BASICS OF ADVERTISING LAW

Gonzalo E. Mon
Partner
Kelley Drye & Warren, LLP
3050 K Street, NW
Washington, DC 20007
202.342.8576
gmon@kelleydrye.com
www.adlawaccess.com

I. Overview

A. Scope

1. This outline provides a general overview of key advertising law issues. It's a good outline – and I'm sure you'll love reading it – but it's not a substitute for getting tailored advice from me or another expert in this area.

2. We all have an idea of what an "ad" is, but as you read through this outline, keep in mind that the principles outlined below have been applied broadly beyond what is traditionally thought of as an ad.[1]

B. Sources of Challenge and Consequences

1. Complying with advertising laws can be hard, so people often want to know what could happen if they don't. There answers range from "maybe nothing" to "you may have to pay many millions of dollars." Here's an overview.

2. If a company fails to comply with the principles discussed in this outline, the company could be challenged by regulators. On the federal level, the main regulator is the Federal Trade Commission (or the "FTC"). On the state level, the main regulators are attorneys general. See Section VII for additional details.

3. Competitors can challenge each other in court under the Lanham Act or before the National Advertising Division of the Council of Better Business Bureaus (the "NAD"). Both options are discussed in Section VIII.

4. Companies can also be challenged by consumers in class action lawsuits. Unfortunately, the possibility of making money through these suits can lead some plaintiffs' attorneys to file suits that are rather silly.[2]

---

[1] For example, NAD determined that information that ACT posted on its website about policies related to COVID constituted ads. *ACT, Inc.*, NAD Case 6429 (Feb. 24, 2021). NAD has also determined that statements on a website that was primarily targeted at investors constituted ads. *See, e.g., Bayer HealthCare LLC*, NAD Case No. 6912 (Dec. 14, 2020). And, of course, even things like short tweets can be subject to advertising laws. Click here, for example.

[2] Click here, for example.

5. If a company loses a challenge, it will most likely have to change its ads. Sometimes, the company may agree to comply with enhanced standards as part of a settlement. In some cases, a company may also have to pay money in damages, penalties, or refunds.

II. Basic Principles of Substantiation

A. Prior Substantiation of Express and Implied Claims

1. Advertisers are generally required to have a "reasonable basis" to substantiate (or prove) every objective claim in their ads before those ads are disseminated. Advertisers should have this before they publish an ad.

2. This requirement applies to express claims, as well as to implied claims, even if the advertiser did not intent to convey the implied claim.[3] An ad can be literally true, but still misleading if it conveys a claim that an advertiser cannot support.[4]

3. Whether an ad conveys an implied claim is sometimes determined through a consumer perception survey. Generally, if more than 20% of consumers take a claim away from an ad, the advertiser must be able to support that claim.[5] Therefore, when evaluating your ads, you should try to view them from the standpoint of a typical consumer in your target audience.

4. In absence of a consumer perception survey, the entity reviewing the ad may step into the shoes of consumers and determine what claims may be conveyed by the ad. NAD, for example, routinely finds implied claims in ads.[6]

B. Reasonable Basis Standard

1. Establishment claims are statements regarding the amount of support an advertiser has for a claim. Phrases such as "tests prove" and "studies show" are examples of establishment claims. Even props, such as lab coats or scientific equipment, may suggest there are scientific tests to support a claim. Advertisers must have the level of proof expressly or implicitly claimed in the ad.

---

[3] *See, e.g., TaxSlayer LLC,* NAD Case No. 6286 (June 2019) (stating that it is "well established that a claim that is expressly truthful can still be misleading").

[4] *See, e.g., Colgate-Palmolive Company*, NAD Case 5490 (Jul. 2012) (stating that "NAD has routinely held that although a claim may be literally true, the context in which it is presented may still cause it to convey a message that is false or misleading to consumer").

[5] *See, e.g. Wm. Wrigley, Jr. Company*, NAD Case No. 4855 (May 2008); *McNeilab, Inc. v. Am. Home Prods. Corp*., 501 F. Supp. 517, 525-527 (S.D.N.Y. 1980).

[6] *See, e.g., Dow Jones & Company, Inc.*, NAD Case No. 7179 (July 2023) (stating that "a claim that consumers can 'cancel anytime' reasonably conveyed the message that cancelling is easy" and that "a consumer might reasonably expect that the ease of cancelling a subscription is similar to the ease of subscribing").

2. Non-establishment claims generally make a statement about a product or service without referring to the support behind the statement. With these claims, there is often a more flexible definition of what level of proof constitutes a reasonable basis.

3. In general, what constitutes a reasonable basis for a claim depends on (a) the type of product, (b) the type of claim, (c) the consumer benefit from a truthful claim, (d) the ease of developing substantiation for the claim, (e) the consequences of a false claim, and (f) the amount of substantiation experts in the field believe is reasonable.[7] The last factor is typically the most important.

4. In some instances, companies may be subject to heightened standards. For example, in health claims may require well-controlled human clinical studies.[8] Note also that the FTC's Guides for the Use of Environmental Marketing Claims (or "Green Guides") provide specific requirements for substantiating various types of environmental claims.[9]

5. See Section III for more details on tests to support claims.

C. Puffery

1. The term "puffery" generally refers to obvious hyperbole, exaggerated displays of an advertiser's pride, and other non-measurable claims. Advertisers are not required to have a reasonable basis to substantiate statements that constitute puffery.

2. Context is important. A statement that may constitute puffery in one context (and thus not require substantiation) may be considered an objective claim in another context (and thus require substantiation).[10]

3. Humor can often be an indicator of puffery,[11] but just because a claim is humorous, doesn't mean it automatically qualifies as puffery.[12]

---

[7] *See Pfizer, Inc.*, 81 F.T.C. 23 (1972).

[8] *See, e.g., Nestlé HealthCare Nutrition, Inc., FTC File No. 092-3087 (Jan. 12, 2011); FTC v. Iovate Health Sciences USA, Inc., Civ. No. 10-CY-587 (W.D.N.Y. July 29, 2010).*

[9] The current (as of the date of this footnote) version of the Green Guides is available here. In December 2022, the FTC started the process of updating the Green Guides. You can find more details here.

[10] *See, e.g., SharkNinja Operating, LLC*, NAD Case No. 7081 (June 21, 2022) (holding that although "Saturday night hair" may be puffery on its own, in the context of the infomercial, "it conveys a comparative superior performance message because the infomercial states that only the [advertiser's product] can achieve that result"). Click here for more information and thoughts about my own hair. *See also Kohler Company*, NAD Case No. 5000 (Apr. 2009) (holding that Kohler had "linked what standing alone could be puffery to specific performance attributes" and, therefore, had to substantiate various claims).

[11] *See, e.g., Dollar Shave Club, Inc.*, NAD Case No. 5843 (May 2015) (holding that "several commercials using slapstick humor and hyperbole to draw attention to the substantial price difference that separates the cost of DSC's razors from the prices typically charged for name brand store-bought razors" were primarily puffery).

[12] *See, e.g., American Association of Orthodontists*, NAD Case No. 6917 (Feb. 18, 2021) (holding that "humor and hyperbole do not relieve an advertiser of its obligation to support messages that their advertisements might reasonably convey – especially when the advertising disparages a competitor's product"); *Traeger Pellet Grills LLC*, NAD Case No. 6327 (Dec. 5,

(...continued)

III. Tests to Support Claims

A. Industry Standard Tests v. Propriety Tests

1. If tests are required to support a claim, an advertiser should determine whether there is an industry standard test on point. If there is, an advertiser should generally use it. These types of tests are usually accorded more weight because they are thought to "reflect the collective wisdom of manufacturers, consumers, academics, and regulators."[13]

2. The failure to follow an industry standard test will not, by itself, be sufficient to invalidate an advertiser's tests. However, an advertiser that deviates from an industry standard will usually bear the burden of justifying the deviations. The NAD, for example, has frequently held that "unexplained deviations from industry standard protocols [can] render…testing insufficiently reliable to support" claims.[14]

3. Nevertheless, there are instances in which a departure from an industry standard test may be appropriate. Indeed, the "NAD routinely reviews testing methods that depart from industry standards which, in certain instances, may be appropriate or even superior for substantiation of challenged claims."[15] This is often the case if the modified test more accurately reflects how consumers use the product or service being tested.

4. If you develop your own test, and your claim is challenged, it is likely that the challenger will attack your methodology. Keep that in mind, as you develop the test.

B. Other Key Requirements

1. Tests should generally reflect how consumers use products or services. For example, the NAD has often noted that it is important to examine the correlation between tests and the real world experience of consumers to determine whether claims are substantiated. If a test doesn't match how consumers use a product or service, the test may not substantiate a claim, regardless of what the results show.[16] Similarly, the FTC recently

(...continued)

2019) (holding that "no amount of humor . . . can rectify an expressly false claim); *Comcast Cable Communications, LLC*, NAD Case No. 5730 (Jun. 2014) (holding that "humor and hyperbole do not relieve an advertiser of its obligation to support messages that their advertisements might reasonably convey").

[13] *Euro-Pro Operating, LLC*, NAD Case No. 4703 (Jul. 2007).

[14] *North American Green/Mulch & Seed Innovations LLC*, NAD Case No. 4854 (May 2008).

[15] *Id*.

[16] *See, e.g., The Procter & Gamble Company*, Case No. 6270 (Apr. 2019) (holding that "the most reliable measure of a product's performance is demonstrated by tests designed to test the product in the same manner the product is directed to bus used by consumers"); *Daimler Trucks North America, LLC*, NAD Case No. 4905 (Sep. 2008) (holding that wind tunnel tests to support fuel efficiency claims did not accurately reflect real-world conditions because drivers encounter wind from all directions).

entered into a settlement with a company whose product was not tested under ordinary conditions (and not under the conditions shown in the ad).[17]

2. If an advertiser makes an ad based on test results, it's important to make sure that what's shown in the ad reflects the test protocol. In the FTC case mentioned immediately above, the way the product was used on screen didn't mirror the way the product was tested.[18]

3. NAD draws a distinction between "sensory performance claims" and "objective performance claims." Sensory claims – such as "smells better" or "stronger taste" – relate to how consumers react to a product. For such claims, NAD believe that sensory testing or consumer opinion testing is generally appropriate. However "when a claim is about the tangible, objective results that a consumer can expect a product to provide, more objective testing is appropriate."[19]

4. Results should generally be statistically significant to the 95th percentile. In addition, test results should be meaningful. The NAD has noted that even if tests demonstrate that a claim is true, if the results aren't meaningful to consumers, the claim could be misleading.[20]

5. Similarly, small variances in performance cannot be used to support a superiority claim if those variances are not meaningful or perceptible to consumers.[21] Therefore, there may be cases in which an advertiser cannot make a superiority claim, even if tests show its product performs better.

6. Products demonstrations should generally depict products under typical consumer use conditions and in accordance with the product instructions.[22] It's also important to ensure demonstrations accurately reflect how the products perform in real-life. Be

[17] *See, e.g., Federal-Mogul Motorparts LLC.,* Docket No. C-4717 (Mar. 25, 2020) (noting that whereas an industry standard braking test requires a driver to try to stop a vehicle in "the shortest distance achievable," the advertiser's protocol required a driver to applying a "constant and relatively light force" to the brake pedal). Click here for more information.

[18] *See also SharkNinja Operating LLC*, NAD Case No. 7151 (April 13, 2023) (holding that product demonstrations in an information differed from how the products were tested). Click here for more information.

[19] *SmileDirectClub, LLC*, NAD Case No. 7091 (July 21, 2022) (holding that "having participants record their opinion of what shade their teeth are does not equate to objective testing because asking untrained consumers to match their tooth to a shade guide with 24 different choices is a subjective practice and does not take into account the light in the room or that consumers may see and interpret shades of white and color differently").

[20] *See, e.g., Church & Dwight Co, Inc.*, NAD Case No. 6355 (Mar. 2020) (holding that a "clinically proven absorption" claim reasonably communicates that the advertiser possesses clinical proof of absorption at "clinically meaningful levels").

[21] *Procter & Gamble*, NAD Case No. 4532 (Jul. 2006) (holding that, at some point, the distinction in the comparative performance of two products "becomes substantially diminished so that a distinction between the products ceases to be meaningful to consumers").

[22] *See, e.g., The Procter & Gamble Company*, Case No. 6270 (Apr. 2019) (holding that a demonstration based on tests that used the product in a manner that was inconsistent with usage instructions was "inherently unreliable and not consumer meaningful); *Jelmar, LLC*, NAD Case No. 4379 (Aug. 2005) (holding that a demonstration was misleading because the product was used in a manner that was inconsistent with the usage instructions).

careful about editing or enhancing those demonstrations in a way that can exaggerate performance. At minimum, any material edits or enhancements need to be clearly disclosed.[23]

IV. Disclosures

A. General Principles

1. If it is necessary to disclose information in order to prevent an ad from being misleading, that information must be disclosed in a "clear and conspicuous" manner.

2. Although a disclosure can be used to clarify a claim, it cannot be used to contradict a claim.[24]

3. In evaluating disclosures, the FTC, NAD, and other regulators tend to frown on the practice of including such information in footnotes or other places that are remote from the claim. Accordingly, there are many cases in which fine-print footnotes have been deemed inadequate to disclaim or modify a claim made elsewhere in the ad.[25] Some courts, however, have been more flexible.[26]

B. The "Clear and Conspicuous" Standard

1. The law doesn't mandate a font size, color, or specific placement for disclosures. On the one hand, this means that there often isn't a clear answer as to whether a disclosure will meet the "clear and conspicuous" standard. On the other hand, this affords advertisers some flexibility.

2. The FTC does provide some guidelines, however. For example, you should generally make sure that your disclosure appears close to the claim it modifies and in a location that people are likely to see it. You should also ensure consider whether your font color

---

[23] For example, NAD looked into a video in which Google demonstrated its Gemini AI model. The video displayed some impressive things, but what appeared on screen wasn't exactly what happened in real time. Click here for more details.

[24] *See, e.g., T-Mobile US, Inc.*, NAD Case No. 7332 (June 5, 2024). T-Mobile advertised a "Price Lock" policy in a commercial and explained that policy with the following disclosure: "Get your last month of service on us if we ever raise your internet rate." Although companies can use a disclosure to clarify a claim, NAD wrote that "a disclosure cannot contradict the claim it qualifies." More specifically: "A disclosure that 'Price Lock' does not lock the price but gives consumers one month of free service if certain conditions are met contradicts the main message communicated by the 'Price Lock' claim." Click here for more information. In another example, a California appellate court reversed the dismissal of a putative class action accusing Bayer Corp. of misleading consumers about its "One A Day" gummy vitamins, when the back of the label recommends taking two vitamins per day. Click here for more information.

[25] *See e.g., Georgia-Pacific Consumer Products LP*, NAD Case No. 7018 (Sep. 17, 2021) (holding that a disclosure at the bottom of a package was not sufficient to qualify a broader claim at the top of the package, particularly when a lot of information appeared between the two); *Verizon Wireless Inc.*, NAD Case No. 5411 (Jan. 2012) (holding that a small footnote was not sufficient to qualify the meaning consumers would likely take away from a broad claim in a headline).

[26] Click here, for example.

and font size make the disclosure easy to read. The FTC discusses these (and many other) concepts in much more detail in its *.com Disclosures* Guidelines.[27]

3. The FTC has advised that these concepts apply equally to ads across all mediums, including social media posts where space may be limited. Undoubtedly, it's not always easy to make disclosures in social media, but that doesn't mean marketers get a pass. The FTC writes that "if a particular platform does not provide an opportunity to make clear and conspicuous disclosures, then that platform should not be used to disseminate advertisements that require disclosures."

4. On June 3, 2022, the FTC announced that was seeking public input on ways to modernize the Guides, and the tone of the press release suggests that more stringent requirements are on the way.[28] Samuel Levine, Director of the FTC's Bureau of Consumer Protection, noted that "some companies are wrongly citing our current guides to justify dark patterns and other forms of digital deception," and that the FTC is looking to "make clear that online tricks and traps will not be tolerated." As of this writing, the FTC hasn't announced the new guidelines. In other areas, though, the FTC has already articulated a more stringent description of the "clear and conspicuous" standard.[29]

V. Comparative Claims

A. General Principles

1. The basic principles outlined above also apply to comparative claims. Therefore, advertisers need to have a reasonable basis for any express or implied claims they make about their own products or services, as well as their competitor's products or services.

2. As a practical matter, comparative ads are more likely to be challenged by competitors. Therefore, the risks associated with comparative ads are often higher than the risks associated with ads that do not target a competitor.

3. The number of challenges has increased in recent years. Most cases are brought before the NAD, but may play out in federal court under the Lanham Act.

B. Naming the Object of Comparison

1. When making comparative claims, advertisers should generally specify exactly what they are comparing against in order to avoid making a broader claim than they can support.[30]

---

[27] The current Guidelines are available here.

[28] Click here for more information.

[29] For example, see the discussion of the Endorsement Guides in Section VI(B) below.

[30] *See, e.g., Telebrands, Corp*., NAD Case No. 6203 (Jul. 2018) (holding that tests against a single competitor's flashlight could not support claims against "ordinary" and "regular" flashlights).

2. The NAD has held that "when making unqualified comparative product performance claims, an advertiser has the burden to provide reliable data against all or a significant portion of competitive products on the market."[31] That has generally translated to 85% of the market.[32]

3. Generally, where an ad makes general brand references but fails to qualify the claim to the product in the ad, the ad could convey the message that the benefits or attributes touted extend to the entire product line (if there is one).

4. When evaluating whether an ad communicates a "line claim," the NAD asks various questions, including: (a) if one variety of product is being featured in the ad, is the performance claim clearly limited to the featured product; (b) are general brand references made throughout the ad that may potentially cause confusion as to the relevance of the claims to other products in the line; (c) does the "beauty shot" showing the company's line of products serve to reinforce the extended applicability of at least some of the claims; and (d) do some of the claims relate to specific product attributes that are also characteristics of the other varieties in the product lines?[33]

5. An ad may be deemed to convey a comparative claim against a specific competitor, even if that competitor is not named.[34]

6. If a company is making a comparison between a current version of its product to a previous (or other) version of its product, that basis of that comparison should be clear such that the comparison isn't interpreted to be against a competitor's products.[35]

C. Apples-to-Apples and Apples-to-Oranges

1. An "apples-to-apples" comparison is one in which an advertiser makes comparison between its product and a similar product made by a competitor. An "apples-to-

---

[31] *Cambridge Pavers, Inc.,* NAD Case No. 5127 (Dec. 2009).

[32] *See also SharkNinja Operating LLC*, NAD Case No. 7151 (April 13, 2023) (holding that testing against 17 vacuums was not enough to support a "best hair pickup of any upright vacuum in America" claim). Click here for more information.

[33] *See, e.g., Kind LLC*, NAD Case No. Case #6407 (Sep. 14, 2020); *Michelin North America, Inc.*, NAD Case No. 4948 (Nov. 2008).

[34] *See, e.g. Progressive Casualty Insurance Company*, NAD Case No. 5577 (Apr. 2013) (noting that "NAD precedent makes clear that an advertiser does not need to mention a particular competitor specifically in order for the claim to be considered comparative to a rival company"); *Time Warner Cable, Inc. v. DIRECTV, Inc., 497 F.3d 144, 162 (2d Cir. 2007)* (noting that "given the nearly binary structure of the television services market, it would be obvious to consumers that DIRECTV's claims of superiority are aimed at diminishing the value of cable—which, as discussed above, is synonymous with TWC in the areas covered by the preliminary injunction).

[35] *See, e.g., The Glad Products Company*, NAD Case No. 7309 (March 28, 2024). Glad advertised that its ForceFlex MaxStrength bags are "25% more durable." More durable than what? A disclosure explained that they are 25% more durable than Glad's own 13-gallon ForceFlex bags. A competitor – presumably worried that consumers would think that Glad was making a comparison to its bags – brought a challenge before the NAD, questioning whether the basis of comparison was sufficiently clear. NAD didn't think so. Click here for more information.

oranges" comparison is one in which an advertiser makes a comparison between its product and a dissimilar product made by a competitor.

2. Apples-to-apples comparisons are preferred. If an advertiser makes an apples-to-oranges comparison, it must clearly disclose all of the relevant and material differences between the products. If an advertiser does not disclose the material differences between the two products or services in a clear manner, the ad is likely to be deemed misleading.[36]

3. The NAD has held that an "advertiser can compare two dissimilar products even if there are more similar products made by the respective companies, so long as the objects of the comparison are clearly identified in the advertisement, and there is no implication that the comparison is to a competitor's more similar product, or that the competitor does not make a more similar product."[37]

D. Disparagement

1. Although the FTC and courts generally do not draw a distinction between claims that disparage competitors and claims that don't, the NAD holds the former to a higher standard. The NAD has stated "claims that expressly or implicitly disparage a competing product will be carefully scrutinized to ensure they are truthful, accurate, and narrowly drawn."[38] Among other things, this means that an advertiser can't exaggerate the differences between it and a competitor.[39]

2. The NAD has held that humor does not relieve an advertiser of its obligation to support all messages that reasonable consumers may take away from its ads, especially when the ads disparage a competitor's product.[40] Even if consumers are unlikely to take claims literally, they may still take away an negative (and unsubstantiated) impression of the product or service being disparaged.[41]

---

[36] *See, e.g., Merck Animal Health*, NAD Case No. 7029 (Jan. 20, 2022) (holding that the advertiser didn't clear disclose the differences between products because the disclosure "is in small print, in light font, against a dynamic background and the language itself is not easy to understand). Click here for more information and a cute picture of my dogs.

[37] *Reckitt Benckiser LLC*, NAD Case No. 6043, (Jan. 2017).

[38] *See, e.g., Zero Technologies, LLC*, NAD Case No. 5673 (Dec. 2013).

[39] *See, e.g., Comcast Cable Communications, LLC*, NAD Case No. 5420 (Jan. 2012) (holding that it was misleading to characterize a competitors picture quality as poor, when only a small number of survey respondents rated it as such).

[40] *See, e.g.*, *Verizon Services Corp.*, NAD Case No. 4922 (Oct. 2008) (holding that Verizon's attempt to present a comical example of what could happen to a construction worker if he fails to migrate to the Verizon service, did not relieve Verizon of its obligation to support implied claims that a competing service was "useless").

[41] *See, e.g., Traeger Pellet Grills LLC*, NAD Case No. 6327 (Dec. 5, 2019) (holding that although consumers were unlikely to believe humorous claims that foods grilled on a gas grill would taste like "ass," they would likely take away a claim that gas grills impart an undesirable flavor to cooked food).

VI. Social Media

A. Overview

1. Claims in social media are subject to the same standards as claims made in other media.[42] For example, that means that advertisers need to have substantiation for all objective claims and that they need to ensure that necessary disclosures appear in a clear and conspicuous manner.

2. Notably, the principles discussed above apply not only when a company makes claims itself, but they also apply when the company uses other people to make the claims on its behalf. And they apply even when the claims are made by fembots.[43]

3. One area where we've seen a lot of attention in social media involves the use of influencers. For these areas, it is important to become familiar with the FTC's *Guides Concerning the Use of Endorsements and Testimonials in Advertising* (the "Endorsement Guides"), which provide important information about campaigns in which companies engage other people – such as endorsers, influencers, or consumers providing reviews – to speak on their behalf.[44]

B. Endorsement Guides

1. One of the key points in the Endorsement Guides – and where we've seen the most scrutiny – is that people need to disclose the relationships they have to the brands they endorse.

2. The term "endorsement" should be read broadly. For example, simply tagging a brand, without anything more, can be an endorsement.

3. The term "relationship" should be read broadly, as well. If an influencer or consumer receives payments or free products, that's obviously a relationship that should be disclosed. But even if an influencer just receives a discount or "other perks," that could also trigger a disclosure requirement.

4. Disclosures should be hard to miss and – in the words of the FTC – "unavoidable." For example, they should appear up-front, in conjunction with the endorsement, and in a manner that makes it likely that consumers will see them. Consumers should not be required to click on a link to see the disclosure. In its most recent update to the Guides, the FTC writes that "if the endorsement is made through visual means, the disclosure should be made at least visually. If the representation is made audibly, the disclosure

[42] Click here, for example.

[43] Click here, for example.

[44] 16 C.F.R. § 255. The current version of the Endorsement Guides – updated on June 29, 2023 – is available here. You can find a summary of the key changes from the previous version here.

should be made at least audibly. And if the representation is made through both visual and audible means, the disclosure should be made both visually and audibly."[45]

5. Disclosures should be made in clear language. If an influencer uses a hashtag, it should be something that consumers are likely to understand. For example, the FTC encourages influencers to avoid abbreviations and shorthand. Unfortunately, influencers may not be able to rely on platform tools to make disclosures.

6. Endorsements should be truthful and not misleading. For example, influencers shouldn't talk about their experiences with products they've never used or praise products they don't actually like. Similarly, they shouldn't make claims that the advertiser can't substantiate.

7. The FTC has stated that advertisers are responsible for ensuring the endorsements are accurate and otherwise complies with applicable laws.[46] An advertiser can be liable if an endorser makes a false claim, even if the advertiser hadn't approved the claim.

C. Examples

1. In 2020, the FTC announced that Teami agreed to settle charges that it promoted its products using deceptive health claims and endorsements by influencers who failed to clearly disclose that they were being paid for their posts. Although many posts did have disclosures, the FTC complained that consumers had to click in order to see them. Although the company instructed influencers to make the disclosures in a way that complied with the Endorsement Guides, the company failed to monitor compliance.[47]

2. Similar principles apply when a company provides incentives for consumers to write reviews. For example, Urthbox offered to send consumers a free snack box if they posted positive reviews on various sites. The FTC argued that that company should have ensured that consumers disclosed that had received a free product in exchange for the review.[48]

3. There have also been cases at the NAD dealing with similar issues. For example, Pyle Audio's shipped products along with a card promising them two rolls of vacuum sealing bags in exchange for leaving a review on Amazon.com. Near that promise, the card included the words "love this" and an image of five stars. The challenger argued that this presentation suggested that consumers had to leave positive reviews in order to receive the free bags. NAD found that because the offer was coupled with the words "love this" and an image of five stars, consumers could reasonably conclude that a positive review was required. Even if that weren't the case, NAD determined that the

[45] Click here for more details.

[46] Other agencies, such as the Food and Drug Administration, have taken similar approaches. Click here for example.

[47] Click here for more details on the case.

[48] Click here for more details on the case.

consumers should have disclosed that they received a free product in exchange for the review.[49]

VII. Regulatory Enforcement

A. FTC Authority

1. Section 5 of the FTC Act prohibits unfair or deceptive acts or practices. Through policy statements, the FTC has provided its interpretation of *unfair* or *deceptive*.

2. A deceptive act or practice is based on three core elements: (a) a representation, omission or practice, (b) about a material fact, (c) that is likely to mislead a consumer acting reasonably under the circumstances.[50]

   a. A statement is "about a material fact" when it is likely to affect a consumer's conduct regarding a product or service, and representations can be express or implied.

   b. There is no intent standard required to prove liability, but intent can help establish liability.

   c. No showing of actual injury is required.

   d. Failure to have substantiation for a claim is a deceptive practice.

3. An unfair act or practice is also based on three core elements: (a) an act or practice that causes substantial injury to consumers; (b) which consumers cannot reasonably avoid; and (c) which is not offset by benefits to consumers or competition.[51]

B. State Attorney General Authority

1. Most states have enacted consumer protection laws that prohibit unfair, deceptive, or misleading statements. State Attorneys General have broad authority to enforce these laws to protect the residents of their states.

2. Many state statutes expressly provide that their consumer protection laws are to be construed in a manner consistent with the FTC Act and its interpretations by the FTC.

VIII. Challenging Claims

A. Overview of Options

1. If a competitor makes a false or misleading claim, the first step is to send a letter to your competitor. How you draft the letter depends on a variety of factors — including the

[49] Click here for more details on the case.

[50] FTC Policy Statement on Deception (1983), *appended to Cliffdale Assocs.*, 103 F.T.C. 110, 174 (1984).

[51] FTC Policy Statement on Unfairness, *reprinted in Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984).

claims at issue, the evidence you have, and your relationship with the competitor — but there are some key points you should generally include. First, clearly identify the false claims and explain why you think they're false. Second, demand that the competitor stop making the claims or, if appropriate, send you the substantiation. And, third, include a deadline and (possibly) an ultimatum.

2. If a letter doesn't work, you have two primary options for challenging the competitor: (a) you can file a challenge before the NAD; or (b) you can file a lawsuit in federal court under the Lanham Act.

B. Challenge at the NAD

1. The standard NAD process is straightforward: (a) the challenger files a challenge; (b) the advertiser files a response; (d) the challenger has the opportunity to, but is not required to, file a reply; and (e) if the challenger files a reply, the advertiser can file a final response. Both parties can meet separately with the NAD staff. There is no discovery, which can help relieve challengers of disruption to business and results in substantial cost savings.

2. In 2020, NAD launched two new processes:

   a. First, NAD launched an expedited process that allows companies to challenge advertising claims made by competitors and get a decision within weeks as opposed to months. The process, "Single Well-defined Issue Fast Track" or "SWIFT" is limited to single-issue cases, condenses and simplifies the standard NAD timeline and process, and is slightly more costly.

   b. Second, NAD launched new Complex Track challenge process that is designed to "support advertising challenges that involve complex substantiation." This process involves three NAD attorneys and more meetings. NAD hopes it will offer "flexible and more predictable scheduling, greater transparency into the case review process, and deeper insights into NAD's perspective on the evidence."[52]

3. Each NAD decision is accompanied by a press release, and advertisers are asked to provide a statement indicating whether they intend to comply with the decision. Participants in the NAD process are generally prohibited from publicizing anything about the case.

4. Although the NAD cannot enforce its decisions, the NAD enjoys an excellent compliance record of around 95%. In the few instances in which an advertiser refuses to cooperate with NAD proceedings or indicates that it will not comply with an NAD decision, the NAD forwards the case to the FTC or to a state regulator for action.

5. The NAD process includes a number of advantages over litigation, including that takes a fraction of the time of litigation, and costs a lot less.

[52] Click here for examples of cases NAD believes would be appropriate for a Complex Track challenge.

C. Litigation Under the Lanham Act

1. Under the Lanham Act, an advertiser can recover for injury sustained as a result of false and/or misleading claims made by competitors.[53] An advertiser may be liable if a commercial message or statement is either (1) literally false, or (2) literally true or ambiguous, but has the tendency to deceive consumers because of an implied message.[54]

2. If your competitor's false ads threatens to cause irreparable injury, you can move for a preliminary injunction, which, if granted, would end the campaign immediately. To prevail on a motion for preliminary injunction, a plaintiff must show, among other things, likelihood of success on the merits, which will require the plaintiff to argue the entire case in a very tight time frame.

3. Although litigation offers many advantages, there are a few things to keep in mind. First, money damages are rare. Second, you can almost certainly expect counterclaims. Third, the document discovery, depositions, and testimony that come with litigation can cause a substantial disruption to your business and possibly lead to the disclosure of damaging facts. And, finally, litigation can be very expensive.

D. Which Option is Better?

1. Whether it makes more sense for you to file a challenge at the NAD or in court depends on a variety of factors, including your goals in the challenge, your budget, and your tolerance for the disruption of litigation and counter-claims.

2. The NAD offers various advantages over litigation. For example: (a) it is much faster; (b) it costs much less; (c) it does not involve discovery; and (d) counterclaims are not permitted (though an advertiser may file a separate challenge against you). However, you cannot obtain money damages at the NAD and there is a small possibility that the advertiser may not comply with the NAD's decision.

3. Litigation offers some advantages of its own. For example: (a) you could get money damages, though they are rare; (b) you may be able to get the ads stopped quickly with a preliminary injunction; and (c) advertisers will have to comply with the court's decision. As noted above, though, litigation will take a lot of time and money and could drain company resources. Thus, you should generally only proceed with Lanham Act litigation if you have a strong claim and a full expectation that counterclaims will follow.

---

[53] 15 U.S.C. § 1125(a).

[54] *See Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc.*, 19 F.3d 125, 129–30 (3d Cir. 1994).

GONZALO E. MON

Partner

I WORK WITH CLIENTS WHO ARE CREATIVE, AND UNDERSTAND THAT THEY OFTEN NEED RESOURCEFUL AND INVENTIVE SOLUTIONS TO THE CHALLENGES THEY FACE.

Gonzalo E. Mon is a partner in Kelley Drye & Warren's Advertising Law practice group. Gonzalo helps clients determine what claims they can make, as well as what level of substantiation is required to support those claims. He defends clients when they are challenged by regulators, consumers, and competitors, and he helps clients challenge their competitors in court and before the NAD. Much of Gonzalo's practice involves helping clients navigate through complex legal issues on social media that implicate a combination of advertising, intellectual property, and privacy laws. Gonzalo also helps clients draft and negotiate the agreements that underlie many of their marketing campaigns. For example, he frequently works agency agreements, sponsorship agreements, and endorsement agreements with celebrities, athletes, musicians, and other influencers. Gonzalo also has extensive experience in a variety of promotions. Outside of work, Gonzalo is a certified Fit to Fight® instructor and teaches self-defense and fitness classes in DC. Click here for his full bio.