until later did he send out another tweet that disclosed that he was, in fact, a part-owner of that company. The FTC has talked about this in some speeches since that time, that that really was not an appropriate disclosure, that that disclosure needed to be made at the time he made the initial tweet, and not later in the day, because again, it might be that people will buy it even more knowing that he's an owner of the company, but that should be something that people should know so that they can take that into account when making those determinations.

Justin Prochnow ([21:39](#)):

This is really what has been the focus of the FTC lately has been how companies make those disclosures. In the context of social media, again, sometimes it gets a little tricky. You have something like Twitter, where you only have a certain number of characters. How do you make those disclosures that it's an endorsement or an ad? Sometimes you'll see "#paidad," "#endorser," something that needs to be clear that it is. The FTC has said you can't bury it amongst a number of other hashtags, so I can't say, "#awesome, #thebest, #paidad, #dontuseanythingelse." It needs to be clear and set apart from everything else.

Justin Prochnow ([22:25](#)):

The focus on celebrities and influencers has really become an increased interest. Several years ago, the FTC, I guess it's been four years now, it's hard to believe, about four years ago, the FTC took some action against influencers. They issued a whole guidance talking about different types of influencers and they really talked about the need for influencers to be better about disclosing material connections. In April of 2017, the FTC sent 90-plus letters out to various influencers and companies "reminding them of their duties to disclose material connections and indicating that, they must be unambiguous, they must be not in the middle of other hashtags, they must make it clear."

Justin Prochnow ([23:21](#)):

Six months later, the FTC sent out 21 follow-up warning letters taking a little bit more aggressive approach to them and saying, "Hey, we told you this and you need to make sure that you're going to do this to be compliant." In conjunction with that, a lot of times the FTC likes to take some action just to drive their point home. They announced a settlement with an online gaming service called CSGO and two influencers who were well-known gaming influencers and they were really touting and promoting this game and sent out numerous YouTube videos and tweets encouraging people to play this game. Turns out that they also happened to be co-owners of the company and they did not disclose that when they were talking about the games. Again, the FTC says this is something that you need to disclose. Again, the fact that they're owners might make it more likely that people would buy it, but really something that the FTC has driven home: You need to disclose material connections. An important aspect of using endorsements and testimonials, disclosing material connections.

Justin Prochnow ([24:37](#)):

Really, the use of endorsements, testimonials, reviews has just continued to increase as a vehicle for companies to promote products, and especially the use of customer reviews. When I review websites, that's often one of the first places I go to because it tends to be the area where companies just lack the knowledge and information about compliance in that area, I would say, and for the same reason that it has become an increased focus from the FDA. I would say customer reviews/endorsement sections of

websites and blog sections of websites are really two areas where the FDA and the FTC have really increased their focus and concentration, so really important that companies evaluate those claims.

Justin Prochnow ([25:34](#)):

To recap, the main issues that you want to look at are A, do those reviews, endorsements, testimonials reflect the same content as what a company would be allowed to make? I cannot use reviews, endorsements, testimonials that make claims that the company would not be permitted or authorized to make directly. That's the first evaluation: You must either revise or remove any endorsements, testimonials, reviews that make disease claims for non-drug products.

Justin Prochnow ([26:18](#)):

The second one is to make sure that any of the reviews, any claims in reviews, I as a company am able to substantiate those claims. Again, the fact that a customer says it, I have to be able to back it up. The main reason for this is that the FTC says that reviews are inherently unreliable in many cases because customers say that, but you don't know what the background is. They say, "Oh, I use Justin's Immune Support and I also lost 20 pounds." They forget to tell you that they've been doing the exercise bike twice a day for the last 30 days, or that they went on a 500-calorie diet, and so because of the somewhat inherent unreliable nature of customer reviews, the FTC and the FDA require that you have substantiation to back up those reviews as well.

Justin Prochnow ([27:15](#)):

A, no disease claims. B, make sure that you have substantiation to back up those claims. C, make sure that those reviews are reflective of what a typical person can expect from using your product, and if not, you need to disclose what a typical person can expect. Then finally, D, material connections, make sure that you disclose any material connections that exist between the person touting or reviewing the product and the company, so if there's a personal relationship, if that person is associated with the company in some way, if those endorsers received free product or are getting paid for their endorsement or review, any of those types of things really need to be disclosed. Again, doesn't mean that they're not true, the FTC has just decided that those are things that customers should know when they're evaluating how much credence to give to those endorsements or testimonials.

Justin Prochnow ([28:19](#)):

That's the Reader's Digest version of endorsements, testimonials, customer reviews. Happy to discuss them further with anyone as needed. You can reach me by my email at [@prochnowjj](#), that's P-R-O-C-H-N-O-W-J-J @ gtlaw dot com. I hope you found this information useful. If you enjoyed this episode, please give it a good review on whatever social media or other platform you are listening to. We look forward to checking in with you again on future podcasts. Thank you.