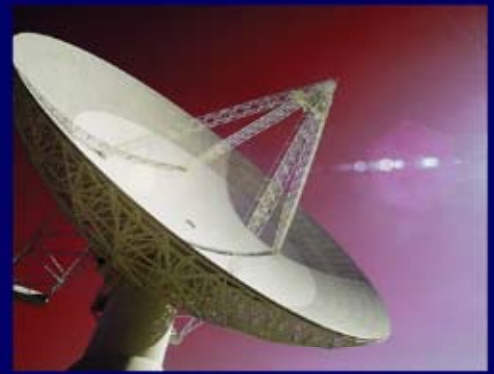




*Sports and Nutrition Advice Online:
What Are the Risks?*

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DISCLAIMER

- The opinions stated during the course of this presentation are the personal opinions of the presenter and may not represent the views or opinions of Patton Boggs LLP.
- This presentation is for informational purposes only and does not constitute legal advice or the formation of an attorney-client relationship.

BIOGRAPHY

- Patton Boggs LLP
Of Counsel
- Latham & Watkins LLP
Senior Associate
- Cytodyne Technologies, Inc.
General Counsel
- Bronx County District Attorney
Assistant District Attorney

Sports and Nutrition Advice

- Type, manner and frequency of exercise
- Diet methods
- Sports training techniques
- Use of dietary supplements
- Promotion of individual skills, expertise and training
- Promotion of services

POTENTIAL RISKS

- *Product Liability-Personal Injury*

“I followed your advice, ate a high-fat, low carbohydrate diet and suffered a heart attack.”

“I followed your advice, started a new strength-training program, and was seriously injured.”

POTENTIAL RISKS

- *Consumer Fraud*

“Your website is misleading/deceptive/false because you didn’t properly advise me of a certain risk.”

“Your website is misleading/deceptive/false because you omitted certain information.”

“Your website is misleading/deceptive/false because certain information on the website has a tendency to deceive consumers.”

POTENTIAL RISKS

- *Rendering of Medical Advice/Unauthorized Practice of Medicine*

“I thought a Ph.D. was a medical doctor.”

“I never thought to check with my doctor before starting this exercise program.”

“He answered my medical questions so I assumed he was a medical doctor.”

POTENTIAL RISKS

- *Failure to Safeguard Private Information*

SOLICITED VERSUS UNSOLICITED ADVICE

- Distinction between answering questions posed to you versus mass e-mail distribution of information.

LAWS AND REGULATIONS TO CONSIDER

- Personal Injury
- State Consumer Protection Statutes
- FTC Act
- FDA Regulations
- State Unauthorized Practice of Medicine
Laws and Regulations
- The CAN-SPAM Act of 2003

RISK MINIMIZATION STRATEGIES

- Awareness of laws and regulations
- Providing truthful and accurate information
- Not providing misleading information
- Providing effective disclaimers
- Consultation with legal counsel when appropriate

EFFECTIVE DISCLAIMERS

- Prominent
- Substantive
- Clear
- Comprehensive

DISCLAIMERS

- Do not absolve a defendant from liability; but may provide an effective defense:

Failure to Warn

Unauthorized Practice of Medicine

Assumption of Risk

EFFECTIVE DISCLAIMERS

- **Consumers are urged to read and follow this entire section. This page contains important safety information regarding product warnings and instructions. Consumers should read and follow these warnings prior to consuming any product advertised on this website.**

EFFECTIVE DISCLAIMERS

- Information on this site is provided for informational purposes only. Consult with your physician before using any dietary supplement. You should read all product packaging carefully before taking. Health statements made, or nutritional supplements on this website have not been evaluated by the Food and Drug Administration (FDA). The products and information are not intended to diagnose, treat, cure, or prevent any disease. Actual results may vary. Consult with your physician before using any dietary supplement. No liability is assumed by COMPANY, its officers, directors, and/or employees, for any information contained herein.

EFFECTIVE DISCLAIMERS

- The products advertised on this website have warning information and recommended use information on the product label and/or packaging provided by the manufacturer. Consumers should read and follow all instructions and warnings on the product label or packaging prior to use. COMPANY is not responsible for advertising claims or product warnings made by third parties. Neither COMPANY, nor any of its directors, employees, or subsidiaries, will be liable for damages arising out of, or in connection with this site. This is a comprehensive limitation of liability that applies to all damages of any kind, including (without limitation) compensatory, direct, indirect or consequential damages, loss of income or profit, personal or property damage, and claims of third parties.

EFFECTIVE DISCLAIMERS

- Do not use any products featured on this website if you are pregnant or nursing. Consult with your physician prior to taking any product featured on this website if you have any medical condition, if you are taking any medication, and before starting any diet or exercise program.

None of the products advertised on this website should be used by individuals under the age of 18.

Consumer testimonials represent extraordinary case scenarios. Individual results may vary and the results depicted may not be typical of the average user.

EFFECTIVE DISCLAIMERS

- Read and follow all label instructions before using any product. Consult a healthcare professional before beginning any weight loss or exercise program. When used in combination with a sensible diet and exercise program, weight loss products can help you reach your weight management goals. Endorsers used products in conjunction with diet and exercise and may have been remunerated for their appearance. Their results are not typical. Substantial weight loss requires the product be used in conjunction with reduced caloric intake or increased physical activity.

Information contained on this website is for informational purposes only and should not be construed as medical advice. Specific medical advice should only be obtained from a licensed health care practitioner. No liability is assumed by COMPANY for any information contained herein.

GORRAN v. ATKINS

- USDC, NY- Jody Gorran sues Atkins Nutritionals, Inc. and the Estate of Robert C. Atkins, M.D.
- Background: Gorran, a 53-year old businessman, went on the low-carb Atkins diet in the spring of 2001. Six months earlier, his cholesterol level was 146 and he had a “very low risk” of heart disease. After two months on the Atkins diet, his cholesterol level shot up to 230. He remained on the diet until October 2003, when he experienced severe chest pain. He had an angioplasty to unclog one of his coronary arteries and a stent was placed.

GORRAN v. ATKINS

- Claims:
- Products liability
- Negligent misrepresentation
- Deceptive Conduct under Florida law

Gorran claimed that the Atkins diet is dangerous because it increases the risk of coronary heart disease, diabetes, stroke and certain types of cancer. He claimed the products sold by defendants (books, food products and nutritional supplements) are “defective and unreasonably dangerous.” He sought money damages, as well as an injunction requiring defendants to put warning labels on all Atkins products and their website.

GORRAN v. ATKINS

- Court's Holding:

Defendant's motion to dismiss GRANTED.

Defendant's books and food products are not defective or dangerous products within the meaning of products liability law. Consumers are aware of the risks associated with a high-fat diet. The Atkins diet consists of advice and ideas, which are protected by the First Amendment.

Questions?

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